The Constitution Project

June 3, 2009

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

The Hon. Jeff Sessions
Ranking Member
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senators Leahy and Sessions and Members of the Senate Judiciary Committee:

The Constitution Project urges the Senate to pass the State Secrets Protection Act, S. 417, and to reject the many proposed amendments that would undermine the important reforms set forth in the bill.

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. The Constitution Project's Liberty and Security Committee issued a report entitled *Reforming the State Secrets Privilege*, which is available at http://www.constitutionproject.org/manage/file/52.pdf. 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.

The State Secrets Protection Act is designed to implement critical reforms to protect actual national security secrets from public disclosure while permitting litigation to proceed where possible. It would restore checks and balances by restoring the role of our independent courts in evaluating state secrets claims. Members of the Senate Judiciary Committee should reject the many proposed amendments to S. 417. Several of the proposed amendments address issues that are not relevant to the state secrets privilege, and as outlined below, many would undercut the critical reforms provided by the bill.

149. Standard of review (Kyl Amendment)

- This amendment would replace the "substantial weight" standard of review with "utmost deference" to executive branch determinations that evidence is subject to the state secrets privilege.

- This amendment should be rejected. Agencies should not be permitted to police themselves in determining whether the state secrets privilege properly applies. Judges are fully capable of assessing whether evidence should be protected by the state secrets privilege. An "utmost deference" standard of review would undermine the ability of judges to conduct an independent review and serve as a check on executive discretion. Unless the evidence asserted to be secret is subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the judicial review that ensures that the government is accountable for its actions.

- The Constitution Project is actually concerned that even the "substantial weight" standard of review currently contained in S. 417 would unfairly tip the scales in favor of executive branch claims before judicial evaluation occurs, and thereby undermine independent judicial review. The Project therefore supports the "independent assessment" standard of review contained in the House version of the bill. However, the "substantial weight" standard is far preferable to the "utmost deference" standard, and Members of the Committee should reject this amendment.

216. Definition of state secret (Cornyn Amendment)

- This amendment would expand the definition of state secrets beyond information reasonably likely to cause significant harm to the national defense or foreign relations of the United States to also include information whose disclosure would expose military or intelligence matters, even if there is no showing that a likelihood of harm actually exists.

- This amendment should be rejected. Although this language is based on some court decisions interpreting the state secrets privilege, the decisions containing such language have expanded the state secrets privilege almost beyond recognition. It is for this reason that legislation is needed to limit the ever expanding definition of state secrets to only that information which, if publicly disclosed, would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States. If there is no likelihood of harm, the information should not be withheld simply because it is related to military or intelligence matters. The bill's current standard will strike a proper balance between protecting actual national security secrets and safeguarding the rights of private litigants.

233. Attorneys designated by the Attorney General and the Supreme Court (Hatch Amendment)

- Currently the State Secrets Protection Act requires attorneys to have appropriate security clearances in order to participate in *in camera* hearings to review state secrets claims. This amendment would limit the available counsel who may represent a party

challenging the government's state secrets claim to a pool of attorneys pre-cleared by the government.

- This amendment should be rejected. Litigants should be free to choose their own lawyers. Especially when individuals are suing the government, limiting representation to government approved counsel is inappropriate. The Act already provides the government the authority to withhold security clearances, sufficient to protect national security.

249. Reduction of standards for dismissal (Sessions Amendment)

- This amendment would greatly expand the circumstances in which a court may dismiss a claim or counterclaim based upon the state secrets privilege. The bill is drafted to provide that three requirements must be met before a court may dismiss a claim or counterclaim on the basis of the state secrets privilege. This amendment would substitute "or" in the list of three requirements instead of "and," so that any one of the three requirements would provide a sufficient basis for dismissal. Thus, it would permit dismissal even when the government could create a non-privileged substitute. This amendment also provides for dismissal if the party asserting the claim or counter claim lacks standing.

- This amendment should be rejected. The Act makes great strides in restoring the state secrets privilege to its proper status as an *evidentiary* privilege rather than an immunity doctrine. S. 417 would prevent dismissal of cases based upon the state secrets privilege, except where: 1) a non-privileged substitute is impossible, 2) dismissal would not harm national security, *and* 3) continuing with litigation in the absence of the privileged material would not substantially impair the ability of a party to pursue a valid defense. Allowing dismissal based only on any one of these three conditions would frustrate the goal of increasing access to justice. It would permit the privilege to foreclose litigation even if it would be possible for the government to produce a non-privileged substitute for the evidence that would provide the parties a substantially equivalent opportunity to litigate the case. In addition, the amendment's addition of dismissal on the basis of lack of standing is unnecessary, because the courts already possess this power and independently assess the standing of all parties to a case or controversy.

