Testimony of

The Honorable Patricia M. Wald

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TESTIMONY OF PATRICIA M. WALD
ON S 2533 (REFORM OF STATE SECRETS PRIVILEGE)
BEFORE SENATE JUDICIARY COMMITTEE
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Former Judge. United States Court of Appeals for District of Columbia Circuit (1979-1999; Chief Judge (1986-91); Judge, International Criminal Tribunal for the former Yugoslavia (1999w2001); Member, President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (2004-5)

Chairman Leahy, Senator Specter, Committee Members:

Thank you for inviting me to testify briefly today on S. 2533 , a bill to regulate the state secrets privilege which is being increasingly raised as a determinative issue in federal court civil litigation involving alleged violations of civil and constitutional rights .My testimony will deal with the capability of federal judges to administer the privilege in a manner that will not endanger national security at the same time it permits litigants to the maximum degree feasible to pursue valid civil claims for injuries incurred at the hands of the government or private parties. In that regard let me make a few points.

1. The state secrets privilege is a common law privilege originating with the judiciary which enunciated its necessity and laid down some directions for its scope in cases going back to the nineteenth century but more recently highlighted In United States v Reynolds, 345 U.S. 1 (1953). Reynolds recognized the government's privilege in that case to refuse to reveal an' airplane accident report in private injury litigation because of 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. (as you undoubtedly know it turned out that there were no such secrets in the report). Since Reynolds, courts have been deciding cases where the government raises the privilege on their own in terms of its scope and its consequences and producing often inconsistent results. There is a wide consensus in the legal community as the American Bar Association Recommendations and Report 116A demonstrate that the importance of the issue and the varying results of leaving the implementation of the privilege totally within the discretion of individual judges militate toward the exercise by Congress of its acknowledged power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations concerning the taking of evidence in the federal courts. Again as you are aware Congress has legislated many times on the Rules of Evidence governing federal court procedures including those for proceedings like habeas corpus and FISA proceedings that may involve matters of national security. In the criminal area, the Classified Intelligence Procedures Act (CIPA) provides

a relevant model for alternatives to full disclosure of classified information which allow a prosecution to continue while affording a defendant his or her due process tights. The time is now ripe for such legislation in the civil arena; litigants and their counsel are confused and unsure as to how to proceed in cases where the: government raises the privilege; the courts themselves are confronted with precedent going in many different directions as to the scope of their authority and the requirements for exercising it.

2. I believe there are several principles which need to be considered in such legislation, and I believe as well that S.2533 has incorporated those principles. Many come from the cases themselves, others from experience with the CIPA legislation and a few from my own judicial experience with cases involving national security information such as the FOIA (Freedom of Information Act). Still others are included in the ABA Report and in a Judicial Conference Advisory Committee Report back in 1969 dealing with codification of the privilege (hereafter Advisory Committee).These principles to be found in S.2533 I believe are capable of being observed by federal judges without making their jobs unduly onerous and are within their competence to administer, as proven by their current use in other kinds of litigation. They will, I also believe, contribute to the uniformity of the privilege's application throughout the federal judiciary and to both the reality and the perception of fairness for deserving litigants with valid civil claims.

a) Reynolds made it clear and subsequent cases have verbally agreed that whether the evidence sought to be withheld by the government if disclosed publicly would present "a reasonable danger" of significant harm to national defense or foreign relations is ultimately a matter for the judge, not the government to decide. Thus it should not be enough - though some cases appear to come close to saying it is-that a prima facie plausible claim of state secret be raised by the government. Rather the judge must make an independent evaluation of whether a state secret is involved. This does not of course mean that he will not give due weight to the government's evidence and expert opinion in making his determination but ultimately it will be his decision. Here I point out that there are other contexts in which secrecy and national security are involved such as the FOIA, where the judge performs a similar function. There in Exemption I, the government may withhold it from public disclosure material that has been duly classified under Executive Order criteria if that classification is reasonable. Under a specific amendment in 1974 however, the court has the authority to look at and decide de novo (though giving "substantial weight" to government affidavits) whether the classification is reasonable. The courts' use of that authority I will say has been cautious to the extreme, but it does exist and on occasion has been employed to reject unjustified claims. A case for even more intense scrutiny of the state secret privilege by judges can be made on the basis that the need for such information is more compelling in the case of a civil plaintiff than any member of the public making a request under FOIA. But the FOIA example makes a basic point that judges do deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is "reasonably likely" to pose a national security risk (Sec. 4051). To my knowledge there have been no court "leaks" of any such information There is no doubt that such a decision is a weighty one but if our courts are to continue their best tradition of constitutional guardianship it is an obligation that they cannot avoid, And the potentiality of a serious judicial review of the material in conjunction with the governments

