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President

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October 12, 2007

The Honorable John D. Rockefeller  
Chairman  
Select Committee on Intelligence  
U.S. Senate  
Washington, D.C. 20510

The Honorable Christopher S. Bond  
Vice Chairman  
Select Committee on Intelligence  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Rockefeller & Senator Bond:

As you draft legislation to amend the Foreign Intelligence Surveillance Act ("FISA"), I write to express the views of the American Bar Association on this issue.

Before acting to amend FISA, Congress should be satisfied that any proposed changes are necessary and consistent with the system of checks and balances required by the U.S. Constitution. This requires that you have sufficient confidential information to make informed amendments to FISA.

It is critical for Congress to fully understand the asserted basis for the surveillance activities conducted since 9/11 to ensure that any revisions establish an effective and constitutionally sound legal framework to meet surveillance needs going forward. Accordingly, we support efforts to obtain from the Executive Branch information relevant to their claims advanced to sanction any warrantless surveillance programs in place prior to the adoption of the Protect America Act ("PAA").

The ABA is concerned that the PAA lacks adequate safeguards such as meaningful judicial review and comprehensive congressional oversight. Independent judicial review of individualized applications by the government to conduct electronic surveillance within the U.S. should be preserved to the greatest extent possible.

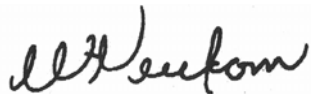
Any new legislation should include appropriate reporting requirements to Congress, such as disclosure of the number of U.S. persons whose communications are acquired and/or disseminated. This information could be disclosed without reference to specific cases to protect classified information, sources and methods. Congress must be aware of the impact of any FISA amendments on American citizens to conduct effective oversight and ensure compliance with the First, Fourth and Fifth Amendments to the Constitution.

The ABA believes that any future foreign intelligence surveillance must be conducted within the framework of FISA. Any amendments to FISA should underscore that FISA and Title III of the criminal code are the exclusive means for conducting electronic surveillance. Furthermore, we believe that affirmative and explicit action by Congress is necessary to take exception to the requirement to abide by FISA when conducting foreign intelligence surveillance. Accordingly, we support inclusion of legislative language affirming that the Authorization for Use of Military Force of September 18, 2001 ("AUMF") did not provide such an exception.

Congressional debate over FISA may include consideration of the application of the state secrets privilege to lawsuits regarding electronic surveillance. This common law privilege shields sensitive national security information from disclosure in civil litigation and has been cited in the recent telecommunications cases. The ABA supports meaningful judicial review of state secret claims and has policy that could serve to unify the standards that courts use to adjudicate claims under the privilege. Our policy could provide you with a blueprint for legislative action to ensure that the state secrets privilege is applied in a measured manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests. For your consideration, our policy is attached.

As originally designed, FISA achieved the necessary balance of providing tools to protect our country while preserving the privacy of American citizens. In amending FISA, we urge you to include appropriate safeguards to ensure that national security objectives are being accomplished within the bounds of our constitutional system of government.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Neukom". The signature is fluid and cursive, written on a light-colored background.

William H. Neukom

Enclosure

cc: Members of the Senate Select Committee on Intelligence

## AMERICAN BAR ASSOCIATION

## ADOPTED BY THE HOUSE OF DELEGATES

August 13-14, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association supports procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and

FURTHER RESOLVED, That in furtherance of this objective the American Bar Association urges congress to enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervenor) that:

- a. Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and without having adverse inferences drawn against the government for doing so;
- b. Requires the government to provide a full and complete explanation of its privilege claims and to make available for *in camera* review the evidence the government claims is subject to the privilege;
- c. Requires a judicial assessment of the legitimacy of the government's privilege claims and deems evidence privileged only if the court finds, based on specific facts, that the government has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States;
- d. Permits the discovery of non-privileged evidence that may tend to prove the plaintiff's claim or the defendant's defense, provided that such evidence can be effectively segregated from privileged evidence, and where appropriate, provides for protective orders, *in camera* hearings, special masters to assist (including when the claim of privilege involves voluminous records), or other measures where necessary to protect the government's legitimate national security interests;
- e. Requires the government to produce a non-privileged substitute for privileged evidence, consisting of a summary of the privileged evidence, a version of the evidence with privileged information redacted, or a statement admitting relevant facts that the privileged evidence would tend to prove, provided that:
  - (i) The court finds that the evidence is essential to prove a claim or defense in the case;
  - (ii) The court finds that it is possible, without revealing privileged evidence, for the government to produce a substitute that provides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence; and

