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I. Scott Messinger
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February 9, 2009

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

I am writing on behalf of the Constitution Project to urge you, in connection with a case to be argued on Monday, to fulfill the promise you made during your confirmation hearings to reevaluate every pending case in which the government had previously invoked the state secrets privilege. As you may be aware, Monday will bring a major test of your commitment to rein in extreme claims of secrecy. The U.S. Court of Appeals for the Ninth Circuit will hear argument in *Mohamed v. Jeppesen Dataplan*, which concerns allegations by five people that defense contractor (and Boeing subsidiary) Jeppesen flew them to a foreign country where they were tortured as part of the CIA's program of "extraordinary rendition." The Bush administration intervened in the case on behalf of Jeppesen, persuading the trial court to dismiss the lawsuit on the basis of the state secrets privilege.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. Members of a bipartisan task force we convened have developed recommendations for reforming the state secrets privilege, available at http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf. We urge the executive branch to invoke the privilege sparingly and call on the courts to independently review state secrets claims, in order to respect constitutional rights, ensure government accountability, and promote fairness in the courtroom.

We believe that, as described in an op-ed to be published shortly by two of our committee members, the Justice Department should apply those principles to this case, rather than those relied upon by your predecessor. David E. Birenbaum, former U.S. Ambassador to the UN for UN Management and Reform, and David Kay, former Special Advisor on the

Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence, explain that although the state secrets privilege serves an important purpose, its mere invocation should not automatically terminate lawsuits that concern national security programs.

We recognize that there may be a valid state secrets claim regarding some particular pieces of evidence relevant to the *Jeppesen* case. However, we urge you to abandon the Bush administration's broad secrecy claims and agree to an independent review by the trial judge to determine what evidence should legitimately be withheld. The judge should then decide whether enough non-privileged evidence exists to allow the case to proceed.

We call on the new administration to demonstrate its commitment to transparency, accountability, and the rule of law by allowing judicial review of the state secrets claims in the *Jeppesen* case, and limiting its claims of privilege to actual national security secrets.

Sincerely,

A handwritten signature in black ink, appearing to read "Virginia E. Sloan". The signature is fluid and cursive, with the first name being the most prominent.

Virginia E. Sloan
President

CC: Kathryn Ruemmler, Principal Deputy Attorney General