Association of the Bar of the City of New York
Committee on Civil Rights

Statement on Pending Legislation Addressing the State Secrets Privilege

June 3, 2009

The Association of the Bar of the City of New York ("the Association") strongly supports two pending bills that would establish procedures and legal standards to govern application of the state secrets privilege: (1) S. 417, the "State Secrets Protection Act"; and (2) H.R. 984, the "State Secret Protection Act of 2009."

Founded in 1870, the Association is a professional organization of more than 23,000 members. Through its many standing committees, including its Committee on Civil Rights, the Association educates the bar and the public about legal issues relating to civil rights and the democratic process. Over the past several years, the Association has attempted to demonstrate by various means – including through the filing of amicus curiae briefs – that individual liberties need not be subverted by governmental power during times of war and that national security can be achieved without prejudice to the constitutional rights that are at the heart of our democracy.

The Association believes that there is a compelling need for legislation to regulate the courts' consideration and application of the state secrets privilege. While the privilege has historical roots, it was rarely invoked until recent years, and the case law governing its proper application is relatively sparse. Following the attacks of September 11, 2001, however, the Bush Administration invoked the state secrets privilege with some frequency, and aggressively used it not simply to protect any particular piece of secret evidence, but to attempt to block judicial consideration of issues involving serious allegations of government wrongdoing, unlawful and unconstitutional government conduct, and violations of individuals' constitutional and human rights.

The Bush Administration's use of the state secrets privilege was fundamentally in error. The state secrets privilege is an evidentiary privilege that is intended to protect information vital to national security if "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). It is not a doctrine that bars the courts from even entertaining a lawsuit, particularly a case raising

the most serious constitutional claims. The Supreme Court has recognized only one limited class of claims that are not justiciable – suits to enforce an alleged contract to act as a spy, see Tenet v. Doe, 544 U.S. 1 (2005); Totten v. United States, 92 U.S. 105 (1876) – and the Court in Tenet explicitly distinguished that doctrine from the state secrets privilege. 544 U.S. at 8-10. Correctly understood, there is no support for the view that the state secrets privilege can properly be used to block all judicial inquiry into serious allegations of unlawful government actions and violations of constitutional and human rights.

Nonetheless, at the urging of the Bush Administration, some courts improperly relied on the state secrets privilege to dismiss lawsuits entirely at the pleading stage, without making any effort to find a way to provide a remedy for unconstitutional and unlawful government conduct while still providing protection for legitimate national defense secrets. See, e.g., El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (affirming on state secrets grounds the dismissal of a case involving the U.S. government's extraordinary rendition program, as a result of which the plaintiff alleged gross mistreatment at a CIA-operated detention facility in Afghanistan); Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (dismissing lawsuit by foreign nationals for damages sustained as a result of the government's extraordinary rendition program, on the ground that "the very subject matter of the case is a state secret"), rev'd, __ F.3d __, 2009 WL 1119516 (9th Cir. Apr. 28, 2009).

President Obama stated at an April 29, 2009 press conference that he thinks the state secrets doctrine is "overbroad" and "should be modified." However, thus far the Obama Administration has taken the same litigation positions as the Bush Administration vis-à-vis the state secrets privilege. On February 9, 2009, at the oral argument of the appeal in Mohamed v. Jeppesen Dataplan, Inc., the Obama Administration reaffirmed the Bush Administration's argument that the suit should be dismissed in its entirety because the subject matter – the extraordinary rendition program – was a state secret. Similarly, in its motion to dismiss and for summary judgment in Jewel v. National Security Agency, No. C:08-cv-4373-VRW (N.D. Cal., filed April 3, 2009), the Obama Administration argued that the case – involving the Bush Administration's warrantless surveillance program – should be dismissed on state secrets grounds because "its very subject matter would risk or require the disclosure of state secrets."

On April 28, 2009, the Ninth Circuit reversed the district court's dismissal of Mohamed v. Jeppesen Dataplan and explicitly rejected the argument that a case could properly be dismissed on the grounds that its subject matter is subject to the state secrets privilege. The Ninth Circuit stated: "This sweeping characterization of the 'very subject matter' has no logical limit – it would apply equally to suits by U.S. citizens, not just foreign nationals; and to secret conduct committed on U.S. soil, not just abroad. According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." 2009 WL 1119516, at *7.