affidavits on the need for nondisclosure even in a courtroom setting will itself pose a deterrent to the dangers of the privilege being too "lightly invoked" (Reynolds).

b) This brings me to the question of whether unlike FOIA which allows but does not require a judge to look at the allegedly risky material himself in camera rather than relying on the government's affidavits, state secret legislation should require the Judge to himself or herself review the material before making a decision on whether the privilege applies. I am of the view that it should. The stakes in civil litigation - as I said - tend to be higher than in POJA for the plaintiff and our traditions of fair hearing dictate that to the maximum degree feasible all relevant evidence be admitted in judicial proceedings. Reynolds itself left open the possibility that in some contexts where the plaintiffs' showing of need was not compelling, the judge need not do so "and as I have related, in FOIA cases the judge may decide not to. On the other hand the judge in CIPA and in FISA cases does regularly inspect the material in camera. I read the ABA Report to recommend a similar approach here. Only in that way can the judge fulfill the judicial obligation to insure a fair bearing but just as important only if he sees the evidence for himself can he make the CIPA like decision whether there are alternative ways than its presentation in original form to satisfy the plaintiff's need but not to impugn national security as well as whether the objected to material can be segregated from other material in the same document that does not qualify for protection, (I do not discount the possibility that an extraordinary case might arise where both the government 8ud the judge agree that his examination of the secret evidence would be unduly risky and alternatives c an be put in place that will insure fairness but this should not be the usual or even a frequent practice). My own experience with highly sensitive information is that our court security safekeeping facilities and procedures can insure its protection; law clerks or masters can be given clearances to handle it and if even that is not possible, the government's own cleared employees can be sent over to stand guard outside the chambers door while the judge reads it. (I have had this done on at least one occasion). I. have heard other district judges like Judge Brikema who presided over the Padilla case express sentiments that it is neither unusual or unduly burdensome for federal judges to handle classified information; many do it on a daily basis.

(c) The thrust of legislation on state secrets should be to emphasize judicial flexibility and creativity in finding alternatives to the original material that will permit the case to proceed whenever possible. Reynolds itself stressed this approach and it has been a hallmark of reform efforts on the privilege since the 1969 Advisory Report. Since then however CIPA has listed and judges have used measures such as requiring the government to produce an unclassified document with as much of the material as possible in the original, stipulating to facts that the original material was designed to prove or contravert or producing a summary of the controversial document that allows the defendant "substantially the same ability to make his defense". 18 use app 3 Sec. 6. In this regard I think the drafters of 5.2533 have done an excellent and comprehensive job of setting out the steps a judge should take in first determining whether in camera hearings, record sealing protective orders, or use of a cleared master can permit the case to go ahead or whether more stringent measures are required, (Sec. 4052). Especially important is the requirement that if the case may be decided on a legal issue alone even if the substantive matter involved maybe a state secret that the judge proceed to decide the legal issue and not hold a state secret hearing, (Sec. 4052(b)(B) When however the judge decides a genuine issue as to state secrets exists, the bill provides a full array of time-tried techniques for crafting alternatives

to its revelation that may allow the case to proceed: unclassified summaries, redactions, segregation of secret from nonsecret material. The specific authorization of Vaughn indices in Section 4052(d) is particularly useful in that in FOIA cases they require the government to justify in detail - sometimes line by line - the need for secrecy.

