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February 12, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

The Honorable John Conyers
Chairman
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Leahy and Chairman Conyers:

Human Rights First strongly supports the State Secret Protection Act of 2009, versions of which were introduced yesterday with bi-partisan support in both the Senate (S. 417) and the House (H.R. 984). If enacted, this legislation would encourage independent and meaningful judicial review of government actions while protecting against the disclosure of sensitive national security information. It would also encourage greater transparency and a more appropriate balance of powers on national security matters.

The need for this legislation is all the more apparent given the Obama administration's decision this week to stand by the Bush administration's overly expansive interpretation of the state secrets doctrine in a case before the Ninth Circuit. The case, *Mohamed et al v. Jeppesen Dataplan, Inc.*, is a civil lawsuit brought on behalf of five men who allege that Boeing subsidiary Jeppesen arranged flights for the Bush administration's "extraordinary rendition" program. The men further allege they were secretly transferred to U.S.-run prisons or foreign intelligence agencies overseas as part of this program and interrogated under torture. The Bush administration intervened in the case and sought a dismissal on "state secrets" grounds, claiming that disclosure of any information regarding the case would harm national security. The Obama administration adopted this same position during oral argument before the Ninth Circuit this week.

The states secret privilege is a common-law rule that allows the government to block the discovery of information when it believes disclosure would harm national security. Since September 11, 2001, the government has invoked the state secrets privilege in cases challenging extraordinary rendition, torture and warrantless domestic surveillance, seeking dismissals of lawsuits at the pleadings stage before any evidence is requested or produced. Many courts have accepted the government's claims of risk

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to national security without independently reviewing the information itself in order to assess whether the information could be disclosed without undue risk, or whether lawsuits may proceed without it. This practice has perpetuated a culture of unchecked power and a complete lack of transparency by the Executive Branch on issues touching on national security. It has also undermined the right of individuals to seek and obtain remedies for human rights violations resulting from government misconduct.

The *State Secret Protection Act* would address this continuing problem without requiring the release of sensitive national security information. Using the Classified Information Procedures Act (CIPA) as a model, the legislation would require courts to independently examine the information for which the government asserts a privilege and decide whether disclosure of the information would pose an unreasonable risk to national security. If a court decides the government has validly asserted the state secrets privilege, then the court would be required to determine whether it is possible to craft a non-privileged substitute for the evidence and to resolve the issue in favor of the plaintiffs if the government refuses. These provisions would balance the need to protect sensitive national security information while facilitating the role of the courts as a meaningful check on executive power.

Legislative reform of the state secrets privilege is also necessary in order to ensure that the United States upholds its obligation under international law to provide access to effective remedies for human rights violations. The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States more than a decade ago, guarantees an “enforceable right to compensation” for unlawful convictions and deprivations of liberty. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) also guarantees victims of torture an “enforceable right to fair and adequate compensation.” When the summary dismissal of lawsuits alleging such government misconduct leaves no legally enforceable right to redress, the United States is in violation of its obligation under the ICCPR and CAT to provide such a remedy. Reforming the state secrets privilege would help bring the United States back toward compliance with international law.

We strongly support legislative reform of the state secret privilege, and we urge Congress to act promptly to pass the *State Secret Protection Act*.

Thank you both for your leadership on this important issue.

Sincerely,



Elisa Massimino
Chief Executive Officer and
Executive Director
Human Rights First