While the Ninth Circuit's decision in Mohamed v. Jeppesen Dataplan was a welcome development, there is still an urgent need for corrective legislative action, given the Obama Administration's continued reliance on the Bush Administration's flawed conception of the state secrets privilege and the potential for lack of uniformity among courts in applying the privilege. Without appropriate legislation, the checks-and-balances and separation of powers that underlie our constitutional system will be endangered, and indviduals who have been grievously injured will have no chance of obtaining redress.

The bills now pending in the House and Senate would go a long way towards restoring the proper constitutional balance. While recognizing the importance of protecting legitimate national security secrets, the bills would bolster the Judiciary's constitutional role as a check on Executive power, restore the transparency and accountability necessary for a thriving democracy, and re-open the doors of our courts to provide relief to victims of government misconduct.

Although the House and Senate bills differ in some respects, as discussed below, they share many of the same basic features. While both bills recognize the need to protect legitimate national security secrets in appropriate circumstances, both bills are intended to make dismissal of plaintiffs' claims on state secrets grounds a last resort, and to require the courts to explore alternatives that would permit the litigation to go forward while also protecting the secret information. The bills would do this in several ways: by requiring the courts to examine in camera the evidence that the Government claims is subject to the privilege, to ensure that there is in fact a substantial basis for the claim of privilege; by precluding dismissal on the pleadings and allowing the case to go forward with discovery on the non-privileged evidence wherever possible; by requiring the court, even if the privilege must be sustained, to explore the option of creating a non-privileged substitute, such as a redacted version, or a non-privileged summary or stipulation of the relevant facts; and by permitting dismissal, if at all, only if there is no other way that the secrecy of the privileged information can be protected.

There is no substantial question that Congress has the authority to enact legislation regulating the courts' application of the state secrets privilege. As the Supreme Court has recognized, the state secrets privilege is an evidentiary privilege that has developed as a matter of federal common law. See Reynolds, 345 U.S. at 6-7 (state secrets privilege is "well established in the law of evidence"); see also Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998) (state secrets privilege is "an evidentiary privilege rooted in federal common law"); Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (state secrets privilege is a "common law evidentiary rule"). There is no doubt that Congress has the constitutional authority to enact laws regulating courts' application of common law evidentiary privileges under Article I, Section 8 of the Constitution (which grants Congress the power "[t]o constitute Tribunals inferior to the supreme court") and Article III, Section 2 (which gives Congress the authority to enact "regulations" for the federal courts), including the power to modify the standards and procedures that have been developed as a matter of federal common law. Indeed, in propounding the Federal Rules of Evidence, the Supreme Court initially included a proposed rule governing the state secrets privilege, Rule 509. While Congress decided,

for other reasons, not to adopt the Supreme Court's proposals with respect to privileges generally, there was never any question that Congress had the authority to adopt such rules.

Despite its common law origins, some courts have recently emphasized that the privilege is "constitutionally based" because it is related to the President's Article II responsibilities for national security and foreign relations. See, e.g., El-Masri, 479 F.3d at 303 (stating that privilege "performs a function of constitutional significance"); cf. United States v. Nixon, 418 U.S. 683, 710-11 (1974) (discussing executive privilege). But even if the state secrets privilege has some basis in the Constitution, that does not mean that Congress does not have the authority to adopt reasonable regulations to govern the courts' application of the privilege and their management of lawsuits in which the privilege has been invoked.

Indeed, in In re National Security Agency Telecommunications Records Litigation, 564 F. Supp. 2d 1109, 1117-24 (N.D. Cal. 2008), the District Court expressly held that Congress not only had the power to regulate the state secrets privilege, but in fact had done so in enacting the Foreign Intelligence Surveillance Act (FISA). In that decision, Judge Walker held that Congress in FISA had preempted the state secrets privilege in situations where FISA applied, and replaced the common law rules with the standards and procedures adopted by Congress. The Court further held that Congress had the power to do so, whether or not the privilege was grounded in the President's constitutional duties. See also Tenet, 544 U.S. at 11-12 (Stevens, J. concurring) ("Congress can modify the common law rule announced in Totten").

We discuss below the Association's position with respect to the key provisions of the House and Senate bills:

1. Both the House and Senate bills continue to recognize the state secrets privilege and the need to protect the secrecy of information that, if disclosed, could endanger national security. See H.R. 984, § 2; S. 417, §§ 4051(2), 4054(e).[1] Both bills, however, adopt a somewhat more rigorous standard than the existing case law for determining whether the privilege is applicable. Under the Supreme Court's decision in Reynolds, the Government may assert the state secrets privilege when "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." 345 U.S. at 10. In contrast, Section 2 of the House bill provides that the privilege would be applicable to evidence whose disclosure would "be reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States." Section 4051(2) of the Senate bill adopts the same "reasonably likely to cause significant harm" standard, though it replaces the House bill's reference to "diplomatic relations" with the term "foreign relations."

[1] Section 2 of the Senate bill, which contains virtually all of its substantive provisions, proposes adding Sections 4051 through 4059 to Title 28 of the United States Code. For clarity, in discussing the Senate bill, this letter will thus refer to the proposed sections of the U.S. Code rather than to the sections of the bill.

The Association supports this effort to define the relevant legal standard more precisely. The Association further believes that the requirement of both bills that only evidence likely to cause "significant harm" to the United States should be privileged is appropriate, and will help ensure that the state secrets privilege is only invoked where there is a real risk of harm to national security, and not as a convenient excuse to hide government wrongdoing. However, the Association would recommend deleting the "diplomatic relations" and "foreign relations" language from the House and Senate bills, as that language unduly expands the scope of the state secrets privilege beyond national security matters and could prompt the government to attempt to keep secret information that would be harmful to the United States' reputation, though not necessarily detrimental to its national security.

2. Both the House and Senate bills emphatically reaffirm that it is the responsibility of the courts to assess whether the evidence at issue is in fact entitled to the protection of the state secrets privilege. See H.R. 984, § 6; S. 417, §§ 4054(e), 4055. Both bills contain extensive provisions for the court to conduct hearings, which may be in camera, to determine whether the evidence is indeed entitled to the protection of the state secrets privilege. See H.R. 984, §§ 3, 5, 6; S. 417, §§ 4052, 4054.[2] Section 6 of the House bill explicitly requires the court to make an "independent assessment" of the harm urged by the Government to determine whether it is in fact reasonably likely to occur if the evidence is disclosed. The Senate bill does not include any similar express statement, but its provisions as a whole clearly require a vigorous judicial inquiry into the propriety of the assertion of the privilege. In addition, both bills expressly require the court to review the evidence as to which the privilege is claimed, and to satisfy itself that the assertion of privilege is valid. See H.R.984, § 6(b); S.417, § 4054(e).[3]

To some extent, these provisions are consistent with current law. It is well settled, for example, that the ultimate decision as to whether the privilege is properly asserted belongs to the court, not to the Executive. See Reynolds, 345 U.S. at 9-10 ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."). Even the Fourth Circuit in El-Masri acknowledged that "the judiciary [is] firmly in control of deciding whether an executive assertion of the state secrets privilege is valid." 479 F.3d at 304-05.

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[2] There is a difference between the Senate and House bills on the question of the use of in camera hearings. Section 3 of the House bill states that hearings "may be conducted in camera, as needed . . . ." Section 4052(b) of the Senate bill, however, provides that "all hearings . . . shall be conducted in camera" unless they relate solely to questions of law. The Association believes that the approach of the House bill is preferable, as it gives the court discretion to conduct public hearings when they can be held without jeopardizing secret information, and better promotes transparency and public understanding.

[3] Both bills also include a provision, however, which authorizes the court to review a sample of the allegedly privileged evidence where the volume of the evidence precludes a timely review of each item. See H.R.984, § 6(b)(2); S.417, § 4054(d)(2).

