LIBERTY AND SECURITY:
RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create "Liberty and Security: Recommendations for the Next Administration and Congress." The Constitution Project coordinated the production of the report, which was released in November 2008.

"Liberty and Security" indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called "enemy combatants"; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

CHAPTER 1: Eliminate Unnecessary Barriers To Legitimate Charitable Work
CHAPTER 2: Closing Guantánamo
CHAPTER 3: End Illegal Detention, Torture, and Rendition
CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law
CHAPTER 5: Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
CHAPTER 6: Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
CHAPTER 7: Misuse of Immigration Detention Laws in Counterterrorism Efforts
CHAPTER 8: Revising Attorney General Guidelines on FBI Investigations
CHAPTER 9: Updating the Law Governing the Privacy of Electronic Communications
CHAPTER 10: Fusion Centers and the Expansion of Domestic Intelligence
CHAPTER 11: Promoting Government Transparency
CHAPTER 12: National Security Letters and Section 215 of the USA PATRIOT Act
CHAPTER 13: Reform of the National Security Surveillance Laws and Procedures
CHAPTER 14: Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
CHAPTER 15: Reforming the State Secrets Privilege
CHAPTER 16: Reforming Watch Lists
CHAPTER 17: Assertion of Executive Authority in National Security Matters
CHAPTER 18: Executive Privilege and Congressional Oversight
CHAPTER 19: Signing Statements
CHAPTER 20: War Powers Authority

The full report is available online at http://2009transition.org/liberty-security/, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

CHAPTER FIFTEEN
Reforming the State Secrets Privilege

I. The Problem

Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in cases challenging the government's national security policies. A number of courts have treated the executive's claims as absolute without independently evaluating whether disclosure of evidence would endanger national security. Further, rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, more recent court decisions have dismissed cases at the pleadings stage, and foreclosed any litigation of cases in which the state secrets privilege is asserted.

For example, in *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), Mr. El-Masri sued the government on the ground that he was an innocent victim of the United States' policy of extraordinary rendition. According to his sworn declaration, he was mistakenly held in U.S. custody for almost five months, during which time he was beaten, drugged, repeatedly interrogated, and held in solitary confinement at a CIA-run "black site" in Afghanistan. The government asserted the state secrets privilege and the court dismissed the case at the pleadings stage, before any discovery had occurred. There was no effort to explore whether unclassified sources of evidence —– such as public statements by U.S. officials and investigations ongoing in Europe —– might be available to permit the case to proceed. In the fall of 2007, the United States Supreme Court declined to review this case, foreclosing Mr. El-Masri's right to litigate his claim in court.

Unless state secrets claims are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances. Furthermore, there is too great a temptation for the executive branch to assert the privilege for illegitimate reasons, and not to protect information whose disclosure would harm national security.

II. Proposed Solutions

A. Guiding Principles

The President, either acting alone or with Congress, must take steps to reform the state secrets privilege to provide critical safeguards that are needed to ensure a proper balance of the interests of private parties, constitutional liberties, and national security. While there is a proper role for the state secrets privilege to protect actual national security secrets from public disclosure, the executive branch should not be able to hide behind this privilege on the basis of its own unchecked authority. The state secrets privilege must both enable the executive branch to protect national security

secrets and also permit litigation challenging government programs to proceed where possible. The judiciary can and should provide an independent check on executive discretion to ensure proper application of the privilege. Judges are fully competent to review evidence purportedly subject to the state secrets privilege and make appropriate decisions as to whether public disclosure of such information is likely to harm our national security.

B. Proposed Measures

1. The president should direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege and assess whether assertion of the privilege can be withdrawn with respect to disclosure of particular pieces of evidence, as well as whether the case can move forward with non-privileged information that is substituted for the privileged information. He should declare that going forward, the state secrets privilege will be invoked only by the head of an agency and only when he or she has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to national defense or diplomatic relations. The president should declare that it is the policy of his administration never to invoke the privilege to cover up illegal or unconstitutional governmental conduct. He should order the Attorney General to convene an interagency working group to implement the policy and direct the Department of Justice to report invocations of the state secrets privilege to Senate and House Committees on the Judiciary.

