

May 6, 2009

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Chairman Leahy:

I write to reiterate the American Bar Association's strong support for S. 417, the State Secrets Protection Act. The Association appreciates your efforts in working with Senator Kennedy (D-MA) to reintroduce this important legislation and schedule it for markup. We hope your Committee will approve this legislation promptly.

The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. The privilege has received heightened public scrutiny in recent years because the government has asserted the privilege and sought dismissal at the pleadings stage in a number of cases that involve allegations of egregious government misconduct and constitutional violations of fundamental rights, including ongoing cases challenging extraordinary rendition and warrantless wiretapping of American citizens.

Because the courts have lacked clear guidance regarding the standard of review, there have been instances since 2001 where courts have deferred to the government without first engaging in sufficient inquiry into the veracity of the government's assertion of privilege. This has prompted concern that the courts may be dismissing meritorious cases and abdicating their responsibility under the constitutional system of checks and balances to review and reverse executive branch excesses.

In August 2007, the ABA called upon Congress to enact legislation establishing procedures and standards to govern consideration of claims that may be subject to the state secrets privilege. Fundamentally, the ABA believes that courts should vigorously evaluate privilege claims in a manner that protects legitimate national security interests and should not dismiss cases based on the state secrets privilege except as a very last resort.

The ABA developed a detailed blueprint for legislation that, in large measure, has been incorporated into S. 417. Accordingly, the ABA strongly supports the State Secrets

Protection Act. The legislation lays out a clear procedural roadmap for courts to follow in considering claims that may be subject to the state secrets privilege, and it establishes a clear standard of review that requires reasonable likelihood of significant harm. It strengthens the court's ability to review relevant evidence by requiring *in camera* review in most situations and providing for the use of special masters, protective orders, *ex parte* proceedings, and other measures to protect legitimate national security interests. And it assures that aggrieved litigants will be afforded every chance to assert their claims in court by requiring the government, when deemed possible, to produce a non-privileged substitute that provides substantially the same opportunity to litigate or defend a claim.

It is important to underscore that S. 417 would not require disclosure of information subject to the state secrets privilege to the plaintiff or the plaintiff's counsel. It would also not require the government to choose between disclosing privileged information and foregoing a claim or defense. However, if the court rules that it is possible for the government to provide a non-privileged substitute for privileged evidence and the government refuses to do so, only then would the government have to choose whether to proceed with a substitute or to forego a claim or defense. The ABA believes that this is a reasonable and appropriate requirement under such circumstances.

As you know, President Obama has invoked the privilege in three closely watched cases that implicate major aspects of President Bush's programs to combat terrorism: *Al-Haramain Islamic Foundation v. Bush*; *Mohammed v. Jeppeson Data Plan*, and *Jewel v. NSA*. He also recently ordered the Department of Justice to examine every ongoing case in which the Bush administration had asserted the state secrets privilege with the goal of articulating a clear standard to guide the administration in any future invocation of the privilege. These developments make it all the more important that your committee act promptly and approve S. 417. Decisive action on S. 417 will demonstrate congressional support for the principles it embodies and will provide guidance for the administration's ongoing review.

The ABA thanks you for your leadership and urges the Committee on the Judiciary to approve this important legislation and press for its prompt passage by the Senate.

Sincerely,



Thomas M. Susman

cc: Members, U.S. Senate Committee on the Judiciary