(d) These tools of judicial flexibility in Sections 40S4-5 should permit a judge to make a conscious decision after a state secrets claim is raised whether the plaintiff's case may proceed to the next stage without the secret material. Premature dismissals should be eschewed. Unless then without such material a party's affirmative case or defense surely fans short of the threshold required by the federal rules of civil procedure(Rules 12(b)(6) and J2(c), the party suffering disadvantage from nondisclosure should be allowed to supplement their case by additional discovery whenever it could reasonably bolster their case. This actually is a very important point because a high percentage of cases are dismissed at tile pleading stage without additional discovery being allowed, and the interposition of the secrets claim makes it fair to mandate special caution in such cases to let the party play out its non secret case. Also worth noting is the difficulty of plaintiff's who cannot show standing to bring the suit unless they are allowed to see secret evidence. Here particular care should be taken to allow maximum access to nonsecret discovery or even postponement of the standing decision until the secrecy claim is decided. Standing is after all a judicial doctrine which has become increasingly onerous and complex in the past few decades; since state secrets is also a judicially implemented doctrine the two should be brought into some form of coexistence that does not fatally disadvantage valid civil claimants. As the ABA Report pointed out while the Totten and Tenet cases in the Supreme Court involving espionage employment contracts do present an absolute bar to justiciability, other cases do not. I agree with the bill as well that the government not be required to immediately plead "confirm or deny" at the pleading stage when the secrets claim is planning to be raised. FOIA practice provides an analog-the government has been allowed to raise a "neither confirm nor deny" answer as to whether a requested document exists in its pleadings in Exemption 1 cases.

(e) Once the government raises a secrets claim, the question arises as to how it will be litigated and by whom. The government is certainly required by affidavit or testimony to justify the claim but where and who can take part in the litigation at that stage may be an issue. The 1969 Advisory Committee Report permitted the judge to hear the matter in chambers "but all counsel are entitled to inspect the claim and showing and to be heard thereon", subject to protective orders. In general every effort should be made to provide the regular counsel with the necessary clearances to litigate the claim, and where that turns out to be impossible to substitute counsel who have such clearances. In some cases the validity of the secrets claim can be litigated at a level which does not require special cleaTal1ces. through devices like the Vaughn index Another device used successfully by our district court was the appointment of a master with the necessary clearances to organize and separate out sample categories of documents in a voluminous submission for which total secrecy was originally claimed under FOIA Exemption 1 and to present them to the judge with the arguments pro and con for the judges decision. As a result 64% of the material was eventually released. See ln. re United States Department of Defense, 848 F2d 232 (1988). In short, judges are used to handling confidential material through sealing, protective orders against disclosure by counsel, screened masters, and in camera or even ex parte submissions. But the need for guidance and a protocol for using such devices in a uniform manner is dominant. The mere exercise of going through the required procedural steps will

concentrate the judge's attention and sharpen his or her awareness of the interests involved at each stage.

(f) Dismissal of a private party claim should be a last resort if it is based on the unavailability of state secret evidence, There will of course be cases where the judge ultimately and rightly decides that a state secret of significant consequence and risk cannot be revealed even under safeguards and that without such evidence a fair hearing cannot be held. See SecA055. I do suggest legislators give some thought as to whether there are any compensatory remedies to the injured party in such cases. I note that back in 1969 the Advisory Committee to the Judicial Conference advised that if a party is deprived of material evidence by the state secrets claim the judge shall make further orders in the interests of justice including striking witness testimony, finding against the government on the relevant issue or dismissing the action. It may sound simple minded but sometimes the ordinary human reaction of an apology from the government can do much to quell rancor from being deprived of an opportunity to rectify an injustice; private bills are also a possibility. Or conversely thought might be given whether when a secrets claim is upheld at the same time the court finds it is covering governmental misbehavior some form of accountability through reporting is in order. Finally expedited appeal-interlocutory in many cases - should be allowed on a truncated record (sealed if necessary) with cutback briefing and absent any requirement for a detailed written opinion by either court, although I do think a few sentences of explanation are always necessary for any kind of meaningful review any level. But the expedited appeal-especially if the government loses its claim-should insure against prolonged delays in the trial itself.

Thank you for this opportunity to present my views. I do believe thoughtful legislation is needed to insure that maximum and uniform efforts are made to strike the right balance between national security needs and fair judicial proceedings. I believe based on my experience as a federal judge and my international war crimes experience that such a balance can be struck and that our federal judges are already acquainted with the use of many of the proper tools for doing so. I am confident that S. 2533 is a sound beginning for needed reform.