STATEMENT OF PATRICIA M. WALD ON H.R. 984 (STATE SECRETS)
COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

I wish to submit this statement in favor of H.R. 984 which seeks to establish procedures for regulating the invocation and decisional processes relating to the state secrets privilege in federal courts. The frequent use of the privilege in recent years to deny all relief to civil plaintiffs who have been injured by governmental action is a matter of grave concern to lawyers, judges and legal scholars. In my view this total cutoff of relief is often unnecessary and produces rank injustice in many cases. The state secrets privilege originated as a common law privilege designed to protect from public disclosure during judicial proceedings national security matters whose revelation would endanger the national welfare. Judges who administer the privilege have struggled with varying success to find a middle way between protection of national security and insuring access by worthy plaintiffs to the courts to remedy serious injuries at the government's hands. Unfortunately judges have not been consistent in the way they administer the privilege; some show a readiness to dismiss cases outright on the mere allegation or conclusory affidavit of the Government that national security would be at risk if the case continued. Although the U.S. Supreme Court in the Reynolds case (345 U.S. 1) acknowleged that ultimately it is the judge who must decide if national security does require nondisclosure of material alleged to present a risk, it did not mandate that the judge himself look at that material and make an independent judgement that such a risk was present. As a result some judges do look at it, others accept the government's word and do not. Nor is there consistency as to how substantial the risk must be to justify closing down the case. Finally in many cases it appears that the judge dismisses the case without a careful evaluation of whether the plaintiff might be able to make out his case with unprivileged material or whether using techniques employed in criminal cases and in FOIA proceedings, redacted or substitute evidence could be used in lieu of the disputed items. It is time to regularize the administration of the privilege in a way that fully protects national security but not at the expense of a total shutdown of civil process for worthy claimants. I believe H.R. 984 accomplishes that end.

I would first emphasize that Congress' power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations on the admissibility of evidence in federal courts is not to be questioned. It has done so in the Federal Rules of Evidence, in FISA proceedings and in CIPA . Congress has also legislated in the Freedom of Information Act to allow judges to decide, though on limited grounds,on citizen access to materials that the government resists disclosing because they have been classified In Al Haramain Islamic Foundation v Bush (N. D. Cal) a district judge in an exhaustive opinion recently decided that FISA procedures for treating information obtained under secret FISA warrants preempted invocation of the state secret privilege , a vindication of Congress' power to legislate evidentiary rules in the domain of national security cases.

Federal judges every day handle classified material and make decisions as to whether redacted versions can be disclosed or summaries made that need not be classified or

stipulations substituted for privileged material. They have used masters, informative indices and sampling techniques when massive amounts of material are involved and to the best of my knowledge no harmful leaks have resulted. In my view this bill incorporates into the civil law area many of these useful techniques with which judges are already familiar in order to minimize the number of cases where dismissal of the entire claim will be necessary. It in no way deprives the government of its right to invoke the privilege or requires it to disclose material which the judge finds is truly a security risk. But it does provide a healthy antidote to casual or purposeful abuse of the privilege to hide government misfeasance or embarrassing mistakes.

The Goal of State Secret Regulation

The goal of legislation on state secrets, in addition to producing consistency in court interpretations and fairness to worthy claimants, should be to allow claims to proceed as far as they can through the judicial process without endangering national security. That is not what is happening now, as the recent Ninth Circuit's recent decision in Mohamed v Jeppesen Dataplan makes clear. In that case the district court dismissed a suit under the Alien Tort Claims Act on the motion of the Government as an intervenor before any discovery or even an answer had been filed.The suit claimed damages against an airline company who had allegedly participated in the "extraordinary rendition" of the plaintiff to a foreign nation pursuant to a U.S.. government (CIA) program where he was tortured. The existence of such a rendition program had been widely publicized in U.S. media., and the Swedish government had publicly acknowleged "virtually every aspect of (the plaintiff's) rendition".The plaintiff argued that he could prove by publicly available evidence Jeppesen's role in transporting the plaintiff to the foreign nation at the behest of the United States., with knowledge of the consequences for the plaintif.. Nonetheless the district court dismissed the case on the Government's invocation of the state secret privilege supported by two affidavits, one classified, one not, alleging "serious damage" to national security if the case proceeded. The judge said that the "allegations of covert US military or CIA operations in foreign countries against foreign nationals" constituted the "core" of the suit and so the "the very subject matter of this case is a state secret". The judge did not rule on whether the plaintiff could have made out a prima facie case without resort to privileged information. His ruling was not dissimilar to that of the judge in the Al-Masri case involving torture allegations of another subject of rendition which was dismissed on the basis of a similar affidavit in the Eastern District of Virginia.