- (iii) In cases in which the government is a party asserting a claim or defense that implicates the privilege, the government is given the opportunity to elect between producing the non-privileged substitute and conceding the claim or defense to which the privileged evidence pertains;
- f. Provides that a ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege be deferred until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts under the procedures described above, except when the court finds that there is no credible basis for disputing that the state secrets claim inevitably will require dismissal;
- g. Provides that, after the court takes these steps and reviews evidence proffered by both parties, judgment for the defendant based on the state secrets privilege is denied if the court finds that the plaintiff is able to prove a *prima facie* case with non-privileged evidence (including non-privileged evidence from sources outside the U.S. government), unless the court also finds, following *in camera* review, that the defendant's ability to defend against the plaintiff's case would be substantially impaired because the defendant is unable to present specific privileged evidence; and
- h. Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to prevent disclosure of such evidence.

## REPORT

### I. INTRODUCTION

The state secrets privilege is a common law evidentiary privilege that shields sensitive national security information from disclosure in litigation. The government is the only party that can assert the privilege, and application of the privilege can result in dismissal of civil litigation. For this reason, it is critically important that courts act as an independent check on the government when it asserts the state secrets privilege, and that courts conduct a meaningful review of the evidence that the government claims must remain secret because it is subject to the privilege. This proposed policy is designed to promote that meaningful, independent review. It seeks to protect both the private litigant's access to critical evidence, including evidence necessary to obtain redress for constitutional violations and other wrongful conduct, and critically important national security interests, which if not protected could put the nation at grave risk.

The proposed policy does this by urging the Congress to enact legislation requiring procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege, while nonetheless recognizing that in limited circumstances, the privilege will require dismissal. The proposed policy relates only to civil cases because the government has typically asserted the state secrets privilege only in civil litigation, and because the Congress already has enacted legislation balancing the competing interests concerning disclosure and non-disclosure of classified information in criminal cases. *See* 18 U.S.C. App. III (2006) (Classified Information Procedures Act). The proposed policy borrows concepts and procedures from that legislation but does not address evidentiary issues in criminal cases, which have unique constitutional concerns that do not arise in civil cases. *See infra* section III.B.6.

In addition, the proposed policy focuses on cases brought by private parties alleging wrongful conduct by the government or by private parties acting in concert with the government, because that is the type of litigation in which tension between civil liberties and national security most frequently arises. In such cases, the government is either the defendant or an intervenor that asserts the privilege on the side of a private defendant in a suit between private parties involving sensitive national security information. (As used in the policy, the term "defendant" is intended to cover the government in both capacities -- as an original defendant and as an intervenor-defendant). Several provisions of the policy would, however, also apply as well to cases in which the government is the plaintiff, because it is possible that the government could assert the privilege in that procedural posture as well.

There is an important opportunity, through this policy, to bring uniformity to a significant issue on which courts have adopted divergent approaches. Some courts have strictly scrutinized the government's privilege claims, while others have been more deferential to the government. The House of Delegates should adopt the policy, because the ABA is in a unique position to recommend ways for the Congress to unify the procedures and substantive standards that courts use to adjudicate claims under the state secrets privilege.

## II. THE REYNOLDS DECISION

Although the state secrets privilege has received significant attention since the terrorist attacks of September 11, 2001, its roots reach back to the beginning of the Republic. *See United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (ruling on Aaron Burr’s subpoena for documents over President Jefferson’s objection that they “contain[ed] material which ought not to be disclosed”). The government rarely invoked the privilege until after World War II. Then in 1953, the Supreme Court issued the seminal decision *United States v. Reynolds*, 345 U.S. 1 (1953), which addressed the scope of the privilege and the procedures for asserting and evaluating privilege claims.

