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April 2, 2008

The Hon. Patrick Leahy
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

The Hon. Arlen Specter
Ranking Member
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy, Senator Specter, and Members of the Senate
Judiciary Committee:

This letter responds to the Attorney General's March 31, 2008 letter
opposing the State Secrets Protection Act. We urge Congress to reject the
arguments raised in Attorney General Mukasey's letter.

The Constitution Project is a bipartisan organization that promotes and
defends constitutional safeguards. The Project brings together legal and
policy experts from across the political spectrum to promote consensus
solutions to pressing constitutional issues. Last year, the Constitution
Project's Liberty and Security Committee and Coalition to Defend Checks
and Balances issued a report entitled *Reforming the State Secrets Privilege*, which
is attached to this letter. The statement is signed by more than forty policy
experts, former government officials, and legal scholars of all partisan
affiliations. It calls on judges to independently assess state secrets claims by
the executive branch, and on Congress to clarify that judges, not the
executive branch, must have the final say about whether disputed evidence
is subject to this privilege.

This letter responds to each of the seven arguments in the Attorney
General's letter in turn.

1. The judicial history of the state secrets privilege actually demonstrates the need for legislative reform.

As the Attorney General's letter notes, the state secrets privilege was first articulated by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953). However, the doctrine has been problematic since it was first recognized at that time. In the *Reynolds* case, the widows of three civilian contractors who were killed in the crash of a military plane sought production of the Air Force accident report. The Supreme Court refused to require the executive branch to turn over the accident report to the district court judge for an independent assessment of whether the report did indeed contain state secrets, concluding that forcing the government to disclose information it claimed was sensitive created an unacceptable risk to national security. However, more than four decades later, the Air Force declassified the accident report, revealing that it did not in fact contain sensitive security information, but only evidence of the government's negligence.

The Attorney General's letter includes a footnote contending that subsequent litigation confirms that disclosure of the accident report at issue in *Reynolds* "could have caused harm to national security." This is untrue. The U.S. Court of Appeals for the Third Circuit did indeed reject a claim in subsequent litigation that the United States government had committed fraud on the court through its characterization of the accident report during the original litigation. *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005). However, in its opinion, the Third Circuit noted that "The presumption against the reopening of a case that has gone through the appellate process all the way to the United States Supreme Court and reached final judgment must be not just a high hurdle to climb but a steep cliff-face to scale." *Id.* at 386. Under this demanding standard, the Third Circuit simply found that the Air Force's characterization of the accident report during the original litigation was subject to a "reasonable truthful interpretation," and therefore the plaintiffs could not prove that these officials had committed perjury. *Id.* at 392. The Third Circuit did *not* make any finding that disclosure of the report could indeed have harmed national security.

Moreover, the problems with the state secrets privilege have only grown since 1953. Although the *Reynolds* opinion mistakenly permitted the Air Force to shield a particular document, the decision nonetheless allowed the litigation to proceed. More recently, however, courts have relied upon the doctrine to foreclose any litigation at all of cases in which the state secrets privilege is asserted. For example, in the *El-Masri* case decided last year by the U.S. Court of Appeals for the Fourth Circuit, the court dismissed the case at the pleadings stage, before any discovery had occurred. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). Mr. El-Masri, an innocent victim of the United States' extraordinary rendition policy, had filed his lawsuit to challenge his imprisonment and abuse by the CIA.

2. The existing procedural safeguards discussed in the Attorney General's letter are insufficient.

The Attorney General's letter correctly points out that "assertion of the state secrets privilege does not necessarily result in dismissal of a lawsuit." However, reform is needed to ensure that the proper balance is struck to protect both national security information and access to our courts, and to provide an independent check on executive discretion.

The proposed States Secrets Protection Act includes at least three critical protections in this regard. First, the bill would prohibit reliance on a state secrets claim to dismiss a case at the pleadings stage – as has happened in cases like *EL-Masri*. Rather, whenever the executive branch asserts the state secrets privilege, courts would be required to first conduct a closed hearing to examine the allegedly secret evidence, and determine whether the privilege should apply.

Second, the bill would require that when the executive branch asserts the privilege, it must provide all allegedly secret evidence to the judge for *in camera* review. The judge is then required to make an independent assessment of each “specific item of evidence” to determine whether the state secrets privilege applies. This requirement for independent court review of the actual evidence is crucial – had such review been mandated in *United States v. Reynolds*, the judge would have discovered that there were no national security secrets contained in the disputed accident report.

The third significant reform in the bill is a requirement that if the judge concludes that an item of evidence legitimately contains state secrets, the judge must assess whether “it is possible to craft a non-privileged substitute” for the evidence “that provides a substantially equivalent opportunity to litigate the claim or defense.” Such non-privileged substitutes could include a version of a document with privileged material redacted, or a summary of the privileged information. If the court finds it is possible to create such a substitute, the bill requires that the court “shall order” the executive branch to provide such a substitute to the opposing party. If the government refuses to comply with this order, the court would be required to decide the disputed issue in favor of the non-government party. This provision balances the need to preserve national security information with the rights of litigants challenging government policies, and would enable some litigation to proceed even where state secrets may be involved.

3. Congress clearly has the constitutional authority to legislate reforms to the state secrets privilege.

The claim in the Attorney General’s letter that Congress may lack the constitutional authority to legislate reforms to the state secrets privilege is simply false. The United States Constitution specifically grants Congress the power to enact “Regulations” regarding the jurisdiction of federal courts. U.S. CONST. Art. III, § 2. This includes the power to legislate reforms to the state secrets privilege. This point is reinforced in the attached letter of October 4, 2007 signed by twenty-three “scholars of constitutional law and students of public policy.” As these scholars urge in their letter, “Congress possesses the constitutional authority to act, and it should do so” to reform the state secrets privilege.

