

**Written Questions of Chairman Patrick Leahy
For Elena Kagan
Nominee to be Solicitor General of the United States
Submitted February 10, 2009**

In a civil case before the 9th Circuit Court of Appeals yesterday, *Mohamed et al v. Jeppesen Dataplan, Inc.*, the Department of Justice adhered to its claim that the “state secrets” privilege required the dismissal of a lawsuit claiming that a unit of Boeing Company provided aircraft to fly people to foreign countries where they were tortured. Last year I chaired a hearing where we explored how the “state secrets” privilege had been greatly expanded and abused by the Bush administration. The privilege should be limited to protecting our national security and not used to avoid accountability.

1. If confirmed, will you review the invocation of the privilege in this case and consider whether through use of CIPA or other procedures there is a way to allow this case to proceed on the merits?

Answer: My understanding is that the Attorney General has directed a review of all litigation in which the United States Government has asserted the state secrets privilege, including the case you cite. If I am fortunate enough to be confirmed, I will work with the Attorney General and others at the Department of Justice and across the agencies to ensure that the United States invokes the state secrets privilege only in legally appropriate situations.

2. Will you provide the Judiciary Committee with briefings on the basis for the invocation of the privilege in this and other cases?

Answer: Although I have a good deal to learn about the Solicitor General’s responsibilities, my current understanding is that the Solicitor General is not the primary person responsible for invoking the state secrets doctrine in litigation. I certainly will work with the Attorney General to ensure that the most appropriate official in the Justice Department provides such a briefing.