*Reynolds* was a Federal Tort Claims Act suit arising out of the crash of a B-29 aircraft that was on a mission to test secret electronic equipment. Three civilian passengers died in the crash, and their widows sued the United States for damages. When the plaintiffs attempted to obtain the Air Force’s accident investigation report in discovery, the government objected, and the Secretary of the Air Force filed a formal Claim of Privilege, which stated that “the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force.” *Reynolds*, 345 U.S. at 4. To support its privilege claim, the government filed an affidavit of the Air Force Judge Advocate General, which claimed that the report could not be produced “without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.” *Id.* at 5. Suggesting an alternative to the accident report, the government offered to produce the three surviving crew members for testimony as to all matters except those of a “classified nature.” *Id.*

The district court ordered the government to produce the accident report for the court’s review. The government refused to produce the report, and the district court ruled that the facts on the issue of negligence would be taken as established in the plaintiffs’ favor. The court of appeals affirmed. The Supreme Court then reversed, holding that the privilege claim was valid, and that the government did not need to produce the accident report. *Id.* at 5, 12.

### A. The Scope of the Privilege

In *Reynolds*, the Supreme Court characterized the privilege under review as a “privilege against revealing military secrets, . . . which is well established in the law of evidence.” *Id.* at 6-7. The Court stated that the privilege applies if “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” *Id.* at 10. In addition, the Court held that if the privilege applies, no countervailing interests can require disclosure; “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.” *Id.* at 11.

### B. Procedures for Asserting and Evaluating Privilege Claims

*Reynolds* made clear that “[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party.” *Id.* at 7 (footnotes omitted). The *Reynolds* Court also emphasized that the state secrets privilege “is not to be lightly invoked,” specifying procedures that the government must follow to assert the privilege:

the “head of the department which has control over the matter” must file a “formal claim of privilege” based on “actual personal consideration by that officer.” *Id.* at 7-8.

In addition, *Reynolds* confirmed that the court has sole authority to determine whether the privilege applies. *Id.* at 8 (“[t]he Court itself must determine whether the circumstances are appropriate for the claim of privilege”). However, the Court also wrestled with how to evaluate privilege claims “without forcing a disclosure of the very thing the privilege is designed to protect.” *Id.* The Court recognized that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers” but would “not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.” *Id.* at 9-10. Applying a “formula of compromise,” the Court concluded that the private party’s “showing of necessity” should determine the depth of the court’s scrutiny, such that “[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted.” *Id.* at 9-11. Because it decided that the *Reynolds* plaintiffs made “a dubious showing of necessity,” the Court upheld the government’s privilege claim without even reviewing the accident report. *Id.* at 11. This approach was consistent with the Court’s statement that there are circumstances in which “the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.” *Id.* at 10.

### C. Segregation of Privileged and Non-Privileged Evidence

In *Reynolds*, the Court decided that the plaintiffs’ showing of “necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege.” *Id.* at 11. That alternative was the government’s offer to make the surviving crewmen available for examination. Furthermore, in the Court’s view, there was nothing to suggest that the secret electronic equipment being tested on the flight had a causal connection to the accident. As a result, the Court concluded “it should be possible for [the plaintiffs] to adduce the essential facts as to causation without resort to material touching upon military secrets.” *Id.* The Court remanded the case to allow the plaintiffs to attempt to prove their case without the privileged evidence. *Reynolds* therefore supports the principle that in cases implicating the state secrets privilege, the courts should attempt to segregate privileged from non-privileged evidence, to allow litigation to proceed with non-privileged evidence.

## III. **CONGRESS SHOULD ADOPT LEGISLATION ENSURING THAT THE STATE SECRETS PRIVILEGE IS APPLIED IN A MANNER THAT PROTECTS THE RIGHTS AND CIVIL LIBERTIES OF PRIVATE PARTIES TO THE FULLEST EXTENT POSSIBLE WITHOUT COMPROMISING LEGITIMATE NATIONAL SECURITY INTERESTS**

### A. **The Legislation Should Establish Procedures and Standards Designed to Ensure That Whenever Possible, Federal Civil Cases are not Dismissed Based Solely on the State Secrets Privilege**

As a general rule, private plaintiffs should be able to seek judicial remedies for injuries caused by unconstitutional actions and other government wrongs. However, in a narrow class of

cases, some courts have dismissed civil actions against the government based on the state secrets privilege, on the ground that the litigation would inevitably require disclosure of sensitive national security information. *See, e.g., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). Such dismissals prejudice the interests of private plaintiffs, denying them any forum to litigate their claims against the government even if egregious government misconduct is involved. By dismissing civil actions on these grounds, courts also may abdicate their responsibility under the constitutional system of checks and balances to review and reverse Executive Branch excesses. The state secrets privilege also can bar private plaintiffs from pursuing claims against private party defendants linked to the government through contractual or other relationships. In such cases, the government may intervene as a defendant and assert the state secrets privilege to prevent discovery of sensitive government information. Dismissal of such cases based on the state secrets privilege also unfairly denies the plaintiff the opportunity to a day in court. Accordingly, the central premise of this proposed ABA policy is that the Congress should enact legislation under which the courts would act as a meaningful check on the government's assertion of the privilege and make every effort to avoid dismissing a civil action based on the state secrets privilege.