2. The president should direct the Attorney General that in all litigation in which the state secrets privilege is asserted, attorneys representing the United States government shall:
   i. Assert the privilege only when the head of the agency possessing the evidence concludes that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
   ii. Consent to have the judge review *in camera* and *ex parte* all evidence claimed to be protected by the state secrets privilege;
   iii. Consent to discovery of non-privileged information in cases in which the state secrets privilege has been invoked;
   iv. Consent to the appointment of special masters and/or technical experts to assist with evaluating state secrets privilege claims;
   v. Prepare and submit non-privileged substitutes for evidence asserted to be protected by the state secrets privilege wherever possible; and
   vi. Decline to seek dismissal of a case on the basis of the state secrets privilege except where the attorney concludes that it is not possible to create a non-privileged substitute for the evidence and disclosure of the evidence asserted to be privileged would cause substantial harm to national defense or diplomatic relations.

3. The president should work with Congress to ensure passage of legislation reforming the state secrets privilege, which shall, at a minimum:
    i. Require that the court conduct a hearing to assess the validity of any assertion of the state secrets privilege, and that the government make available to the court for review *in camera* and *ex parte* all of the evidence it claims is protected by the state secrets privilege;
    ii. Provide that in conducting a review of voluminous evidence claimed to be privileged, the court may review a reasonable sampling of the evidence to make its independent assessment as to whether the privilege applies;
    iii. Provide that the state secrets privilege applies only when the judge has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
    iv. Require that the judge weigh testimony from government experts in the same manner as it does, and along with, any other expert testimony;
    v. Provide that the judge shall make an independent assessment as to whether the state secrets privilege applies, and that the judge should not accord "utmost deference," "substantial weight," or any other special deference to the assertions of any party;
    vi. Prohibit dismissal of cases or granting motions for summary judgment based on the state secrets privilege unless and until the private party has had a full opportunity to complete discovery of non-privileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information;
    vii. Require that if the court determines that the privilege applies but it is possible to produce a non-privileged substitute for the evidence that would provide the parties a substantially equivalent opportunity to litigate the case, then the court shall order the government to produce that substitute;
    viii. Specifically authorize the use of special masters and/or technical experts to assist the court in evaluating state secrets privilege claims; and
    ix. Require the Attorney General to report to Congress within seven days each instance in which the state secrets privilege is invoked for the first time in a particular civil action.

4. The president should direct the Attorney General that attorneys representing the United States government shall consent to reinstatement and reconsideration of cases dismissed on the basis of the state secrets privilege if the underlying judgment, order, or proceeding from which party seeks relief was entered within the past six years, and the claim on which the judgment, order or proceeding is based is against the government or arises out of conduct by persons acting in the capacity of a government officer, employee, or agent. The legislation described in solution #3 above should include an application

provision permitting reinstatement of such cases decided within the past six years. [Note: six years is the statute of limitations period for filing civil actions against the government (28 U.S.C. § 2401).]

III. Allies*

American Association of Law Libraries

Mary Alice Baish, Acting Washington Affairs Representative
baish(at)law.georgetown.edu
202-662-9200

American Library Association

Lynne E. Bradley, Director
lbradley(at)alawash.org
202-682-8410
The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) *available at* http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

Bill of Rights Defense Committee (BORDC)

Chip Pitts, President
chip.pitts(at)att.net

Center for Democracy & Technology

Gregory T. Nojeim
gnojeim(at)cdt.org
202-637-9800 (ext 113)
The Internet in Transition, *available at*
http://www.cdt.org/election2008/

Common Cause

Sarah Dufendach, Vice President for Legislative Affairs
www.commoncause.org
202-736-5709

