Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Chairman, Senate Judiciary Committee
On "Examining the States Secrets Privilege:
Protecting National Security While Preserving Accountability"
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Today, the Judiciary Committee turns its attention to the state secrets privilege - a common law doctrine the government can claim in court to prevent evidence that could harm national security from being publicly revealed. I want to thank Senators Specter and Kennedy for their help in planning this hearing, and commend them for their work on legislation that would create uniform standards to guide courts in evaluating state secrets privilege claims.

Over the past seven years, the Bush administration has aggressively sought to expand executive power in alarming ways. Public accountability has been repeatedly frustrated because so many of the administration's actions have been cloaked in secrecy. Time and again, the administration has fought tooth and nail to prevent the American people and Congress from having information about its policies and practices.

It is through the press that we first learned about secret surveillance of Americans by their own government in the years after 9/11, secret renditions abroad in violation of U.S. laws, secret prisons abroad, secret decisions to fire some of the nation's top prosecutors, and the secret destruction of interrogation tapes that may have contained evidence of torture. Having relied on an overly expansive, self-justifying view of executive power, the Bush administration now seeks secrecy for its actions. It has taken a legal doctrine that was intended to protect sensitive, national security information and seems to be using it to evade accountability for its own misdeeds.

The state secrets privilege has been used in recent years to stymie litigation at its very inception in cases alleging egregious government misconduct, such as extraordinary rendition and warrantless eavesdropping on the communications of American citizens. Reflecting on recent state secrets litigation, The New York Times has observed: "To avoid accountability, [the Bush] administration has repeatedly sought early dismissal of lawsuits that might finally expose government misconduct, brandishing flimsy claims that going forward would put national security secrets at risk."

The clearest example of the state secrets privilege short-circuiting litigation is the 2006 case of Khaled El-Masri. Mr. El-Masri, a German citizen of Lebanese descent, alleged that he was kidnapped on New Year's Eve in 2003 in Macedonia, and transported against his will to

Afghanistan, where he was detained and tortured as part of the Bush administration's extraordinary rendition program. He sued the government over his alleged detention and harsh treatment. A district court judge in Virginia dismissed the entire lawsuit on the basis of an ex parte declaration from the Director of the CIA and despite the fact that the government has admitted that the rendition program exists. Mr. El-Masri has no other remedy. Our justice system is off limits to him, and no judge ever reviewed any of the actual evidence.

The government has also asserted the state secrets privilege in the litigation over the warrantless wiretapping of Americans that took place for more than five years. There, a district court judge has rejected the government's claim that the very subject matter at issue was a state secret, but the government is appealing.

The state secrets privilege serves important goals where properly invoked. But there are serious consequences for litigants and for the American public when the privilege is used to terminate litigation alleging serious government misconduct. For the aggrieved parties, it means that the courthouse doors are closed - forever - regardless of the severity of their injury. They will never have their day in court. For the American public, it means less accountability, because there will be no judicial scrutiny of improper actions of the executive, and no check or balance.

Senator Specter, Senator Kennedy and I have introduced a bill to help guide the courts to balance the government's interests in secrecy with accountability and the rights of citizens to seek judicial redress. The bill does not restrict the government's ability to assert the privilege in appropriate cases. Rather, the bill would allow judges to look at the actual evidence that the government submits is protected by the state secrets privilege so that they, neutral judges, rather than self-interested executive branch officials, would render the ultimate decision whether the state secrets privilege should apply. This is consistent with the procedure for other privileges recognized in our courts.

When I think about this administration's expansive use of the state secrets privilege, I am reminded of another secretive administration that was involved in the Watergate scandal and the Pentagon Papers case. That was a case about the government's attempt to hide an historical study of this country's involvement in Vietnam. The Nixon administration contended that knowledge of the study would pose "grave and immediate danger to the security of the United States." Fortunately, the United States Supreme Court reaffirmed the vitality of our rights and system of government when it decided the Pentagon Papers case. In his concurring opinion Justice Black noted: "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." The same government tendency toward self-serving secrecy that the Nixon administration was promoting then is evident once again in the Bush-Cheney administration's aggressive use of the state secrets privilege.

Secrecy can be important to national security, but it can also deprive the American people of their ability to judge the effectiveness of their government on national security matters. It is critical that federal judges not abdicate their role in our system of checks and balances as a check on the executive.

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