

**Statement of William H. Webster  
Submitted to the  
Subcommittee on the Constitution,  
Civil Rights, and Civil Liberties  
of the House Judiciary Committee**

**January 29, 2008**

I am submitting this statement to urge you to enact much-needed reforms to the state secrets privilege. My background in the federal judiciary and in the intelligence services leads me to conclude that our courts can, and must, provide critical oversight and independent review of executive branch state secrets claims.

I served as a Judge for the U.S. District Court for the Eastern District of Missouri from 1970 to 1973, and as a Judge of the U.S. Court of Appeals for the Eighth Circuit from 1973 to 1978. Thereafter, I served for nine years as Director of the Federal Bureau of Investigation, and then, from 1987 to 1991, I served as Director of Central Intelligence.

Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in court, in a variety of lawsuits alleging that its national security policies violate Americans' civil liberties. In these cases, the government has informed federal judges that litigation would necessitate disclosure of evidence that would risk damage to national security, and that consequently, the lawsuits must be dismissed. Courts have indeed dismissed lawsuits on this basis.

For example, *El-Masri v. United States* involved a challenge by Khaled El-Masri, a German citizen who, by all accounts, was an innocent victim of the United States' extraordinary rendition program. The district court dismissed the case at the pleadings stage, before any discovery had been conducted, on the basis of the executive branch's assertion of the state secrets privilege. The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal, and, last fall, the U.S. Supreme Court declined to accept review of the case. Thus, Mr. El-Masri has been denied his day in court even though no judge ever reviewed any evidence purportedly subject to the privilege. Nor did any judge make an independent assessment as to whether enough evidence might be available for Mr. El-Masri to proceed with his lawsuit based upon public accounts of the rendition and an investigation conducted by the German government.

As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Indeed, judges increasingly are called upon to handle such sensitive information under such

statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

In addition, 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. It is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice. If there remains concern about judges having the necessary expertise and background in national security matters to make these determinations, a standing panel of judges specially designated could perform this function as under FISA, or judges could refer matters to special masters with appropriate security clearances for assistance.

Granting executive branch officials unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse. It makes much more sense to require the executive branch to submit such evidence to the courts for an independent assessment of whether the privilege should apply. Courts, not executive branch officials, should be entrusted to make these determinations and thereby preserve our constitutional system of checks and balances.