The Constitution Project

Sharon Bradford Franklin
sfranklin(at)constitutionproject.org
202-580-6920
The Constitution Project, *Reforming the State Secrets Privilege, available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privileges_Statement2.pdf

Defending Dissent Foundation

Sue Udry, Director
Sue.udry(at)defendingdissent.org
202-549-4225
www.defendingdissent.org

Electronic Frontier Foundation (EFF)
Kevin S. Bankston
bankston(at)eff.org
415-436-9333 (ext.126)
A Privacy Agenda for the New Administration, *available at* http://www.eff.org/deeplinks/2008/11/privacy-agenda

Essential Information
John Richard or Robert Weissman
202-387-8034

Federation of American Scientists
Steve Aftergood
saftergood(at)fas.org
202-546-3300

Government Accountability Project
Jesselyn Radack, Homeland Security Director
JesselynR(at)whistleblower.org
202-408-0034 (ext. 107)

Liberty Coalition
Michael D. Ostrolenk, Co-Founder/National Director
www.libertycoalition.net
mostrolenk(at)libertycoalition.net
301-717-0599

Muslim Advocates
Shahid Buttar
shahid(at)muslimadvocates.org
415-692-1512

National Coalition Against Censorship
Joan E. Bertin, Esq., Executive Director
bertin(at)ncac.org
212-807-6222
Fax: 212-807-6245

National Litigation Project of the Lowenstein International Human Rights Clinic, Yale Law School
Hope Metcalf

hope.metcalf(at)yale.edu
Ramzi Kassem
ramzi.kassem(at)yale.edu
203-432-4800

National Security Archive

Meredith Fuchs, General Counsel
mfuchs(at)gwu.edu
202-994-7000

OMB Watch

Sean Moulton, Director, Federal Information Policy
202-234-8494
Fax: 202- 234-8584

OpenTheGovernment.org

Patrice McDermott
pmcdermott(at)openthegovernment.org
202-332-6736

Public Citizen

Angela Canterbury, Director of Advocacy, Public Citizen's Congress Watch Division
acanterbury(at)citizen.org
202-454-5188
Fax: 202-546-5562

Stanford Law School - Mills International Human Rights Clinic

Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director
Kathleen Kelly, Clinical Teaching Fellow
bj.olshansky(at)gmail.com
650-736-2312

U.S. Bill of Rights Foundation

Dane vonBreichenruchardt, President
usbor(at)aol.com
202-546-7079

* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments, and Rebuttal

Based upon the Congressional hearings held to date on the State Secrets Protection Act bills introduced in the House and the Senate in 2008, the opposition to state secrets reform focuses on two principal arguments: (1) That courts lack the expertise in national security matters to make appropriate decisions about which disclosures will harm national security; and, relatedly, (2) That any judicial review of state secrets claims should accord "utmost deference" to the testimony of executive branch officials asserting the privilege. The principal source of such opposition has come from members and veterans of the George W. Bush administration. Both of these arguments have been addressed and countered by other witnesses, including William Webster and William S. Sessions, both of whom are former federal judges who have also served as Director of the FBI – and in the case of Judge Webster, also as former Director of the CIA. Both have submitted statements attesting to the competence of federal judges to make such determinations, the experience judges have in making such determinations in other contexts, such as in FOIA cases and cases involving the Classified Information Procedures Act, and to the need for a true independent review by judges of executive branch claims.