In recent decisions justifying dismissal based on the state secrets privilege, courts have relied on two Supreme Court cases holding that claims for breach of a secret espionage contract must be dismissed at the pleadings stage, because there is simply no way for the case to proceed without divulging the secret espionage relationship. *See Totten v. United States*, 92 U.S. 105, 107 (1875) (affirming dismissal of claim by alleged Civil War spy for breach of espionage agreement, because trial would “inevitably lead to the disclosures of matters which the law itself regards as confidential”); *Tenet v. Doe*, 544 U.S. 1 (2005) (affirming dismissal of claims by alleged Cold War spies for breach of covert espionage agreements). However, the ground for dismissal in *Totten* and *Tenet* was *justiciability*, not the state secrets evidentiary privilege. As the Court explained in *Tenet*, “lawsuits premised on alleged espionage agreements are altogether forbidden.” *Tenet*, 544 U.S. at 9. The Court distinguished this “categorical . . . bar” from “the balancing of the state secrets evidentiary privilege,” in which particular pieces of evidence are evaluated in “*in camera* judicial proceedings.” *Id.* at 9-11. To emphasize this distinction, the Court noted that lawsuits arising from secret espionage agreements must be dismissed even if the state secrets privilege does not apply: “[t]he possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable.” *Id.* at 11.

Although *Totten* and *Tenet* relate to justiciability of “the distinct class of cases that depend upon clandestine spy relationships,” 544 U.S. at 10, some lower courts have relied on *Totten* and *Tenet* to dismiss other types of cases at the pleadings stage, on the ground that the entire subject matter of litigation is protected by the state secrets privilege. *See El-Masri*, 479 F.3d at 308, 313; *see also Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-44 (4th Cir. 1985). This proposed ABA policy urges that cases should not be dismissed based on the state secrets privilege, except as a very last resort, and recommends enactment of a non-exhaustive list of procedures to accomplish that goal. *Fitzgerald*, 776 F.2d at 1244 (dismissal at pleadings stage is appropriate “[o]nly when no amount of effort and care on the part of the court . . . will safeguard privileged material”).



**B. The Legislation Should Provide That Courts Should Evaluate Privilege Claims in a Manner That Protects Legitimate National Security Interests While Permitting Litigation to Proceed With Non-Privileged Evidence**

**1. The Government Should be Allowed to Plead the State Secrets Privilege Without Having Adverse Inferences Drawn**

To meet the policy's objective of avoiding dismissal, the legislation urged by the policy would require a court to make every effort to permit a case to proceed past the pleadings stage and into the discovery period, when the court can evaluate particular privilege claims as to specific evidence. In recent cases brought against the government, the government has sought dismissal at the pleadings stage of a case based on the state secrets privilege, arguing that the complaint cannot be answered without confirming or denying facts that would expose state secrets. *See, e.g., El-Masri*, 479 F.3d at 301. The proposed policy would allow a case to proceed past the pleadings stage and protect the government's legitimate national security concerns at the same time, by permitting the government to plead the state secrets privilege in its answer, in response to particular allegations of a complaint. The proposed policy further provides that no adverse inferences would be drawn against the government for asserting the privilege in this manner.

This part of the proposed policy derives from current federal practice governing a defendant's invocation of the Fifth Amendment privilege against self-incrimination in civil proceedings. When the civil defendant asserts the Fifth Amendment privilege in an answer to a complaint, he neither admits nor denies the allegations in the complaint. *See Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 931-32 (7th Cir. 1983). The same should be true if the government asserts the state secrets privilege in its answer, under circumstances in which the government claims that confirming or denying facts in the complaint would reveal state secrets. However, the government should not be penalized for asserting the privilege by having adverse inferences drawn, as could be the case when the civil defendant asserts the Fifth Amendment privilege. That is because if the state secrets privilege does apply, the government's interest in nondisclosure is so compelling. *See Reynolds*, 345 U.S. at 11 ("even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake").

