

GOVERNMENTAL AFFAIRS  
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW  
Washington, DC 20005-1022  
(202) 662-1760  
FAX: (202) 662-1762

DIRECTOR

Thomas M. Susman  
(202) 662-1765  
susmant@staff.abanet.org

DEPUTY DIRECTOR

Denise A. Cardman  
(202) 662-1761  
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

R. Larson Frisby  
(202) 662-1098  
frisbyr@staff.abanet.org

Lillian B. Gaskin

(202) 662-1768  
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

Ann Carmichael  
(202) 662-1767  
carmicha@staff.abanet.org

Kristi Gaines

(202) 662-1763  
gainesk@staff.abanet.org

Kirra L. Jarratt

(202) 662-1766  
jarrattk@staff.abanet.org

E. Bruce Nicholson

(202) 662-1769  
nicholsonb@staff.abanet.org

LEGISLATIVE COUNSEL/DIRECTOR

GRASSROOTS OPERATIONS

Julie M. Strandlie

(202) 662-1764  
jstrandlie@staff.abanet.org

LEGISLATIVE COUNSEL/  
DIRECTOR OF STATE LEGISLATION

Kenneth J. Goldsmith

(202) 662-1789  
goldsmithk@staff.abanet.org

INTELLECTUAL PROPERTY  
LAW CONSULTANT

Hayden Gregory

(202) 662-1772  
gregoryh@staff.abanet.org

LEGISLATIVE ASSISTANT

Jared D. Hess

(202) 662-1780  
hessj@staff.abanet.org

OFFICE ADMINISTRATOR

Holly Mattocks

(202) 662-1776  
mattockh@staff.abanet.org

STAFF DIRECTOR FOR  
INFORMATION SERVICES

Sharon Greene

(202) 662-1014  
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion

(202) 662-1017  
mcmillionr@staff.abanet.org

EDITOR WASHINGTON SUMMARY

Justine Gregory

(202) 662-1016  
gregoryj@staff.abanet.org

October 5, 2009

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United State Senate  
Washington, DC 20510

The Honorable Jeff Sessions  
Ranking Member  
Committee on the Judiciary  
United State Senate  
Washington, DC 20510

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
United State House of Representatives  
Washington, DC 20515

The Honorable Lamar Smith  
Ranking Member  
Committee on the Judiciary  
United State House of Representatives  
Washington, DC 20515

Dear Chairman Leahy, Ranking Member Sessions, Chairman Conyers and  
Ranking Member Smith:

As you know, the Department of Justice issued a memorandum announcing the new executive branch policy on invocation of the state secrets privilege in litigation that became effective last week. There is much to praise in the new Justice Department policy, including the adoption of a tougher “significant harm” standard (modeled after the standard in pending legislation), a more stringent internal review process, and greater transparency and accountability. Nonetheless, legislation is still needed to address critical issues not covered by the policy and to assure that federal courts engage in meaningful, independent review of claims of privilege. We therefore write to reaffirm our support for S. 417 and H.R. 984, state secrets legislation pending before your committees, and to urge you to renew your efforts to secure enactment of a comprehensive bill this Congress.

While the new procedures comport with the basic principles underlying the ABA's 2007 policy and pending legislation, they lack specificity. We are particularly concerned that the memorandum is silent on whether the Justice Department will consent to *in camera* judicial review of allegedly privileged evidence or to a judicial process for developing non-privileged substitutes for evidence containing national security secrets.

The Administration, of course, cannot compel future administrations to adhere to its policy, nor can it direct the federal courts to engage in meaningful judicial review of assertions of the privilege and follow procedures to assure that cases will only be dismissed based on the as a last resort. Codification of a set of judicial procedures requires congressional action. Enactment of legislation such as S. 417 and H.R. 984 will assure present and future generations that the government will only be able to assert the state secrets privilege when genuinely necessary and not to hide government misconduct.

The Administration's new policy initiates important reforms with regard to the state secrets privilege. We hope Congress now will step forward to finish the work at hand. We urge you to advance the legislative process by completing markup and reporting the bills out of committee this fall. The ABA stands ready to help accomplish this.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman