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“State Secret Protections Act of 2009”

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**Testimony of Asa Hutchinson before the Subcommittee on the Constitution, Civil Rights,
and Civil Liberties of the House Judiciary Committee
June 4, 2009**

Thank you for the opportunity to testify today in support of legislation to provide critical reforms to the state secrets privilege. I am grateful for the leadership of this Subcommittee in holding this hearing on a subject of critical importance to both our national security and the security of individual rights.

In addition to having served as a Member of Congress (R – AR), I have worked for many years in law enforcement and homeland security. I have served as United States Attorney, as Director of the Drug Enforcement Administration, and as Under Secretary for Border and Transportation Security at the Department of Homeland Security. Because of my law enforcement and security experience, I have a keen appreciation for our country’s need to protect its national security information. However, my experience also demonstrates that it is important to reform the state secrets privilege to ensure that our courts provide critical oversight and independent review of executive branch state secrets claims. I believe that Congress needs to act to serve both goals, and help restore a proper balance between our need to safeguard national security information and our responsibility to ensure access to the courts for litigants.

The state secrets privilege was originally recognized as a doctrine to protect particular evidence from disclosure in litigation, when such disclosure might threaten national security. In recent years, however, it has evolved from an *evidentiary* privilege into an *immunity* doctrine, which has blocked any litigation of cases involving national security programs. Over the past twenty years, courts have dismissed at least a dozen lawsuits on state secrets grounds without any independent review of the underlying evidence that purportedly would be subject to this privilege. Not only does this create an incentive for overreaching claims of secrecy by the executive branch, but it has prevented too many plaintiffs from having their day in court. For example, in the case of *El-Masri v. United States*, the trial court and the U.S. Court of Appeals for the Fourth Circuit relied on the state secrets privilege to dismiss a lawsuit by Khaled El-Masri, a German citizen who, by all accounts, was an innocent victim of the United States’ extraordinary rendition program. The case was dismissed at the pleadings stage, before any discovery had been conducted. No judge ever examined whether there might be enough non-privileged evidence to enable the case to be litigated, such as evidence from public accounts of the rendition and an investigation conducted by the German government.

In April of this year, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Mohamed v. Jeppesen Dataplan, Inc.*, which reflected a very different and much more encouraging interpretation of the state secrets privilege. The court held that cases cannot be foreclosed at the outset on the basis of the state secrets privilege, and that the trial court must “undertake an independent evaluation of any evidence sought to be excluded to determine whether its contents are secret within the meaning of the privilege.” Such an independent review is essential to provide the necessary check on executive discretion. However, even if the Ninth Circuit’s interpretation of the privilege stands after further litigation, it is still critical that Congress act to provide trial courts with the guidance they need to conduct such an independent

review. The State Secrets Protection Act, H.R. 984, provides the type of legislative direction that would establish necessary oversight and a more appropriate balance in the application of the state secrets privilege.

Having served in both the Congress and the executive branch, I have a full appreciation for the need for a robust system of checks and balances, and a genuine respect for the role of our courts in our constitutional system. I also understand the natural tendency on the part of the executive branch to overstate claims of secrecy and to avoid disclosure whenever possible. It is judges who are best qualified to balance the risks of disclosing evidence with the interests of justice. Judges can and should be trusted with sensitive information and they are fully competent to evaluate independently whether the state secrets privilege should apply to particular evidence.

It is Congress' responsibility, and fully within its constitutional role, to enact such legislation to restore checks and balances in this area. Legislation to reform the state secrets privilege would not interfere with the President's responsibilities under Article II of the Constitution. On the contrary, 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.

Congress should reform the state secrets privilege and allow courts to independently assess whether the privilege should apply. I want to highlight several particular provisions of the State Secrets Protection Act, H.R. 984, that recognize this need for change and would institute reforms that I support.

Section 6 of the State Secrets Protection Act would provide the most basic and critical reform, by requiring that whenever the executive branch asserts the state secrets privilege, the judge must review the claim, including reviewing the actual evidence asserted to be privileged, and must make "an independent assessment" of whether the privilege applies. Section 3(b) of the Act provides that this hearing may be conducted *in camera*, so that there would not be a risk that the review itself might disclose any evidence. Judges are well-qualified to review evidence asserted to be subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Judges already conduct similar reviews of sensitive information under such statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

Section 6(c) provides that "The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." Executive branch officials are entitled to the same respect and deference as any other expert witnesses but the judgment these officials make should not be without oversight. I do not believe it is appropriate, as the companion Senate bill does, to include language requiring that executive branch assertions of the privilege be given "substantial weight." The standard of review in H.R. 984 provides proper respect for executive branch experts, whereas a "substantial weight" standard would unfairly tip the scales in favor of executive branch claims before the judge's evaluation occurs, and would undermine the thoroughness of the judge's own review. The standard of review in

H.R. 984 would ensure that a court's independent review is meaningful and is not just a routine acceptance of executive assertions.

Section 7(b): This provision requires that if the judge finds that certain evidence is protected by the state secrets privilege, the judge should also assess whether it is possible to create a non-privileged substitute for the evidence that would allow the litigation to proceed. If a non-privileged substitute is possible, the court must order the government to produce such a substitute. This provision would help restore an appropriate balance in national security litigation, by ensuring both that national security secrets are protected from public disclosure and also that litigation will be permitted to proceed where possible. Judges are fully competent to assess whether it is possible to craft a non-privileged substitute version of certain evidence, such as by redacting sensitive information.

Section 7(c): This section would prohibit courts from dismissing cases on the basis of the state secrets privilege at the pleadings stage or before the parties have had the opportunity to conduct discovery. The provision would still permit dismissals on other grounds, such as for frivolousness. This section would help restore the doctrine to its proper role as an *evidentiary* privilege rather than an *immunity* doctrine, and would ensure that plaintiffs like Mr. El-Masri will be able to have a judge independently determine whether there is sufficient non-privileged evidence for their cases to be litigated.

Other sections: Several other provisions of H.R. 984 are designed to ensure that judges have the tools they need to conduct their independent reviews of state secrets claims, and should counter any concern that judges may not have the necessary expertise and background in national security matters to make these determinations. For example, Section 5(b) of the bill instructs the court to consider whether to appoint a special master with appropriate expertise to assist the court in its duties, and Section 6(b) enables the court to rely on sampling procedures when the evidence to be reviewed is voluminous.

These provisions would provide for independent judicial determinations of whether the state secrets privilege should apply and thereby help restore the critical oversight role of our courts. Granting executive branch officials unchecked discretion to decide whether evidence may be withheld under the state secrets privilege provides too great a temptation for abuse. I urge you to support these reforms contained in the State Secrets Protection Act and to help preserve our constitutional system of checks and balances. Finally, I am attaching to my prepared testimony a white paper released by the Constitution Project's bipartisan Liberty and Security Committee, which I have recently joined. The report, entitled *Reforming the State Secrets Privilege*, is signed by more than forty policy experts, former government officials, and legal scholars of all political affiliations. Although it was released before I joined this committee, I endorse its conclusions that judges should independently assess state secrets claims by the executive branch, and that Congress should clarify that judges, not the executive branch, must have a final say about whether disputed evidence is subject to this privilege.