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The Honorable Patrick Leahy
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The Honorable Arlen Specter
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Dear Chairman Leahy and Senator Specter:

Ellen McBarnette
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I write to reiterate the American Bar Association's strong support for S. 2533, the *State Secrets Protection Act*. The Association appreciates your efforts in working with Senator Kennedy (D-MA) to introduce this important legislation. We urge the Committee to take prompt action to advance this proposal to the full Senate for consideration.

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The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. During the past several years, the government has asserted the state secrets privilege and sought dismissal at the pleadings stage in a number of cases involving fundamental rights and serious allegations of government misconduct. Courts have been required to evaluate these claims of privilege without the benefit of statutory guidance or clear precedent. This has resulted in the application of inconsistent standards and procedures in determinations regarding the applicability of the privilege.

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In August 2007, the ABA called upon Congress to enact legislation establishing procedures and standards to govern consideration of claims that may be subject to the state secrets privilege. Fundamentally, the ABA believes that courts should vigorously evaluate privilege claims in a manner that protects legitimate national security interests and should not dismiss cases based on the state secrets privilege except as a very last resort.

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Accordingly, the ABA strongly supports the *State Secrets Protection Act* because it provides for more meaningful judicial review of legal claims that may involve state secrets while ensuring that sensitive national security information is not jeopardized. The legislation lays out a clear procedural

roadmap for courts to follow in considering claims that may be subject to the state secrets privilege. It strengthens the courts' ability to determine the applicability of the privilege in a given situation by enhancing judicial access to the relevant information at issue in a case. Adoption of this legislation would bring uniformity to the process and facilitate the ability of the courts to act as a meaningful check on the government's assertion of the privilege.

The *State Secrets Protection Act* provides courts with the opportunity to conduct more searching judicial review before dismissing a case that may involve state secrets issues. At the same time, the bill recognizes that legitimate state secrets information may limit the ability of the government to defend against a claim in some instances. Specifically, the *State Secrets Protection Act* permits the government to plead the privilege in response to any allegation in a particular claim or counterclaim. It outlines procedures for the court to conduct *in camera* hearings in its review of evidence that may involve state secrets, including a requirement that the government make such evidence available to the court for review. The bill also highlights the tools that are available to the courts in directing the government to separate privileged from non-privileged information and endorses their authority to require the government to produce a non-privileged substitute for information adjudicated to be privileged, when possible.

The ABA believes that the legislation respects the roles of all three branches of government in addressing state secrets issues. The legislation builds upon the traditional strength of the judiciary, which routinely considers the decisions made by expert government agencies. Courts have a long history of dealing with sensitive national security information and evaluating executive branch determinations through tested and proven procedures such as those established by Congress in the *Freedom of Information Act* and the *Classified Information Procedures Act*. The legislation adds an additional judicial safeguard to the process by allowing for interlocutory appeals. It also provides accountability by requiring regular reports to Congressional committees on the use of the state secrets privilege to ensure that all three branches are engaged in this process.

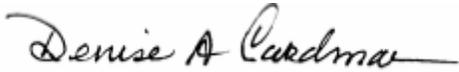
We believe that it is important to underscore that the legislation would not require disclosure of information subject to the state secrets privilege to the plaintiff or the plaintiff's counsel. It would also not require the government to choose between disclosing privileged information and foregoing a claim or defense. However, if the court rules that it is possible for the government to provide a non-privileged substitute for privileged evidence, and the government refuses to do so, only then would the government have to choose whether to proceed with a substitute or to forego a claim or defense. The ABA believes that this is a reasonable and appropriate requirement under such circumstances.

Establishing procedures for the courts to conduct more searching judicial review, informed by evidence, will ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability. Furthermore, it will restore the necessary checks and balances among the three branches of government to establish appropriate safeguards for protecting against the disclosure of

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true state secrets without compromising the effectiveness of our legal system. The ABA urges your support for this important legislation.

Sincerely,

A handwritten signature in black ink that reads "Denise A. Cardman". The signature is written in a cursive style with a long horizontal flourish at the end.

Denise A. Cardman
Acting Director

cc: Members, U.S. Senate Committee on the Judiciary