

August 13, 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 an executive privilege invoked by the head of the department having control over the information to protect information that, if disclosed, would harm the national defense, 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 to the SECARMY (or SECDEF, where appropriate) so that he or she may 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 (the AUSA and LITDIV attorney(s)) 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 assert 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).
 - LITDIV should advise responsive commands to coordinate with their respective Freedom of Information Act (FOIA) offices to determine what information, if any, has previously been released pursuant to the FOIA.
 - Upon identifying information belonging to non-Army agencies, LITDIV should send a letter to the agency(s) with the relevant

information enclosed, and request that the agency coordinate its review and final response directly with the AUSA. If the information belongs to another DoD agency, LITDIV should coordinate the referral with DoD-GC.

3. (Week 2) (LITDIV/OCAs/OGC). LITDIV should coordinate a meeting with all Army stakeholders. This meeting should seek to:
 - a. Introduce all attendees to the history and nature of the litigation and the necessary basis for invoking the state secrets privilege.
 - b. Identify/Verify **all** classification equities (i.e., to the extent the preliminary review of the classified documents did not reveal all classification equities). LITDIV/OTJAG must determine which official(s) will sign declaration(s), and which official 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.

5. (Weeks 3-6) OCAs). OCAs *must* make timely and definitive rulings on the current classification of the requested material and prepare a representative declaration. Issues of classification should be referred to ODSCINT for guidance. OCAs should also include a *Vaughn* index, listing all documents being withheld under the state secrets privilege. 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.
9. (Week 10). LITDIV delivers state secrets privilege package to AUSA.

Success points:

1. Communication must be constant and proactive.
2. The process must be started early with plenty of time for appropriate review of all documents by all interested parties in the process.
3. Requires close monitoring by LITDIV to ensure that the correct process and review is followed.