Moreover, contrary to the Department of Justice’s claim, the state secrets privilege is not rooted in the Constitution. In its decision in *Reynolds*, the Supreme Court examined two constitutional claims, but concluded that it was “unnecessary to pass upon” these claims. 345 U.S. at 6. It chose, instead, to analyze the case in terms of the Federal Rules of Civil Procedure, particularly Rules 34 and 37. *Id.* at 6-7. The decision was not grounded in

constitutional law. Finally, as outlined below, constitutional principles actually favor reform of the state secrets doctrine to restore our constitutional system of checks and balances.

4. The State Secrets Protection Act strikes an appropriate balance among the branches of government and their respective powers in the area of national security.

The State Secrets Protection Act would indeed take steps to shift responsibilities to the courts in determining whether evidence should be subject to the state secrets privilege. This shift is an appropriate corrective measure designed to respect the constitutional roles of all three branches of government.

Judge William H. Webster submitted a Statement to the Senate Judiciary Committee in connection with the state secrets privilege hearing on February 13, 2008. Judge Webster served as a federal judge from 1970 to 1978, served for nine years as Director of the Federal Bureau of Investigation, and served from 1987 to 1991 as Director of Central Intelligence. In his statement, Judge Webster asserted that:

As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Indeed, judges increasingly are called upon to handle such sensitive information under such statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

Legislative reform is necessary to ensure that courts *not* accord "utmost deference" to executive branch national security officials. Such officials are entitled to the same respect and deference as any other expert witness, and independent judges are needed to provide a check on executive discretion. Without independent review by judges, the opportunity and incentive for abuse of the privilege is far too great.

5. Separation of powers principles support legislative reforms to restore our constitutional system of checks and balances.

Contrary to the assertions in the Attorney General's letter, the State Secrets Protection Act would not harm, but would restore our constitutional system of checks and balances.

Although the President is "Commander in Chief of the Army and Navy," U.S. CONST. Art. II, § 2, as the United States Supreme Court has recognized, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Thus, although the executive branch has considerable power to defend our nation against threats from abroad, the courts retain an independent responsibility to determine whether that power is being exercised consistent with the law,

even in our current efforts to combat international terrorism. As the Supreme Court has noted in the context of military commissions, it “raises separation-of-powers concerns of the highest order” when decision-making is confined to “executive officials without independent review.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring).

Nor do the tools authorized by the State Secrets Protection Act – such as procedures to enable private plaintiffs to obtain attorneys with appropriate security clearances – violate separation of powers principles. Rather, these provisions are designed to ensure that courts will possess the powers they need to protect our national security secrets while still enabling litigation to proceed whenever possible.

6. The State Secrets Protection Act contains adequate safeguards to prevent public disclosure of actual national security secrets.

The bill would ensure that an independent judge evaluates claims of state secrets and makes a determination as to which evidence should appropriately be subject to the privilege. It is true that the bill would alter the standard that has been applied in recent cases, but a tightening of the standard is needed to avoid the injustices of recent decisions. Moreover, the State Secrets Protections Act does indeed provide that if the court finds the privilege applies, the privileged evidence shall not be disclosed or admitted as evidence, and that cases may be dismissed on that basis.

Recent court decisions have not appropriately balanced the interests of private parties, constitutional liberties, and national security. In too many cases, judges have relied upon executive branch claims to dismiss suits without independently assessing whether these cases may be litigated while still protecting national security secrets. For example, in the *El-Masri* case, the Fourth Circuit held that when the state secrets privilege has been successfully invoked, the plaintiff “loses access to evidence that he needs to prosecute his action and, if privileged state secrets are sufficiently central to the matter, may lose his cause of action altogether.” *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007). Thus, the suit brought by this victim of mistaken identity and truly appalling treatment at the hands of the CIA was dismissed at the pleadings stage, before Mr. El-Masri had even sought any evidence in discovery.

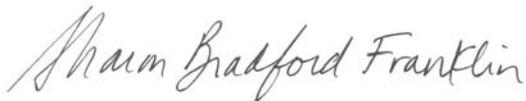
The district court in the *El-Masri* case examined only a classified declaration by then-Director of the CIA Porter Goss, outlining the government’s claim that litigation of the case would risk disclosing sensitive national security information. There was no effort to explore whether unclassified sources of evidence — such as public statements by U.S. officials and investigations ongoing in Europe — might be available to permit the case to proceed. The State Secrets Protection Act would ensure that an independent judge makes exactly this type of assessment – to prevent public disclosure of actual state secrets while enabling litigation to proceed when possible.

7. It is appropriate for the legislation to affect ongoing litigation.

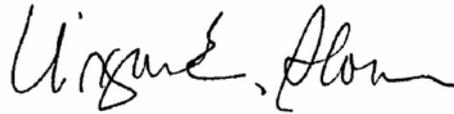
Because the State Secrets Protection Act would restore a needed independent check on executive discretion and includes necessary safeguards to ensure protection of both sensitive national security information and access to the courts, it is appropriate to apply these reforms to pending litigation.

We hope that Members of the Judiciary Committee will find this response to Attorney General Mukasey's letter helpful as you consider the State Secrets Protection Act. Please let us know if we can be of further assistance.

Sincerely,



Sharon Bradford Franklin
Senior Counsel



Virginia E. Sloan
President