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Sunday, October 04, 2009

Legislation is still required to strengthen new policy on use of state secrets privilege

6:05 PM ET

Julian Sanchez [Research Fellow, **Cato Institute**]: "The administration's **new policy** on invocation of the state secrets privilege does set a higher transparency standard, but that's largely because their predecessors had to enlist Otto Lidenbrock to get it to the low point it hit in the last administration. But to the extent the checks here remain internal to the executive branch and the Justice Department, it's not clear how much of a difference it will make, especially since their position appears to be that the new policy is no obstacle to the broad invocation of state secrets to bar, entirely, lawsuits already underway involving interrogation policies and warrantless wiretaps. If the effect is just that attorneys will have to do a find-replace and insert "substantial" before "harm" in all their state secrets motions, nobody should be terribly impressed.

What could make a difference is the requirement that an agency seeking to invoke the privilege prepare a detailed declaration specifying the harm that is feared as a result of disclosure, and an explanation of the rationale linking the harm to the particular information withheld. Though the attorney general's memorandum doesn't explicitly say so, my understanding is that this is meant to be submitted to any judge before whom the privilege is invoked. This might do something to deter specious invocations, and perhaps prompt judges to raise questions when the link between the harm and the sensitive information is conspicuously strained.

Even assuming a greater commitment to limiting use of the privilege - —something for which the evidence is as yet scanty - in actual litigation the —guidelines implemented by one attorney general can just as easily be reversed by the next one. (Or, for that matter, by the same one if they prove inconvenient.) So I see no reason to back off the effort to codify some restrictions in legislation."

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