V. Recommended Documents for Further Reading

a. The Constitution Project, *Reforming the State Secrets Privilege, available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf.

b. The Constitution Project, Statement on the State Secrets Protection Act (HR 5607), *available at* http://www.constitutionproject.org/pdf/CP%20State%20Secrets%20Testimony%207-31-08.pdf.

c. *The Justice Department's Litigation Security Group and Its Ethics Violations in the Al-Haramain Case*, FINDLAW (May 8, 2008), *available at* http://www.whistleblower.org/content/press_detail.cfm?press_id=1389

d. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama http://hrw.org/reports/2008/us1108/

e. The Constitution Project, *Reforming the State Secrets Privilege, available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf

f. Geoffrey R. Stone, *On Secrecy and Transparency: Thoughts for Congress and a New Administration* (June 2008), *available at* http://www.acslaw.org/files/Geoff%20Stone%20Issue%20Brief.pdf

g. Amanda Frost & Justin Florence, *Reforming the State Secrets Privilege, available at* http://www.acslaw.org/files/Frost%20FINAL.pdf

APPENDIX
"Reforming the State Secrets Privilege"
Recent Legislative and Judicial Action

I. Jurisdiction

A. Judicial

The state secrets privilege was first recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), a case brought by three widows of civilian contractors against the government for negligence in a military plane crash that killed their husbands. The widows sought, and were denied, production of the Air Force accident report. More recently, rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, courts have dismissed cases at the pleadings stage, and foreclosed any litigation of cases in which the state secrets privilege is asserted. Since September 11, 2001, various federal courts of appeals have consistently credited the executive branch's invocation of the state secrets privilege in cases relating to national security issues, without independently evaluating whether disclosure of evidence, in fact, would endanger national security. *See*, *e.g.*, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (dismissing case alleging that El-Masri is innocent victim of U.S. extraordinary rendition program); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007) (state secrets privilege prevented plaintiffs from establishing standing to challenge NSA surveillance program). Although some courts have rejected claims that the very subject matter of a lawsuit challenging national security policy is a state secret, *see*, *e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (NSA surveillance program has been publicly disclosed and program itself is not a state secret), even in such cases courts have shown extreme deference to executive assertions.

Since this is a judicially created doctrine, the Supreme Court would have had jurisdiction to reexamine and clarify the scope of the privilege, and this issue was squarely presented in the *El Masri* case. However, with the Supreme Court's denial of the petition for writ of certiorari from the Fourth Circuit's decision in *El-Masri* in the fall of 2007, legislative reform and changes in executive practice are now the most viable options.

B. Executive

The Executive branch has jurisdiction to determine whether and when it will assert the state secrets privilege in litigation. It can also fully control which evidence is claimed to be privileged and can consent to independent judicial review to assess privilege claims.

C. Legislative

Congress has jurisdiction to enact reforms to the state secrets privilege. The Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress should establish new rules that will simultaneously protect individual rights and national security, and preserve access to the courts and our constitutional system of checks and balances. The House and Senate Judiciary Committees have jurisdiction to consider such legislation.

II. Status of Actions in Legislative and Executive Branches

A. Executive Branch

The Bush administration has broadly and frequently asserted the state secrets privilege as outlined above.

B. Legislative Branch

Legislation was introduced in both the House and the Senate in the 109th Congress to reform the state secrets privilege and modify the executive branch's blanket invocations of the state secrets privilege in national security cases. The State Secrets Protection Act (H.R. 5607, S. 2533) is designed to allow the executive branch properly to assert the privilege where necessary, while allowing litigation that would not jeopardize national security interests to proceed. The proposed legislation would enact many of the reform measures identified above, including (1) allowing non-privileged discovery to proceed in the litigation, (2) requiring the government to make available for the court's in camera and ex parte review the supposedly privileged evidence; and (3) authorizing the court to employ special masters to assist in its review of the evidence as to which the government has asserted the state secrets privilege.

Congressional Hearings:

January 29, 2008: Oversight hearing by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee

February 13, 2008: Legislative hearing by the Senate Judiciary Committee on the State Secrets Protection Act S. 2533

April 24, 2008: Senate Judiciary Committee passed State Secrets Protection Act S. 2533 out of committee by an 11-to-8 vote.

September 18, 2008: The Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee voted 6-3 to order the State Secrets Protection Act H.R. 5607 reported favorably.