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Obama's Disappointing State Secrets Procedures

Legislative Analysis by *Kurt Opsahl*

After months of internal review, the Obama Administration today announced a new policy on the use of the state secrets privilege. The state secrets privilege traditionally allows the government to withdraw particular pieces of evidence from a court case on the grounds that the evidence would reveal sensitive classified information. Despite this limited purpose, it's been repeatedly misused by the Bush and now Obama administrations to try to throw important litigation out of court, and is badly in need of reform.

Unfortunately, the new policy falls far short of the real reform that's needed. The Obama Administration has essentially added several layers of Executive Branch bureaucracy before the privilege can be asserted. They've promised only to use the privilege in cases where a "significant harm" to national security would result, and promised "not to invoke the privilege for the purpose of concealing government wrongdoing."

In the end, all the Executive Branch has promised here is that it will check *with itself* before invoking the state secrets privilege. What's needed instead is a policy that ensures that the separation of powers is restored — that a court can ensure that the secrecy is warranted and, if necessary, that a case be dismissed because so much secrecy is needed. This court role is critical, and the lack of it runs the real risk that the new rules will allow the same abuses to continue. This core judicial role is what the Ninth Circuit Court recently decided was the right course in Mohammed v. Jeppeson.

Additionally, and of most importance to EFF's warrantless wiretapping cases, the new policy does not change or withdraw current assertions of the privilege in ongoing litigation. The policy states that it "does not, create any right or benefit, substantive or procedural, enforceable at law." As a result, it will not impact the Obama Administration's current assertion of the state secrets privilege to dismiss EFF's lawsuits against those responsible for the NSA's warrantless surveillance program, or any case dealing with wiretapping, extraordinary rendition, torture or other potentially illegal government activities.

Real reform of the state secrets privilege will require legislative action, and we therefore urge Congress to move forward on considering two State Secrets Protection Act bills that were introduced this Spring in both the House and the Senate.