

May 20, 2009

The Honorable Patrick Leahy
433 Russell Office Building
U.S. Senate
Washington, DC 20510

The Honorable Jeff Sessions
335 Russell Office Building
U.S. Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions,

The undersigned organizations representing a diverse universe of constituents who care about civil rights and civil liberties write in support of S. 417, the State Secrets Protection Act. This bill strikes an appropriate balance between allowing plaintiffs to seek justice through our judicial system and protecting information that would endanger national security if released to the litigants or the public. We urge the bill's immediate passage.

Over time, the common law state secrets privilege has evolved into an alternative form of immunity that has increasingly been used to shield the government and its agents from accountability in cases challenging national security programs. Instead of evaluating pieces of evidence on a case-by-case basis and excluding only the information that would harm national security, some courts have applied the privilege by dismissing cases in their entirety at the pleadings stage, thereby preventing citizens from seeking redress and barring a public airing of the merits of the case. Only legislation can stop this miscarriage of justice and ensure that the state secrets privilege is used only as a shield for national security information and not a sword to strike down cases prematurely.

S. 417 would permit the government to continue invoking the state secrets privilege. However, it would direct the executive branch to submit the evidence the government seeks to shield for an independent assessment by the judge, with the help of experts or special masters, about whether the state secrets privilege properly applies. If the privilege is determined to apply to a specific item, the judge would have flexibility in ordering the government to fashion a non-privileged substitute such as a summary, a redacted version of the evidence, a stipulation or other alternative in the interests of justice and the protection of national security. Additionally, hearings could be held in camera and ex parte; evidence, information and hearings could be governed by protective orders; and the executive branch could require private attorneys to obtain a security clearance before accessing protected information.

Ultimately, the State Secrets Protection Act is not about releasing classified information to the public. It simply restores checks and balances by permitting federal judges to see and rule on evidence, and determine whether there is enough non-privileged evidence for a case to proceed. We urge committee passage and quick floor consideration of this important common sense bill.

Sincerely,
American-Arab Anti-Discrimination Committee
American Association of Law Libraries
American Civil Liberties Union
American Library Association

Association of Research Libraries
Bill of Rights Defense Committee
The Brennan Center for Justice
Center for Democracy & Technology
The Constitution Project
Council on American-Islamic Relations
Defending Dissent Foundation
Discrimination and National Security Initiative
Electronic Frontier Foundation
Federation of American Scientists
Human Rights First
Liberty Coalition
National Association of Criminal Defense Lawyers
National Security Archive
OMB Watch
OpenTheGovernment.org
U.S. Bill of Rights Foundation