The requirement that the court must review the evidence as to which privilege is claimed, however, is a departure from current law. The Court in Reynolds, while generally giving judges discretion to examine the evidence if necessary, expressly held that the court should not "automatically require a complete disclosure to the judge before the claim of privilege will be accepted." 345 U.S. at 10. As the Court explained, "[i]t may be possible to satisfy the court, from all the circumstances of the case," that the privilege is being validly asserted, and in these circumstances, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." Id.

The Association strongly believes that the provisions of the House and Senate bills requiring the courts to review the evidence in camera are necessary and appropriate to ensure that the privilege is being properly asserted and that the claim of privilege is not being used to cover up unlawful or simply embarrassing Government conduct. Notwithstanding the Court's comments more than 50 years ago in Reynolds, it has become routine for the courts to consider classified or secret information in a variety of contexts, and there is no reason for concern that the courts cannot be trusted to preserve legitimate secrets in the interests of national security. Both FISA and the Classified Information Procedures Act (CIPA) explicitly give this authority to the courts, and there is no reason why the courts should not play the same role in evaluating the validity of a state secrets claim. Indeed, notwithstanding the Court's comments in Reynolds, the Government's routine practice in cases involving claimed state secrets has been to provide the courts with an opportunity to review the evidence, and the courts have routinely exercised that review. See, e.g., Al-Haramain, 507 F.3d at 1203 ("Having reviewed it *in camera*, we conclude that the Sealed Document is protected by the state secrets privilege . . ."); El-Masri, 479 F.3d at 312 ("We have reviewed the Classified Declaration, as did the district court, and the extensive information it contains is crucial to our decision . . .").

3. The Senate and House bills specify similar procedures for the assertion of the state secrets privilege. Both bills permit the Government to assert the privilege in a case where it is a defendant, or to intervene in another case for purposes of asserting the privilege. S. 417, § 4053(a); H.R. 984, § 4(a). Both bills require the Government to submit to the court an affidavit explaining the factual basis for the claim of privilege, which must be signed by the head of the responsible Executive Branch agency. S. 417, §§ 4053(d), 4054(b); H.R. 984, § 4(b). These provisions are consistent with current law. See, e.g., El-Masri, 479 F.3d at 304 (privilege may be asserted only by the Government, through a formal claim of privilege asserted by head of relevant agency, after actual personal consideration). Both bills also require the Government to make public an unclassified version of the affidavit. S. 417, § 4054(b); H.R. 984, § 4(b). While this requirement is new, it in fact accords with the Government's standard practice. The Association strongly supports these provisions.

4. The Senate bill contains a provision permitting the Government to assert the state secrets privilege in the answer to a complaint in lieu of admitting or denying an allegation, and specifies that no adverse inference may be drawn from this assertion of

privilege. S. 417, § 4053(c). The House bill does not contain any similar provision. The Association believes this provision is reasonable and appropriate, and will facilitate the goal of permitting the litigation to go forward on non-privileged issues while deferring resolution of the state secrets claim. The Association therefore urges the House to add a similar provision.

5. Both the Senate and House bills provide that courts shall not dismiss cases on state secrets grounds solely on the pleadings, but rather should first examine and conduct pretrial hearings on the purportedly privileged evidence. S. 417, § 4053(b); H.R. 984, § 7(c). There is an important difference, however, between the provisions of the two bills. The House bill provides that the case should not be dismissed in its entirety based on the state secrets privilege, on a motion to dismiss or a motion for summary judgment, until the opposing party "has had a full opportunity to complete discovery of non-privileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information." H.R. 984, § 7. In contrast, Section 4053(b) of the Senate bill provides only that a ruling on such a motion to dismiss or for summary judgment based on the state secrets privilege "shall be deferred pending completion of the hearings provided under this chapter." Language in the Senate bill that would have required the court to defer a ruling until after discovery was struck from the bill during the mark-up process in 2008.