**2. The Government Should be Required to Justify Any Assertion of the Privilege and Permit *In Camera* Review of Evidence**

Under the legislation urged by the proposed policy, the government would be required to provide a full and complete explanation of the privilege claim and make available for *in camera* review the evidence the government claims is subject to the privilege. It is well settled that it is the court's responsibility to determine whether the privilege applies. *Reynolds*, 345 U.S. at 8; *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Terkel*, 441 F. Supp. 2d at 908-09. In addition, the government has the burden to prove that the privilege applies. *See El-Masri*, 479 F.3d at 305. The court cannot determine whether the government has met its burden in a vacuum – only an *in camera* review of evidence will permit a thorough evaluation of the government's privilege claims. The policy accordingly requires the government to make the

evidence available to the court for *in camera* review and further provides that if the evidence is voluminous, a special master may be appointed to assist the court in its review.

This part of the proposed policy challenges the Supreme Court's statement, in *Reynolds*, that there are some situations in which the privileged evidence is so sensitive that there should be no "examination of the evidence, even by the judge alone, in chambers." *Reynolds*, 345 U.S. at 10. Commentators have properly criticized that suggestion as an abdication of judicial responsibility. See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*, 253-62 (University Press of Kansas) (2006); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at 32, available at 2006 WLNR 9560648. In addition, the federal courts' role in assessing classified information has evolved substantially since *Reynolds*. As explained in more detail below, the federal courts review and analyze classified information in criminal cases, under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III. Furthermore, Congress has provided that any U.S. district court is authorized to hold an *in camera* hearing to review challenges to the legality of electronic surveillance, in cases involving classified information. See 50 U.S.C. § 1806(f) (2006). Department of Defense regulations also now expressly acknowledge that members of the federal judiciary do not need security clearances and "may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts." 32 C.F.R. § 154.16(d)(5) (2006). And such access has been necessary for proper adjudication. For example, the U.S. Court of Appeals for the D.C. Circuit recently required judicial access to all classified information relevant to the government's determination that various individuals detained at Guantanamo Bay were "enemy combatants," rejecting the government's argument that the court need not review some of the relevant classified information. *Bismullah v. Gates*, No. 06-1197, 2007 U.S. App. LEXIS 17255 (D.C. Cir. July 20, 2007). The federal courts' increasing familiarity with review and evaluation of classified information justifies departing from the *Reynolds* Court's reluctance to require *in camera* review in all cases raising the state secrets privilege.

Furthermore, the facts of the *Reynolds* case itself demonstrate that courts should not uphold a privilege claim without conducting an *in camera* review of the evidence alleged to be privileged. A recent review of the (now declassified) accident report withheld as privileged in *Reynolds* – which the court never reviewed *in camera* – shows that the government's privilege claim was baseless, because the report contained no sensitive national security information. The report's only mention of classified information was a reference about the removal of top-secret equipment from the crash site. Barry Siegel, *The Secret of the B-29*, L.A. Times, Apr. 19, 2004, at 1, available at 2004 WLNR 19772466. In addition, the accident investigation report contained evidence of the government's negligence – an admission that "[t]he aircraft [was] not considered to have been safe for flight" – that would have supported the plaintiffs' claims. Barry Siegel, *The Secret of the B-29*, L.A. Times, Apr. 18, 2004, at 1, available at 2004 WLNR 19770961. There is every reason to believe that if the *Reynolds* Court had reviewed the accident report *in camera*, the government's privilege claim would have been rejected.

An *in camera* examination of evidence alleged to be privileged enables the court to probe the government's privilege claim and decrease the possibility of abuses, such as the abuse that appears to have occurred in the *Reynolds* case. In addition, numerous courts have followed the

practice. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998); *Ellsberg*, 709 F.2d at 56, 59; *Halkin v. Helms*, 598 F.2d 1, 7-8, 9 (D.C. Cir. 1978). The proposed policy properly requires the government to make evidence available for *in camera* review in all cases in which it asserts the state secrets privilege.

