

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

July 31, 2008

I am submitting this statement to urge you to enact much-needed reforms to the state secrets privilege. The State Secrets Protection Act, H.R. 5607, would take several important and necessary steps toward resolving the problems with the state secrets privilege, and I therefore urge you to support this legislation.

My background in the federal judiciary and in law enforcement leads me to conclude that these reforms provided by the State Secrets Protection Act would properly allow our courts to provide critical oversight and independent review of executive branch state secrets claims. I served as Chief of the Government Operations Section at the United States Department of Justice, as United States Attorney, and as a United States District Court Judge and Chief Judge of the United States District Court for the Western District of Texas. I was then appointed by President Ronald Reagan to serve as the Director of the Federal Bureau of Investigation, a position I continued to hold under Presidents George H.W. Bush, and William J. Clinton. I have devoted much of my career to law enforcement and the fair and effective operation of our justice system.

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 in which it is alleged that 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 without any independent review of evidence that purportedly would be subject to this privilege.

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 United States Attorney, 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. Legislation to reform the state secrets privilege would not interfere with the President's responsibilities under Article II of the Constitution. The United States Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. CONST. Art. III, § 2. This includes the power to legislate reforms to the state secrets privilege.

Congress should reform the state secrets privilege and allow courts to independently assess whether the privilege should apply. A number of provisions of the State Secrets Protection Act, H.R. 5607, recognize this need for change and would institute reforms that I recommend.

First, Section 7(c) of H.R. 5607 would prohibit courts from dismissing cases on the basis of the state secrets privilege at the pleadings stage or before the parties have had the opportunity to conduct discovery. The section is clear that the prohibition only applies to dismissals based upon the assertion of the state secrets privilege, and therefore the provision would not prevent dismissals on other grounds, such as for frivolousness. This section would provide a critical reform so that in the future, litigants like Mr. El-Masri will not have their cases dismissed before the parties can litigate, and a judge has the opportunity to evaluate whether there is enough non-privileged evidence available to permit a lawsuit to proceed.

Similarly, 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. 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). Section 6 of the State Secrets Protection Act would require that whenever the executive branch asserts the state secrets privilege, the judge must review the claim, including reviewing the allegedly secret evidence and must make "an independent assessment" of whether the privilege applies. Section 3(b) of the Act provides that this hearing may be conducted *in camera*, so that there would not be a risk that the review itself might disclose any evidence.

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. Section 7 of the bill would implement this recommendation. It provides that if the judge finds that certain evidence is protected by the state secrets privilege, the judge should also assess whether it is possible to create a non-privileged substitute for the evidence that would allow the litigation to proceed. If a non-privileged substitute is possible, the court must order the government to produce such a substitute. This provision would help restore an appropriate balance in national security litigation, by ensuring both that

national security secrets are protected from public disclosure and also that litigation will be permitted to proceed where possible.

This legislation would also address the concern that judges may not have the necessary expertise and background in national security matters to make these determinations. Section 5(b) of the bill instructs the court to consider whether to appoint a special master with appropriate expertise to assist the court in its duties.

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. Legislative reform is necessary to ensure that courts *not* accord “utmost deference” to executive branch national security officials. The State Secrets Protection Act would ensure that a court’s independent review is meaningful and is not just a mindless acceptance of executive assertions. Section 6(c) provides that “The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony.” Such officials are entitled to the same respect and deference as any other expert witness, and independent judges are needed to provide a check on executive discretion.

These provisions would help restore the role of independent courts in determining whether the state secrets privilege should apply. 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. I urge you to support these reforms contained in the State Secrets Protections Act and to help preserve our constitutional system of checks and balances.