In other words, the House bill seeks to ensure that a plaintiff is provided as full an opportunity as possible to conduct discovery on non-privileged issues before the case may be dismissed, whereas the revised Senate bill authorizes the court to dismiss the case after a hearing on the state secrets claim, without any discovery or other proceedings.

The Association believes that the House approach is preferable. The courts should make every effort to allow a case to go forward in all respects that do not implicate the alleged state secrets, including discovery related to non-privileged aspects of the case. Dismissal of the case on the pleadings alone – if it is ever justified – should be a last resort, and should only be permitted after all other options have been explored.

7. Both House and Senate bills require the courts to consider alternatives to permit the litigation to go forward once the court concludes that the state secrets claim is valid. Section 4054(f) of the Senate bill provides that where the court concludes that it is possible to craft a non-privileged substitute that would provide the plaintiff with a "substantially equivalent opportunity to litigate the claim or defense," the court shall order the Government to prepare such a non-privileged substitute. This may include a summary of the privileged information; a version of the evidence that redacts the privileged information; a statement admitting relevant facts in lieu of disclosing the evidence; or any other alternative that the court may devise in the interests of justice. If the Government fails to comply, the court is directed to find the disputed issue against the Government. S. 417, § 4054(g). Section 7(b) of the House bill is similar.

The Association strongly supports these provisions. They provide a reasonable approach that may permit a plaintiff to litigate his or her claim whenever possible, and

may permit the courts to afford a remedy to a plaintiff injured by Government wrongdoing when this can be done without disclosing information legitimately protected by the state secrets privilege,

8. Both bills include provisions intended to permit adversary hearings on the validity of the Government's state secrets claim, by having counsel available to the opposing party (or to represent his or her interests) who has a security clearance sufficient to be given access to the secret evidence. The approaches taken by the House and Senate bills on this issue, however, differ slightly.

Section 5(e) of the House bill provides that, where the court orders a party or counsel to obtain a security clearance, the government shall promptly decide whether to provide the clearance. If the necessary security clearance is not promptly provided, the party can propose alternate or additional counsel to be cleared. If the Government does not grant a clearance to that counsel within a reasonable time, the court, in consultation with the party and counsel, "shall appoint another attorney" who can obtain the clearance promptly. If a security clearance is denied, the court may require the government to present an ex parte explanation of any security clearance denial.

Section 4052(c) of the Senate bill is similar in many respects. Section 4052(c) provides that the court, at the request of the Government, shall limit participation in hearings or access to affidavits or motions, to attorneys with appropriate security clearances; that the court may suspend proceedings in the case while an application by counsel for a security clearance is pending; and, if a security clearance is not promptly provided, that the court may review the reasons for the Government's actions in camera and ex parte. Unlike the House bill, however, the Senate bill provides that the court "may also appoint a guardian ad litem with the necessary security clearances to represent any party" for purposes of any hearing on the Government's state secrets claim.

The Association supports the goals of these provisions, which are intended to ensure that the party contesting the Government's claim of privilege has counsel who can effectively challenge the Government's claim. The Association believes that every effort should be made to allow a party to have counsel of his or her choice, and therefore supports the provisions of the House bill that are intended to facilitate the grant of a security clearance to counsel chosen by the party. Both the House and Senate bills recognize, however, that in some circumstances this may prove to be impossible. The House bill authorizes the court, after consultation with the party and existing counsel, to appoint another attorney who can obtain the necessary clearance promptly. The Senate bill authorizes the appointment of a guardian ad litem who already has the necessary security clearance to represent the interests of the party. The difference between these approaches is slight, but the Senate approach makes sense if appropriate counsel can be identified who already has the necessary clearance, particularly if the Senate bill were amended to include the House's requirement that the court make this appointment only after consultation with the party and his existing counsel.

9. There is an important difference between the House and Senate bills as to the proper disposition of the case once the court has determined that the Government's claim of state secrets privilege must be upheld and that it is not possible to craft a non-privileged substitute.