316. Exceptions to state secrets (Sessions Amendment)

- This amendment would have the effect of exempting a small class of litigants from pursuing cases which may involve a claim of the state secrets privilege; namely anyone designated by any department or agency of the United States as a person who commits, threatens, or supports terrorism.

- This amendment should be rejected. The Act already provides critical safeguards to protect national security secrets, including procedures to ensure that attorneys participating in an *in camera* review of evidence obtain the necessary security clearances. If counsel for the litigant has been granted the necessary security clearances by the executive branch, there is no legitimate interest in denying access to courts in such cases. This amendment would continue to deny justice to individuals like Khalid El-

Masri who have been misidentified by the United States as terrorists, illegally detained and tortured. The dismissal on state secrets grounds of Mr. El-Masri's case, alleging he was an innocent victim of the United States' policy of extraordinary rendition, is a prime example of why the state secrets privilege needs to be reformed. The effect of this amendment would be to grant the executive branch unchecked control over which cases may go forward against a state secrets claim, a determination that should be made by the judiciary. To maintain our constitutional system of checks and balances, and especially to assure that fairness in the courtroom is accorded to private civil litigants, the Act should clarify that *all* civil litigants have the right to reasonably pursue claims in the wake of the invocation of the state secrets privilege.

318. Utmost deference on security clearances (Sessions Amendment)

- This amendment would grant "utmost deference" to government assertions regarding the need to limit participation or access to any hearings to serve the interests of national security.

- This amendment should be rejected. We object to the notion that federal judges lack the competence to assess the interests of national security. Indeed the capacity of the courts to independently examine and assess classified documents has been vastly enhanced over the past half century, through the 1974 amendments to the Freedom of Information Act (FOIA), the 1978 creation of the Foreign Intelligence Surveillance Act (FISA), and the Classified Information and Procedures Act (CIPA). "Utmost" judicial deference to executive claims does not protect national security, but instead creates an incentive for abuse and threatens our constitutional system of checks and balances. Requiring judges essentially to accept these claims as valid on their face undermines the principle of judicial independence, the adversary process, and fairness in the courtroom.

330. Dismissal based on standing (Sessions Amendment)

- This amendment, similar to amendment 249, would allow for the dismissal of a claim or counterclaim on the basis of the state secrets privilege if the party asserting the claim or counterclaim lacks standing.

- This amendment should be rejected. As discussed above, federal courts already have the power to assess standing and dismiss cases on this basis. It is unnecessary to legislatively impose an additional standing requirement.

345. Guardian ad litem (Coburn Amendment)

- This amendment would delete the procedures provided in the Act for counsel to seek appropriate security clearances from the government to participate in litigation subject to the state secrets privilege. In addition, it includes a provision allowing the federal court to appoint a guardian ad litem with the necessary security clearances to represent any party.

- This amendment should be rejected. As discussed above with regard to amendment 233, it is critically important that litigants are free to choose their own representation. The security clearance provisions struck by this amendment appropriately provide the

executive branch ample opportunity to protect national security information by determining the granting or denial of security clearances to counsel. The provisions also facilitate judicial review of state secrets claims through a fair process that includes participation by security-cleared counsel for the party challenging the state secrets claim. Furthermore, the addition of the guardian ad litem provision is unnecessary since it is already provided for in the security clearance provision of the Act.

346. Court review of clearance (Coburn Amendment)

- Currently the State Secrets Protection Act requires attorneys to have appropriate security clearances and allows court oversight if the government fails to provide a security clearance for any reason other than for the protection of national security. This amendment would eliminate the ability of courts to review a government denial of necessary security clearances to determine whether the denial was legitimate.

- This amendment should be rejected. Preventing appropriate court oversight undermines the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances.

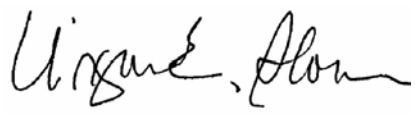
447. Eliminate security clearance guidelines (Hatch Amendment)

- This amendment would eliminate completely the security clearance guidelines provided by the Act, similar to amendments 233, 345, and 346.

- This amendment should be rejected. It is vital to our notion of justice that a litigant suing the government is represented by his or her choice of counsel. The security clearance guidelines in the Act already permit the government to grant or withhold security clearances, sufficient to protect national security. Disallowing private counsel to seek security clearance to participate in litigation involving state secrets claims encourages the government to withhold information on the basis that counsel does not have a security clearance.

Thus, the State Secrets Protection Act as presently drafted would provide critical safeguards that are needed to ensure a proper balance of the interests of private parties, constitutional liberties, and national security. The Constitution Project urges Congress to enact this legislation to reform the state secrets privilege and establish these much needed safeguards against executive abuse, and to reject the amendments which would undermine its purpose. This legislation would help to restore our system of checks and balances, and simultaneously protect national security and individual rights.

Sincerely,



Virginia E. Sloan
President

Sharon Bradford Franklin
Senior Counsel