

September 24, 2009

Senator Patrick Leahy  
Chairman, Senate Judiciary Committee  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510

Congressman John Conyers, Jr.  
Chairman, House Judiciary Committee  
United States House of Representatives  
2426 Rayburn House Office Building  
Washington, DC 20515

Senator Jeff Sessions  
Ranking Member, Senate Judiciary Committee  
United States Senate  
335 Russell Senate Office Building  
Washington, DC 20510

Congressman Lamar Smith  
Ranking Member, House Judiciary Committee  
United States House of Representatives  
2409 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Leahy, Ranking Member Sessions, Chairman Conyers and Ranking Member Smith:

As you know, yesterday Attorney General Eric Holder announced a new executive branch policy on invocation of the state secrets privilege, a doctrine which protects against disclosure of national security secrets in litigation. Both the Bush and Obama administrations have previously relied upon the state secrets privilege to block litigation challenging policies ranging from warrantless wiretapping to extraordinary rendition, and our organizations welcome the new policy as an important first step in bringing much needed reform to the use of this doctrine. However, legislative reform is still vitally needed to address a variety of problems not addressed in the new executive policy. We therefore write to urge you to enact legislation such as the pending versions of the State Secrets Protection Act (S. 417 and H.R. 984) to protect the role of the courts in determining whether the state secrets privilege properly applies in given cases.

The Justice Department's new policy tightens the standards for when executive agencies may assert the state secrets privilege, requires multiple levels of review before such a determination is made, and provides for increased reporting to Congress and agency Inspectors General. These are all important and needed changes. Indeed, the Attorney General's new tighter standard for invoking the state secrets privilege is very similar to the standard of review contained in both the House and Senate versions of the State Secrets Protection Act.

But the Justice Department memorandum only provides the first step. Passage of legislation would ensure that the important changes made by the memorandum were codified into law and it would provide guidance to courts on the tools available to them in assessing state secrets claims. For example, the new executive policy is silent on whether the Justice Department will consent to judicial review of the allegedly privileged evidence in order to assess state secrets claims – in a closed or *in camera* hearing – or to a judicial process for developing non-privileged substitutes for evidence containing national security secrets. The new policy also contemplates the possibility that some lawsuits could be shut down before the non-government party has a

chance to identify non-privileged evidence that could prove the case without any risk to national security. To ensure proper oversight and an independent check on executive discretion, judges must be able to review the evidence, order the creation of non-privileged substitutes where appropriate, and assess whether there is sufficient non-privileged evidence to enable a case to proceed. Legislation is necessary to implement these key reforms.

We urge you to support legislative reform such as the State Secrets Protection Act bills. The administration's announcement yesterday should not end debate on this matter, but should demonstrate that it is now Congress' turn to take the next step.

Thank you for your work on these important issues.

Sincerely,

Michael W. Macleod-Ball  
Acting Director  
**ACLU Washington Legislative Office**

Elizabeth Goitein  
Director, Liberty and National Security Project  
**The Brennan Center for Justice**

Greg Nojeim  
Senior Counsel and Director, Project on Freedom, Security and Technology  
**Center for Democracy and Technology**

Sharon Bradford Franklin  
Senior Counsel  
**The Constitution Project**

Devon Chaffee  
Advocacy Counsel  
**Human Rights First**

Meredith Fuchs  
General Counsel  
**National Security Archive**

Sean Moulton  
Director of Federal Information Policy  
**OMB Watch**