### **3. The Privilege Should be Based on a Reasonable Likelihood that Disclosure Would Harm National Defense or Diplomatic Relations**

The legislation urged by the proposed policy would require courts to assess the legitimacy of the government's privilege claims and deem evidence privileged only if the court finds, based on specific facts, that the government agency has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or would cause substantial injury to the diplomatic relations of the United States. The policy accordingly provides for judicial review of the specific basis upon which the relevant government agency rests its claim that particular information is privileged. The policy also recognizes that since the Supreme Court's decision in *Reynolds*, which established the privilege in cases in which disclosure of military secrets is at risk, subsequent decisions have extended the privilege to cases in which diplomatic secrets are at risk. *See, e.g., United States v. Nixon*, 418 U.S. 683, 706 (1974).

The standard proposed in the policy is a modification of drafts by the Advisory Committee for Federal Rules of Evidence that would have codified the state secrets privilege in a Federal Rule of Evidence 509. (Congress ultimately rejected Fed. R. Evid. 509 and other evidentiary privilege rules submitted contemporaneously in favor of Fed. R. Evid. 501, which recognizes common law evidentiary privileges but does not mention the state secrets privilege.) Under the proposed ABA policy, the government agency must make a reasonable determination of "significant injury" to trigger the privilege when national defense secrets are at risk or a reasonable determination of the more exacting "substantial injury" to trigger the privilege when diplomatic relations are at stake. The reference in the proposed policy to "diplomatic relations" as opposed to "international relations" is intended to further limit the circumstances in which the privilege can be claimed, and with the more exacting "substantial injury" requirement, to ensure that the privilege cannot be claimed when disclosure of evidence would do little more than embarrass the government.

The standard is intended to give the courts sufficient flexibility to decide what information is subject to the privilege, informed by the arguments of the Executive Branch, which has substantial expertise in the injury to national defense or diplomatic relations that could result from disclosure of the information, and also informed by the arguments of the plaintiff.

### **4. Discovery of Non-Privileged Evidence Should Proceed Under Flexible Procedures Designed to Protect the Government's Legitimate National Security Interests**

Under the legislation urged by the proposed policy, courts would permit discovery of non-privileged evidence, to the extent that it can effectively be segregated from privileged evidence, and employ protective orders, *in camera* hearings, and other procedures where necessary to protect the government's legitimate national security interests. If the state secrets

privilege applies to some evidence in a case, the “court must consider whether and how the case may proceed in light of the privilege.” *Fitzgerald*, 776 F.2d at 1243. Disentanglement of privileged and non-privileged evidence is the most effective way to balance the interests of the private party against the government’s interest in protecting national security secrets. And flexible procedures that permit access to non-privileged evidence need not compromise national security – “[o]ften, through creativity and care, [the] unfairness [of the state secrets privilege] can be minimized through the use of procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form.” *Id.* at 1238 n. 3.

**5. The Government Should be Required, Where Possible, to Produce a Non-Privileged Substitute for Privileged Evidence That is Essential to Prove a Claim or Defense**

The legislation urged by the proposed policy also would require the government, where possible, and without revealing privileged evidence, to produce a non-privileged substitute for privileged evidence that is essential to prove a claim or defense in the litigation. In cases in which it is possible to generate such a substitute, and the government is a party asserting a claim or defense that implicates the privilege, the legislation would require the government to elect between producing the substitute and conceding the claim or defense to which the privileged evidence relates. The standard the evidentiary substitute would need to meet would be less exacting than the standard applicable to criminal cases under CIPA.

In a criminal case, the defendant has Fifth and Sixth Amendment rights to have the prosecution’s evidence presented at trial. *See Nixon*, 418 U.S. at 711. These rights present difficulties for the government in prosecutions involving classified evidence that the government does not wish to disclose. In many criminal cases, the government produces non-classified substitutes for classified evidence, so that the prosecution may proceed at a public trial at the same time that the secrecy of the classified information is maintained. *See, e.g., United States v. Libby*, 467 F. Supp. 2d 20, 30-32 (D.D.C. 2006) (government’s proposed substitutions of unclassified evidence for classified evidence were sufficient to provide defendant with substantially the same ability to make his defense). CIPA governs production of such evidentiary substitutes, which can be in the form of “a statement admitting relevant facts that the specific classified information would tend to prove” (18 U.S.C. App. III § 6(c)(1)(A)) or a “summary of the specific classified information” (*id.* § 6(c)(1)(B)). CIPA also permits introduction of redacted documents into evidence to protect classified information. *Id.* § 8(b). Furthermore, under the CIPA procedures, the government is required to elect between producing non-privileged substitutes for classified evidence essential to the defense and having the court dismiss the indictment or make other rulings adverse to the prosecution’s case. *Id.* § 6(e)(2).