In Jeppesen however the Ninth Circuit Court of Appeals reversed the dismissal and remanded for further proceedings, ruling that upfront dismissals on the basis of "the very subject matter" of the suit were to be confined to situations where the Government and theplaintiff had an agreement that was by its very nature expected by the . parties to be secret, such as a contract for CIA undercover work See Totten v United States,92 U.S. 105 .Where no such agreement exists, the Ninth Circuit said, the judge's task is different under Reynolds; he must weigh the interests of the plaintiff and the circumstances of the case to make a determination that revelation of the allegedly privileged material is necessary to the plaintiffs prima facie case or to the Government defense and that if revealed, national security will be impugned. In making that determination "judicial control over the evidence cannot be abdicated to the caprice of the executive officers"

(quoting Reynolds) and the judge must make an" independent evaluation "of the claim The court of Appeals went on to examine the claim in the suit before it, finding that it did not depend exclusively on any proof that a rendition program existed at all, nor that any secret agreement existed beween the plaintiffs and the Government..It adopted instead a protocol of "excising secret evidence on an item-by-item basis, rarther than foreclosing litigation altogether at the outset". In so doing it emphasized that the state secret privilege does not bar the litigation of allegations the Government objects to but only the discovery of the evidence itself that might qualify as privileged. It does not create a "zone of silence" around allegations that the Government says concern state secrets.; it proterets only specific pieces of evidence not the facts themselves which the evidence may demonstrate.—"it cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence,regardless whether privileged evidence might also be probative of the truth or falsity of the allegation:". Thus, the appellate court concluded: "dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant".

The court further refused to rule that the plaintiff in Jeppersen would not be able to make out a prima facie case without access to the secret material.

> "We simply cannot resolve whether the Reynolds evidentiary privilege applies without (1) an actual request for discovery of specific evidence,(2)an explanation from plaintiffs of their need for the evidence,and (3)a formal invocation of the privilege...with respect to that evidence,explaining why it must remain confiden tial. ...Nor can we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal."

Provisions of H.R. 984

I have dealt at length with the Jeppesen opinion because it represents a remarkably similar preview of what H.R. 984 requires of trial judges faced with the invocation of the state secret privilege. The proposed legislation in section 4 et seq. requires the Government to assert in affidavit form the factual basis for the claim of privilege. The court must then make a preliminary review of the information and confer with the parties as to whether special protective steps need be taken such as appointment of a special master or if materials are massive submission of an index, akin to that used in FOIA cases, to indicate which parts of the material are privileged and why without revealing the material itself.(section 5) He then decides if the parties should be allowed to continue with discovery of materials not covered by the asserted privilege before he rules on the privilege so that if a prima facie case or defense can be based on such unexceptionable material, the case can go forward to judgement.He can also order security clearances for defense counsel, if necessary.

These preliminary steps will assure that cases which might validly go forward without any need to involve privileged material will not be cutoff prematurely , and in so doing would alleviate much of the justified concern lawyers, legal academics and commentators, including the American Bar Association, and the public have voiced that legitimate grievances against the Government should not be consigned to permanent oblivion and

that the Government will not be allowed to exercise unilateral power over the life and death of such claims in our courts.

Beginning with section 6, the bill sets out a clear and logical process for determining whether the claim of privilege is valid. In cases where it becomes clear that the material in dispute is indispensable to either the plaintiff or the Government. The bill provides first and foremost that the judge shall make an independent assessment of "whether the harm identified by the Government is reasonably likely to occur",i.e. ":significant harm to the national defense or the diplomatic relations of the United States". The Government has the burden of proof as to the nature of the harm and... the likelihiood of its occurrence" In making that assessment the "court shall weigh testimony from Governmenrt experts in the same manner as it does,and along with, any other expert testimony". Section 7 then provides a series of alternatives to disclosure if the judge finds that the privilege has been legitimately raised and the material cannot be disclosed. They include provision by the Government of a substitute for the privileged document or testimony that gives the plaintiff a "substantially equivalent opportunity" to litigate the case.This could involve redaction, summarizing or stipulating relevant facts, all techniques with which courts are familiar under CIPA.If the Government refuses to provide such a substitute, after the judge rules that such a substitute is possible, the court may make an adverse finding against the Government on the relevant factual or legal issue. If on the other hand the judge finds that it is not possible to proffer an adequate substitute presumably the case would have to be dismissed although the bill presently is not entirely clear on this matter. See sections 7(b)@2) and (d). It may be wise to clarify whether the power to make orders such as striking testimony,making adverse findings etc. laid out in 7(d) embraces the situation where an adequate substitute is not possible .

Issues Raised By the Bill

There is an additional issue of what happens when the disputed information does not foreclose the plaintiff from making out a prima facie case but would foreclose the defendant from making out a valid defense. The Jeppesen case notes that under existing precedent the case would be dismissed. I note however that it appears that section 7 would allow the court to make orders "in the interest of justice", striking testimony or even dismissing a claim or counterclaim in that situation This would introduce a novel though equitable power in the courts that still falls short of requiring any disclosure and is deserving of discussion.

