

April 24, 2001

MEMORANDUM FOR FILE

SUBJECT: Practical Guidelines for Invoking the State Secrets Privilege

Background: These guidelines are intended to provide an instructive road-map for addressing the common substantive and procedural requirements associated with an invocation of the state secrets privilege. The state secrets privilege is a type of executive privilege that is invoked by the head of the department having control over the information to protect information that, if disclosed, would harm the nation's defense capabilities, disclose intelligence-gathering methods or disrupt diplomatic relations with foreign governments. To invoke the privilege, the government must demonstrate that "there is a reasonable danger that compulsion of the evidence will expose military matters which in the interest of national security should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

IAW AR 27-40, the Litigation Division (LITDIV), US Army Legal Services Agency Litigation Center, is responsible for handling litigation matters concerning the Army. As such, LITDIV should take the lead on preparing, coordinating, and staffing the necessary documentation up to the SECARMY (or SECDEF, where appropriate) so that he or she might invoke the privilege.

Guidelines: These guidelines assume that a litigant has requested—via the discovery process—Army information that the Army wishes to withhold from the litigant because the information is classified (or otherwise sensitive), and the court has given the government 10 weeks to respond to the litigant's request.

1. (Week 1) (LITDIV). Identify the need to assert the privilege. LITDIV should ensure that the lead attorneys on the case consider the various options for answering the discovery request (e.g., motion to quash, limited disclosure pursuant to a protective order) prior to seeking to assert the state secrets privilege.
2. (Weeks 1-2). Once the decision has been made to attempt to invoke the privilege, LITDIV must gather and review, with the assistance of ODCSINT, all documents responsive to the discovery request to preliminarily identify all stakeholders with classification equities (both subordinate Army elements and other federal agencies) in the information—to include the original classification authorities (OCAs).
3. (Week 2) (LITDIV/OCAs/OGC). Coordinate a meeting with all Army stakeholders. This meeting should seek to:

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a. Introduce all attendees to the history and nature of the litigation and the basis for invoking the state secrets privilege.

(b)(5) [REDACTED]

b. Identify/Verify *all* classification equities (i.e., to the extent the preliminary review of the classified documents did not reveal all classification equities). Decide who will sign declarations, and who will invoke the privilege (e.g., SecArmy or SecDef).

c. Develop a procedural plan and timeline using "backwards planning". [Note: Army OGC must receive package for review at least 2 weeks prior to the date SECARMY would be required to act on package.]

- Suggested routing for SecArmy invocation:

1. LITDIV prepares package
2. Thru OTJAG
3. Thru ODCSINT
4. Thru Army OGC
5. For SECARMY

- If other DoD OCAs involved, suggested routing for SECDEF invocation is:

1. LITDIV prepares package
2. Thru OTJAG
3. Thru ODCSINT
4. Thru Army OGC
5. For SECARMY (who signs a transmittal letter thru DoDGC, requesting that SECDEF invoke privilege).

d. Assign all tasks/responsibilities to attendees with strict time line for completion.

4. (Week 3) (LITDIV). Transmit documents and information at issue to the OCAs for review. Notify appropriate officials at OCAs of the need for declarations that will support the invocation of the privilege. Provide example of past declaration to OCAs.

(b)(5) [REDACTED]

5. (Weeks 3-6) OCAs). OCAs *must* make timely and definitive rulings on the current classification of the requested material. Issues of classification should be referred to ODCSINT for guidance. This function must be completed early to allow the Litigation Division to perform its final review.

6. (Week 6-7) (LitDiv). Litigation Division coordinates with all Army OCAs to compile one aggregate Army document, complete with all declarations and finalized for final review and SecArmy approval.
7. (Weeks 7-8). Review by OTJAG and ODSCINT. Recommend sending a bootleg copy to DoDGC, if asking SECDEF to invoke.
8. (Weeks 9-10). Army OGC review and schedule time for LITDIV to present to SecArmy for approval. OTJAG, ODSCINT, and OCA representatives should be available to attend and participate in briefing to SECARMY, as needed.

Success points:

1. Communication must be constant and proactive.
2. The process must be started early with plenty of time for appropriate review by all interested parties in the process.
3. Finally, all the documents and parties must be identified with as near certainty as possible early in the game.