CIPA (and the Fifth and Sixth Amendment principles underlying CIPA) do not apply in civil cases and therefore do not require the government to make a similar election when invoking the state secrets privilege to bar production of evidence in a civil case. *See Reynolds*, 345 U.S. at 12 (noting that the government’s obligation to produce evidence or let the criminal defendant “go free” does not apply in a civil case). However, it is apparent from criminal cases that government can, in many circumstances, produce non-classified substitutes for sensitive national security information, thereby permitting litigation to proceed in a public forum while simultaneously protecting national security. In these criminal cases, it is in the government’s

interest to produce such substitutes, because the alternative would be to dismiss the charges to which the evidence relates. It would be contrary to the interests of justice if the government were *able* to produce analogous substitutes in a civil case without compromising national security, but did not do so purely as a litigation tactic, to avoid liability for claims asserted by a private plaintiff. *See, e.g., Reynolds Holding, A Double Standard on State Secrets?*, Time, March 19, 2007.

Accordingly, the legislation urged by this proposed policy would require that in cases in which it is possible to produce an adequate non-privileged substitute for evidence subject to the state secrets privilege (without revealing privileged evidence), the government would be required to do so. In cases in which the government is a party asserting a claim or defense implicating the privilege, the government would be required to elect between producing that substitute and conceding the claim or defense to which the evidence applies. By requiring that election only when the substitute is “possible,” the policy recognizes that there will be some civil cases (just as there are some criminal cases) in which the government will not be able to produce an evidentiary substitute without improperly revealing sensitive national security information; under such circumstances, the policy would not require the government to produce a substitute or risk conceding the claim or defense to which the evidence applies.

The proposed policy also addresses the adequacy of the non-privileged evidentiary substitute, requiring that it must provide a “substantially equivalent opportunity” to litigate a claim or defense as would the privileged evidence. This standard is intended to be sufficiently exacting to encourage the government to provide substituted evidence that will be as complete as possible and useful to the other party (or parties) to the litigation, but less stringent than the standard imposed under CIPA. CIPA requires that the substitute “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” 18 U.S.C. App. III § 6(c)(1). The lesser standard incorporated into the proposed policy recognizes that the Fifth and Sixth Amendment interests underlying CIPA do not apply in a civil case.

Finally, the proposed policy follows CIPA in providing that the form of the substitute would be a summary of the evidence, a redacted version of the evidence, or a statement admitting relevant facts that the privileged evidence would tend to prove. *See* 18 U.S.C. App. III §§ 6(c)(1)(A), 6(c)(1)(B), 8(b). This portion of the proposed policy follows the suggestions of some courts that CIPA should serve as guidance in civil cases involving the state secrets privilege. *See Fitzgerald*, 776 F.2d at 1244 (referring to CIPA as possible template for balancing competing interests in civil context).

#### **6. A Ruling on a Dispositive Motion Should be Deferred Until the Parties Complete Discovery of Facts Relevant to the Motion**

The proposed policy also seeks to avoid premature dismissals by providing that courts should defer ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts. This provision of the policy relies on Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, which authorizes the court to “postpone[ ] its disposition” of a motion to dismiss “until the trial on the merits.” Fed. R. Civ. P.

12(a)(4)(A). This provision also relies on Rule 56(f) of the Federal Rules of Civil Procedure, which permits a “continuance” for “discovery to be had” in resolving a summary judgment motion. Fed. R. Civ. P. 56(f).

This part of the proposed policy is intended to address cases in which the government intervenes to seek dismissal of a case brought by a private party against a private defendant, on the ground that the private defendant cannot answer the complaint without revealing state secrets. *See, e.g., Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 920 (N.D. Ill. 2006); *Hepting v. AT&T Corp.* 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006). In such a case, the ruling on the motion to dismiss would be postponed until after the court evaluates particular discovery requests, and permits discovery of non-privileged evidence, relevant to the motion. Under these circumstances, the complaint would not need to be answered until after the court rules on the motion, even if that does not occur until the time of trial. *See* Fed. R. Civ. P. 12(a)(4)(A).