In prior hearings several issues have been raised as to the burdens and criteria the judge should use in deciding if the privilege applies.One is whether the judge should be required in all cases to personally view the secret material in making his independent assessment. Reynolds made no such requirement and in FOIA cases the judge is allowed in his discretion to look at the material but not required to do so. This bill requires that he view the material before ruling on its privileged status. It certainly seems that he ought to view the material himself rather than accept its description in the government affidavit in virtually all cases, although it is always possible to conceive of an exception,i.e. the precise formulas for nuclear weapons. . It is hard to see how without seeing the material for himself he could make the decisions required by the bill as to whether an adequate

substitute is possible or as to what kind of segregation or redaction of privileged material in a document would be adequate as a substitute. Where material is massive, sampling techniques or a master might be used to facilitate his review. See,e.g. In re U.S. Department of Defense,848 F2d 232 (D.C. Cir. 1988). Here I emphasize that federal judges handle classified and secret material in other contexts (FISA and CIPA) regularly and there are detailed written materials issued by the Federal Judicial Center as well as trained and cleared security assistants provided to insure its safekeeping.

Another issue that has arisen is whether the fact that material has been officially classified is sufficient to render it subject to the secrets privilege. The Ninth Circuit considered this claim and ruled the two categories are not synonymous; rejecting the precedent of FOIA Exemption 1 in this regard that if the judge finds material legitimately classified he is not empowered to release it. The Ninth Circuit found the FOIA situation distinguishable for several reasons. Foremost was a recognition that Reynolds warned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers..without lead[ing] to intolerable abuses" and therefore according to the Ninth Circuit "A rule that categorically equated "classified"with "secret" matters would, for example, perversely encourage the President to classify politically embarrassing information simply to place it beyond the reach of judicial process". While classification may be a "strong indication of secrecy as a practical matter" it is not determinative and the judge must make his own evaluation on the distinct criteria of the secrets privilege. Secondly, the purposes of the two disclosure situations are very different; the balance of equities in a civil claim includes the plaintiff's interest in access to justice for a grievance against the government; in FOIA the plaintiff need make no showing of any injury to seek access to the material. I would add that the FOIA itself allows the judge to go beyond the classification label and look at the material to see if it has been "reasonably" classified.

The final issue I want to discuss is the standard by which Government affidavits will be evaluated in the judge's independent assessment. Past courts have used different standards, some giving great deference to the Government's identification of harm and consequences of disclosure. Other courts have insisted on a greater scrutiny of the logic and credibility of the Government's predictions. H.R.984 provides that the judge make his independent evaluation of the harm in a manner that weights the testimony of Government experts like those of other experts. Judges are confronted every day with expert testimony of all kinds and are accustomed to evaluating it on the basis of the expert's background,, firsthand knowledge of the subject, and inherent credibility as well as the consistency and persuasiveness of his testimony Thus police officers or law enforcement officials receive no special deference emanating from their status alone. Were Government experts in these cases to be treated differently from other experts solely because of their affiliation,, the overriding criteria of an independent judicial evaluation could be undermined. As an example, the testimony of a newly appointed Assistant Secretary or Division Head does not automatically warrant greater deference than that of a recently retired Secretary of the same agency who might be an expert on the other side. Other factors enter into the calculus of weight., The Government witness may be able to demonstrate his more up to date access to relevant information while the

retired official may be able to show he has dealt with similar matters over many years. The judge should look at all factors in making his evaluation of what weight is to be given to expert testimony. In earlier testimony I mentioned that the FOIA Exemption 1 Conference Report spoke of giving "substantial weight" to Government affidavits. Judge Skelly Wright of the D. C. Circuit subsequently interpreted that phrase in Ray v Turner,587 F2d 1187 (1978) as follows: "It is important to recognize the limits,as well as the value of this language...Stretching the Conference Committee's recognition of the "substantial weight" deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute and would render meaningless Congress' obvious interest in passing the provision [permitting judges to decide if the classification was reasonable] over the President's specific objections". Other courts have rejected Government affidavits in national security cases when they found them lacking in specificity or detail, when they evidenced bad faith or failure to account for contrary evidence. See,e.g., Campbell v D.O.J., 164 F.3d 70 (D.C.Cir. 1998) I believe that H.R. 984 provides sufficient guidance for judges in making their independent evaluations and. any additional provision applying to Government evidence alone would be in tension with the provision in this bill placing the burden of showing harm on the Government. As I said before, federal judges daily deal with expert evidence of all kinds, forensic, spcialized law enforcement and intelligence, medical and accord it the weight it deserves without special preferences or presumptions. They will do the same with national security evidence.

Conclusion

I support H.R, 984

as a long overdue and eminently feasible means of insuring that the state secret privilege is administered in a consistent and fair way in our federal courts. Thank you for this opportunity to present my views.

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