

October 6, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland:

In September 2009, Attorney General Eric Holder issued a memorandum titled “Policies and Procedures Governing Invocation of the State Secrets Privilege.” This memorandum was intended to “provide greater accountability and reliability in the invocation of the state secrets privilege in litigation”¹ and to “rebuild[] the public’s trust in the government’s use of this privilege.”² To those ends, the memorandum established, among other things, a policy under which the Department of Justice (DOJ) would “provide periodic reports to appropriate oversight committees of Congress with respect to all cases in which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege.”³ In addition, where the Attorney General “concludes that it would be proper to defend the invocation of the privilege in a case,” which would “preclude adjudication of particular claims, but that . . . case raises credible allegations of wrongdoing,” the 2009 memorandum requires DOJ to refer “those allegations to the Inspector General of the appropriate department or agency.”⁴

President Biden—12 years later—has committed “to adhering to the rigorous guidance” set forth in the 2009 memorandum.⁵ We now write to request information on DOJ’s adherence to these policies and procedures.

¹ Memorandum from Attorney General Eric Holder on Policies and Procedures Governing Invocation of the State Secrets Privilege to Heads of Executive Departments and Agencies and Heads of Departments Components (Sept. 23, 2009), <https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf> [hereinafter *2009 Memorandum*].

² Press Release, Dep’t of Justice, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009), <https://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures>.

³ *2009 Memorandum*, *supra* note 1.

⁴ *Id.*

⁵ Press Release, The White House, Statement by President Joe Biden on Department of Justice Filing (Aug. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/09/statement-by-president-joe-biden-on-department-of-justice-filing/>.

The state secrets privilege was—and remains—intended to prevent court-ordered disclosure of government information “when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.”⁶ Per the terms of the memorandum, it should be invoked only upon a “sufficient showing that [it] is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm” to U.S. national security and be narrowly tailored for that specific purpose.⁷ The periodic reports that DOJ has committed to providing Congress pursuant to the policies and procedures established by the 2009 memorandum and, in particular, the Department’s explanation for invoking the privilege contained within these reports, are critical to congressional oversight and understanding of whether it was properly and appropriately invoked.

It is, however, unclear if DOJ has provided such periodic reports to Congress on a regular basis. DOJ staff have confirmed that the Department has not provided a periodic report since 2019, notwithstanding the invocation of the state secrets privilege in *In re Terrorist Attacks on Sept. 11, 2001*⁸ and in other cases since then.⁹ In fact, it appears that DOJ has only ever submitted two such reports—one in 2011 and one in 2015—to the Senate Committee on the Judiciary since the 2009 memorandum was issued according to records maintained by the Committee.

While “periodic” is not defined in the 2009 memorandum, it should be plainly obvious that intervals—now more than six years since the last report on file was submitted—by which DOJ has provided these reports to Congress frustrates meaningful and effective congressional oversight. That DOJ does not appear to have submitted periodic reports is further inconsistent with DOJ’s commitment to ensuring greater accountability and reliability in the invocation of the privilege and to strengthening public confidence.

Accordingly, we write to request information about the Department’s periodic reports and referrals to the Inspector General, and to request that the Department promptly begin adhering to the commitments it made in the 2009 policy. We ask that you provide written responses to the following questions no later than October 27, 2021:

1. Please list the dates on which DOJ has provided “periodic reports to appropriate oversight committees of Congress” pursuant to the 2009 policy, identifying (i) the congressional committee(s) to which the report was provided and (ii) the cases in which the state secrets privilege was invoked covered in each report. Please provide copies of all previously submitted reports. If you are unable to do so, please explain why that is the case.
2. Are there pending cases in which the state secrets privilege has been invoked, but which have not been addressed in a periodic report to Congress? If so, please identify these cases, produce a report on an expeditious timeline, and explain why DOJ had not previously provided a periodic report to Congress.

⁶ 2009 Memorandum, *supra* note 1.

⁷ *Id.*

⁸ See *In re Terrorist Attacks on September 11, 2001*, 2021 WL 839455 (S.D.N.Y.).

⁹ We have been able to identify at least two additional cases in which the state secrets privilege was invoked since 2019, including *Kareem v. Haspel*, 412 F.Supp.3d 52 (D.D.C. 2019) and *Twitter, Inc. v. Barr*, 445 F.Supp.3d 295 (N.D. Cal. 2020).

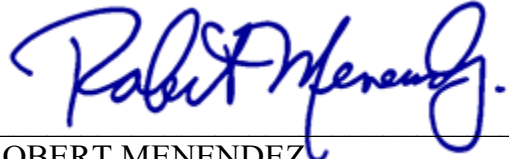
3. Are there now-settled or otherwise resolved or closed matters in which the state secrets privilege was invoked, but which were not addressed in a periodic report to Congress? If so, please provide retroactive reports consistent with the policies and procedures detailed in the 2009 memorandum and explain why DOJ did not provide a report to Congress at the time the privilege was invoked.
4. President Biden has said that his Administration will “[adhere] to the rigorous guidance” set forth by the Obama Administration in the 2009 memorandum. This seemingly includes DOJ’s commitment to provide periodic reports to the appropriate congressional oversight committees.
 - a. Please identify all DOJ rules, guidelines, practices, procedures or similar documents that govern DOJ’s submission of periodic reports on assertions of the state secrets privilege to the appropriate congressional oversight committees. If no such rules, guidelines, practices, procedures, or similar documents exist, please identify how DOJ plans to implement this periodic reporting requirement in the future.
 - b. If not otherwise addressed in those documents (Question 4(a)), please explain how DOJ defines “periodic” for the purpose of adhering to the 2009 memorandum’s commitment to periodic reporting.
 - c. If not otherwise addressed in those documents (Question 4(a)), please identify which congressional committees DOJ considers to be the “appropriate oversight committees of Congress.”
5. The 2009 memorandum does not include any language committing the Department to make its periodic reports available to the public notwithstanding that DOJ adopted the policies and procedures outlined in the 2009 memorandum “to strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.” Will the Department consider making such reports available to the public, with redactions (or using unclassified versions) where necessary to protect classified information?
6. The 2009 memorandum requires periodic reports concerning “all cases in which the Department invokes the [state secrets] privilege on behalf of departments or agencies in litigation[,]” but does not address reporting concerning cases in which the Department declined another department’s or agency’s request to assert the privilege. Please identify the number of instances that DOJ has declined such requests.
7. Please state whether the Department has made any referrals pursuant to section 4(C) of the 2009 memorandum, which requires DOJ to refer credible allegations of government wrongdoing to the “Inspector General of the appropriate department or agency” where invocation of the privilege precludes addressing those allegations in litigation. If so, we request a briefing on the nature and disposition of those referrals.

Thank you for your time and consideration.

Sincerely,



RICHARD BLUMENTHAL
United States Senate



ROBERT MENENDEZ
United States Senate



CORY A. BOOKER
United States Senate



KIRSTEN GILLIBRAND
United States Senate