The policy allows for dismissal based on the state secrets privilege prior to the completion of discovery or relevant facts only when the court finds there is no credible basis for disputing that the state secrets claim inevitably will require dismissal. The purpose of this provision is to foreclose a lengthy discovery process certain to be futile. Dismissal at this stage of the proceedings would be permissible only in the very limited circumstance that it is virtually without doubt that dismissal will later be required.

This provision of the policy also recognizes that in many cases involving the state secrets privilege, the plaintiff will challenge government actions (or related private party actions) that may be clandestine, so that the plaintiff may not initially have access to the evidence necessary to prove that those actions caused the plaintiff injury. The plaintiff’s standing to sue turns in part on establishing that the defendant caused such injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Accordingly, in the interests of fairness, the proposed policy would require that if facts relevant to standing are subject to a claim of privilege, the court should defer ruling on any motion to dismiss based on standing until the plaintiff has a legitimate opportunity to discover non-privileged evidence necessary to prove standing.

A complaint that meets the minimal pleading standards of the Federal Rules of Civil Procedure should not be dismissed for lack of standing at the pleadings stage. It is well established that “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Lujan*, 504 U.S. at 561. Accordingly, if the government or related private party defendant wishes to challenge the plaintiff’s standing in a case with a properly pleaded complaint, it should do so on summary judgment or at trial. If the defendant moves for summary judgment on standing grounds, the court should follow the procedure set forth in Rule 56(f) of the Federal Rules of Civil Procedure and “order a continuance to permit . . . discovery to be had,” so that the plaintiff may seek sufficient evidence to attempt to oppose the motion. Fed. R. Civ. P. 56(f); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (noting summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition); *Burlington N. Santa Fe R.R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003) (“Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its

theory of the case, district courts should grant any Rule 56(f) motion fairly freely. . . . [e]specially where . . . documentation or witness testimony may exist that is dispositive of a pivotal question . . . .”). Then, after discovery as to standing is complete, and any non-privileged evidence pertinent to standing has been produced, the court should adjudicate the summary judgment motion. If factual disputes preclude summary judgment, the court should resolve standing at trial on the merits. *See Lujan*, 504 U.S. at 561.

**7. Cases Should Not be Dismissed Based on the State Secrets Privilege Unless At Least One of the Parties Cannot Fairly Litigate With Non-Privileged Evidence**

The proposed policy also provides that after taking the steps described above to permit litigation to proceed with non-privileged evidence, and such other steps as the court may deem appropriate to accomplish the same goal, the case should proceed to trial unless at least one of the parties cannot fairly litigate with non-privileged evidence. In particular, a court should not dismiss an action based on the state secrets privilege if it finds that the plaintiff is able to prove a *prima facie* case, unless the court also finds, following *in camera* review, that the defendant is unable to assert a valid defense with non-privileged evidence (including the non-privileged evidentiary substitutes described above). The review envisioned by this policy would involve evidentiary proffers scrutinized by the court. If the court finds that the plaintiff can prove a *prima facie* case with non-privileged evidence (including that obtained from sources outside the government), and that the defendant’s ability to defend against the plaintiff’s case would not be substantially impaired because the defendant is unable to present specific, privileged evidence, the case would proceed to a trial on the merits. Following that rule, courts will satisfy the essential premise of the proposed policy, by making every effort to avoid dismissing a civil action based on the state secrets privilege.

**8. The Government Should be Entitled to Take an Expedited Interlocutory Appeal From a District Court Decision Authorizing Disclosure of Evidence Subject to a Privilege Claim**

Under the legislation urged by the proposed policy, the government would be entitled to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege. This provision of the proposed policy recognizes that the government’s legitimate interests in protecting against disclosure of sensitive national security information could be compromised if an appeal of such a decision had to await final judgment, given that the disclosure, once made, could not be taken back. The language of this provision of the policy is based on a provision of CIPA that addresses the same issue. *See* 18 U.S.C. App. III § 7.

**IV. CONCLUSION**

The ABA House of Delegates should adopt the proposed policy to encourage meaningful judicial review of assertions of the state secrets privilege. Absent that review, there is a risk that the government would effectively judge its own claim that information necessary to prove a plaintiff’s case must be kept secret because disclosure would harm national defense or

diplomatic relations of the United States. Adoption of the proposed policy would help ensure that the state secrets privilege is applied in a manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests.

Respectfully submitted,

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