Section 4055 of the Senate bill provides that a court may dismiss a claim on the basis of the state secrets privilege only if the court determines that: (1) it is impossible to create a non-privileged substitute; (2) dismissal of the claim would not harm national security; and (3) continuing with litigation of the claim in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim. While this provision states that the court "may" dismiss the claim (rather than requiring dismissal), and while there is perhaps some room for the court's exercise of discretion in determining whether the absence of the evidence would impair a "valid" defense for the Government, this provision as a whole seems to contemplate that the proper disposition where the state secrets privilege has been sustained would in fact be to dismiss the action. Certainly there is nothing in the Senate bill which authorizes the court to take any other action.

In contrast, the House bill explicitly gives the court the authority to make such orders as justice may require. Section 7(d) of the House bill provides that, "after reviewing all available evidence," and after sustaining a claim of privilege and concluding that a non-privileged substitute is impossible, "the court shall weigh the equities and make appropriate orders in the interest of justice, such as striking the testimony of a witness, finding in favor of or against a party on a factual or legal issue to which the evidence is relevant, or dismissing a claim or counterclaim." This provision plainly grants the court a much greater degree of flexibility to make such orders as may be appropriate in the interests of justice, and does not limit the court to the sole remedy of dismissing the plaintiff's claim. Indeed, this provision seems to grant the court the authority to consider the privileged evidence and to make such orders as justice may require, even if the evidence itself cannot be disclosed – which arguably would include the possibility of awarding relief to an individual bringing a claim against the Government.

While the authority for the court to potentially grant relief based on the court's ex parte examination of the evidence is novel, the Association supports this broad grant of authority to take such action as may be appropriate in the interests of justice. In some cases in which the state secrets privilege has been asserted, there is strong evidence that the Government has acted unlawfully and unconstitutionally, and the court ought to be empowered to grant relief – and ought not to be forced to dismiss a case – when the court plainly sees from the evidence before it that there has been wrongdoing. There is no unfairness to the Government in these circumstances, since the Government will have full access to the secret evidence, it will have the opportunity to make whatever arguments it wants to the court, in camera if necessary, and the court's ruling would of course be subject to review by an appellate court. This is far preferable to the alternative of requiring dismissal, which would enable the Government to commit wrongdoing, shield

itself from liability by asserting the state secrets privilege, and deprive injured parties of any redress.

10. Both the House and Senate bills authorize either party to take an interlocutory appeal from the district court's ruling on a state secrets privilege issue, and provides that such appeals should be expedited to the extent possible. S. 417, § 4056; H.R. 984, § 8. The Association supports these provisions. Immediate appellate review of the district court's rulings on state secrets privilege issues is warranted, whether the court sustains the privilege or not. If the court has overruled the Government's claim, the Government should be entitled to an immediate appeal to make sure that information that should be kept secret is not improperly disclosed. On the other hand, a court ruling upholding the claim of privilege will often have an extraordinary, often dispositive impact on the plaintiffs' ability to prove his or her case, and an immediate appeal is therefore appropriate.

11. Finally, there is an important difference between the House and Senate bills with respect to the cases to which it applies. The Senate bill provides that it applies to any civil case "pending on or after the date" of its enactment. S. 417, § 4. The House bill similarly states that it applies to "claims pending on or after the date of enactment." H.R. 984, § 11. However, the House bill also goes much further, and provides that the court may also relieve a party from a final judgment or order that was based, in whole or in part, on the state secrets privilege if: (1) a motion for relief is filed in the rendering court within one year after enactment of the bill; (2) the underlying judgment or order was entered after January 1, 2002; and (3) the party's claim was against the government or arose out of conduct by government officers, employees, or agents. Id.

The Association recognizes that the provision of this House bill is extraordinary, but believes that it is warranted by the extraordinary circumstances. Since September 11, 2001, the Government has improperly relied on the state secrets privilege to block judicial inquiry into allegations of the most serious government wrongdoing, and plaintiffs who have seemingly been the victims of the most egregious violations of their civil and human rights have been denied all relief. Indeed, the precious reputation of the United States for respecting the rule of law and for making justice available to individuals who complain against government misconduct has been tarnished. The Association fully supports re-opening the doors of our courts to plaintiffs who have been improperly been denied any remedy on the basis of the state secrets privilege.