STATEMENT OF BRUCE FEIN

BEFORE THE HOUSE JUDICIARY COMMITTEE

REGARDING THE STATE SECRETS PRIVILEGE

JULY 31, 2008

Dear Mr. Chairman and Members of the Committee:

As Chairman of the American Freedom Agenda, I am pleased to share views on the state secrets privilege generally and legislation that would limit its invocation to frustrate private redress for constitutional or sister violations of law perpetrated or aided and abetted by the government. The American Freedom Agenda seeks legislative reform of the state secrets doctrine as one of its tenets for restoring checks and balances and protections against government abuses. The organization was formed by stalwart conservatives, including Richard Viguerie and former Congressman Bob Barr.

But the state secrets privilege is neither a liberal nor a conservative issue. It addresses a question raised by Chief Justice John Marshall of the United States Supreme Court more than two centuries ago in Marbury v. Madison (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury…The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

"If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case."

The state secrets privilege assaults what Chief Justice Marshall maintained was the essence of civil liberty. It denies a plaintiff injured by constitutional wrongdoing of a remedy if proof of liability would require disclosure of a state secret, i.e., information that might damage the national security. In the words of the great Chief Justice, the doctrine casts "obloquy" on the nation's jurisprudence, and can be justified only by the "peculiar character" of the litigation. The origin of state secrets as a defense to any type of alleged government wrongdoing was thoroughly misconceived by Justice Stephan Field in Totten v. United States (1875). There, the Court declared that a contract with the government to spy

was not enforceable if proof of the contract would reveal a state secret. As applied to voluntary contracts, the state secrets doctrine was unalarming because if the government habitually dishonored its promises private entities would no longer volunteer. But the gratuitous and expansive language of Totten has been interpreted to make state secrets applicable to any litigation where government wrongdoing is alleged.

The state secrets privilege is further dubious because it runs against the grain of the doctrine frowning on evidentiary privileges announced by Justice Byron White in Branzburg v. Hayes (1972): the public enjoys a presumptive right to everyman's evidence.

The need for legislative reform of state secrets as the doctrine has evolved in litigation is self-evident. Consider the following hypothetical, fashioned largely from the state secrets case involving the abduction, imprisonment, and interrogation abuse of Khalid El-Masri, a German citizen of Lebanese descent. An American citizen residing in Berlin is kidnapped and tortured by CIA operatives based on President George W. Bush's signature "gut instincts" that the American has collaborated with Al Qaeda in Iraq. The President's suspicion is erroneous, and the citizen sues his CIA kidnappers and torturers for a deprivation of liberty and torture in violation of the Constitution. The state secrets privilege is invoked as a defense. It is averred in an affidavit submitted by the Director of the CIA that to prove the kidnapping would disclose to the international terrorist enemy a method of capture that would enable terrorists to train for means of evasion; and, that to prove the torture would disclose a method of intelligence collection that would alienate allies of the United States and would enable the enemy to train terrorists to resist the type of torture disclosed. The prevailing state secrets doctrine would require dismissal of the citizen's case resting on kidnapping and torture, despite the obloquy the ruling would cast on the jurisprudence of the United States. Moreover, by denying a remedy for the constitutional wrongdoing the doctrine encourages repetitions of lawlessness. That understanding is

what provoked the Supreme Court to fashion an exclusionary rule remedy for Fourth Amendment violations in Mapp v. Ohio (1961), plus a civil damages remedy in Bivens v. Six Unknown Agents (1971).

I thus applaud the endeavor of H.R. 5607 to constrain abusive applications of the state secrets doctrine. My opening observations lead to several legislative recommendations.

The burden of proving entitlement to the state secrets privilege should be placed on the government for threefold reasons: evidentiary privileges obstruct the search for truth; the state secrets privilege casts aspersion on the nation's system of justice by blocking a remedy for a violation of constitutional or sister legal rights; and, the government holds the information relevant to proving the state secrets privilege. I would also recommend that in cases implicating constitutional as opposed to non-constitutional wrongdoing, the government should be required to prove state secrets by clear and convincing evidence standard, not simply by a preponderance.

In ruling on state secrets claims, the legislation should also instruct judges to consider both the government's unique expertise in knowing what disclosures might harm national security and the government's institutional incentives to prevaricate or distort the truth over national security to conceal crime, maladministration, or politically embarrassing mistakes. In Reynolds, the government lied about secret spying equipment to avoid civil liability for an airplane crash under the Federal Tort Claims Act. In the Pentagon Papers case, the government misrepresented the harm that would ensue from publishing the history of the Vietnam War. President Nixon also made bogus national security claims in an effort to obstruct the Watergate investigation. In United States v. United States District Court (1972), the Supreme Court rejected the government's claim that judges were too naïve in domestic security cases to ascertain probable cause needed for warrants. Justice Lewis Powell explained: "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial

evaluation…If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance."

While judicial vetting of national security determinations are not daily subjects of litigation, neither are they a novelty. They are made in suits under the Freedom of Information Act. They are made by FISA judges in issuing warrants for the collection of foreign intelligence. And judges review the government's deletions of alleged national security information included in the writings of former CIA officers or otherwise, for example, the decision by the United States Court of Appeals for the Fourth Circuit in United States v. Marchetti (1972).

Evenhandedness is a chief feature of civilized law. The state secrets privilege should not skew justice. It should not expose itself to withering criticism reminiscent of Anatole France's observation: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Similarly, the state secrets privilege should empower the judge, after examining in camera all evidence said to be protected by state secrets, to award judgment either in favor of the plaintiff or in favor of the defendant whenever the ends of justice would so require. The privilege should not be a one-way street in favor of the defendant, especially because—in the words of Chief Justice Marshall—its invocation by the defendant casts obloquy on the nation's jurisprudence.

Finally, constitutional doubts raised by detractors of the legislation are frivolous. No Supreme Court decision holds that state secrets in civil litigation is anchored to the Constitution. Further, under the Gravel precedent, Members of Congress enjoy authority to disclose classified information in conjunction with their legislative duties. In addition, even if there were no state secrets privilege whatsoever, the President would not be compelled to disclose anything. The government could simply accept a default judgment or an adverse finding of fact and keep all information secret to protect what the President believes is national security. A similar choice is required in criminal prosecutions under

the Classified Information Procedures Act of 1980: when a summary of classified information will not satisfy the notice required by due process, the government must drop the prosecution if it wishes to protect the alleged state secrets.

Even assuming the state secrets privilege is an inherent Article II power to protect the national security, Congress is empowered to regulate its exercise under the Necessary and Proper Clause to prevent abuses which cast obloquy on the nation's jurisprudence and to deter constitutional and related legal wrongdoing. In addition, the separation of powers doctrine only prevents Congress from exercising an "overriding" influence over an executive power. The proposed legislation does not require the President to reveal anything believed to need secrecy to protect the national security. The maximum sanction under the proposed legislation is the payment of money damages which would be funded from congressional appropriations. And the state secrets standard established by the legislation does not compromise national security but generally echoes what the President through executive orders has decreed justifies secrecy.

In sum, state secrets legislation is clearly constitutional and should not be skewed by concocted fears of unconstitutionality.