# Statement of the Constitution Project
# Submitted to the
# Subcommittee on the Constitution, Civil Rights, and Civil Liberties
# of the House Judiciary Committee

**July 31, 2008**

The Constitution Project submits this statement to urge support for the State Secrets Protection Act (H.R. 5607). Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in cases challenging the government's national security policies. A number of courts have treated the executive's claims as absolute without independently evaluating whether disclosure of evidence would endanger national security. The State Secrets Protection Act would implement critical reforms to protect actual national security secrets from public disclosure while permitting litigation to proceed where possible. The Constitution Project urges Congress to pass the State Secrets Protection Act to provide these essential reforms.

The Constitution Project is an independent think tank 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* (attached). The statement is signed by more than forty policy experts, former government officials, and legal scholars of all political 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 a final say about whether disputed evidence is subject to this privilege.

## The Expansion of the State Secrets Privilege and the Need for Reform

The states secrets privilege was first recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), a case brought by three widows of civilian contractors against the government for negligence in a military plane crash that killed their husbands. The widows sought production of the Air Force accident report as part of the litigation. The Supreme Court refused to require the executive branch to turn over the 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.

Since its inauspicious beginnings in *Reynolds*, the state secrets privilege has expanded almost beyond recognition. Rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, more recent court decisions have foreclosed any litigation of cases in which the state secrets privilege is asserted. For instance, in *El-Masri v. United*

*States*, 479 F.3d 296 (4th Cir. 2007), Mr. El-Masri sued the government on the ground that he was an innocent victim of the United States' policy of extraordinary rendition. According to his sworn declaration, he was mistakenly held in U.S. custody for almost five months, during which time he was beaten, drugged, repeatedly interrogated, and held in solitary confinement at a CIA-run "black site" in Afghanistan. The government asserted the state secrets privilege and the court dismissed the case at the pleadings stage, before any discovery had occurred. 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. Last fall, the U.S. Supreme Court declined to review this case, foreclosing Mr. El-Masri's right to litigate his claim in court.

Unless state secrets claims are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances. Furthermore, as demonstrated in *Reynolds*, there is too great a temptation for the executive branch to assert the privilege for illegitimate reasons, and not to protect information whose disclosure would harm national security.

Now that the U.S. Supreme Court has declined to review *El-Masri* and reexamine the state secrets privilege, Congress should take advantage of this opportunity and exercise its constitutional authority to enact legislation to reform the state secrets privilege. The Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress should establish new rules that will simultaneously protect individual rights and national security, and preserve access to the courts and our constitutional system of checks and balances.

## Critical Safeguards in the State Secrets Protection Act (H.R. 5607)

While there is a proper role for the state secrets privilege to protect actual national security secrets from public disclosure, the executive branch should not be able to hide behind this privilege on the basis of its own unchecked authority. The State Secrets Protection Act would implement many critical safeguards to protect national security secrets and also preserve access to courts:

- **The court can no longer rely on a state secrets claim to dismiss a case at the pleadings stage, allowing future litigants like Mr. El-Masri the opportunity to litigate their claims in court.**
  - ✓ Section 7(c) prohibits a court from dismissing a claim or granting a motion for summary judgment based on the state secrets privilege "until [the private] party has had a full opportunity to complete discovery of nonprivileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information."

- **While the court is reviewing the evidence claimed to be subject to the privilege in order to determine whether the privilege should apply, the court is required to take steps to protect the sensitive information and to prevent its disclosure to outside parties. Thus, the review process itself does not create a risk of improper disclosure.**
  - ✓ Section 3 of the bill allows for all hearings and proceedings assessing privilege claims to be conducted *in camera* and *ex-parte* and permits the judge to issue protective orders, require security clearances for parties or counsel, place materials under seal, and apply additional security measures established under the Classified Information Procedures Act.

  - ✓ In order to further protect sensitive information, if the court determines that disclosure of information to a party or counsel, or disclosure of information by a party that already possesses it, presents a specified risk of harm, and that risk "cannot be addressed through less restrictive means," section 3(d) allows the court to "require the Government to produce an adequate substitute," such as redacted documents or a summary of the sensitive information, for use during the evaluation process.

- **The judge must independently examine all the evidence claimed to be subject to the privilege and determine whether the privilege claim is valid. The review is thereby meaningful, and the court does not simply defer to executive assertions.**
  - ✓ Section 6(b) requires the court to independently review all of the evidence claimed to be subject to the privilege and all information submitted by the parties related to the privilege claim.

  - ✓ A judge must independently examine the evidence claimed to be subject to the state secrets privilege to assess whether the claim is valid. Section 6(c) of the bill requires the court to make an "independent assessment of whether the harm identified by the Government…is reasonably likely to occur should the privilege not be upheld. The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." This standard recognizes that judges are capable of making such determinations and should not simply defer to the executive's claim that the privilege applies. The standard also ensures that executive branch experts would be accorded respect for their assessments as expert witnesses, but that these executive branch experts would not be accorded any special deference above other experts.

- **The court may receive assistance in assessing complex and voluminous information.**
  - ✓ To facilitate the court's review of the sensitive information, section 5(b) authorizes the court to appoint a special master or expert witness with appropriate expertise.

  - ✓ The court may also require the Government to organize its evidence into a clear and useful format. Section 5(c) permits the court to order the Government to provide a "manageable index of evidence the Government

asserts is subject to the privilege" and "correlate statements made in the affidavit…with portions of the evidence" the Government asserts is privileged.

- ✓ Section 6(b)(2) permits the court to rely upon "a sufficient sampling of the evidence" if the evidence asserted to be privileged is voluminous and "there is no reasonable possibility that review of the additional evidence would change the court's determination on the privilege claim."

- **If the court determines that the privilege is validly asserted, it will further assess whether the litigation may proceed through reliance on a nonprivileged substitute version of the evidence. If the court finds it is possible to craft such a substitute, the court must order the Government to produce one.**
  - ✓ Section 7(b) provides that if the court determines that the privilege applies but it is possible to produce a "nonprivileged substitute" for the evidence that "would provide the parties a substantially equivalent opportunity to litigate the case," then the court "shall order" the Government to produce that substitute.

- **If the court determines that the state secrets privilege validly applies to certain evidence, that evidence may not be disclosed. National security secrets will be protected.**
  - ✓ If the court determines that the privilege is validly asserted as to an item, section 7(a) prohibits the disclosure of that evidence to any "nongovernmental party or the public."

Thus, the State Secrets Protection Act 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. This legislation would help to restore our system of checks and balances, and simultaneously protect national security and individual rights.

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