Madam Speaker, I proudly ask you to join me in commending Stephanie Hull for her accomplishments with the Girl Scouts of America and for her efforts put forth in achieving the highest distinction of Girl Scout Gold Award.

INTRODUCTION OF THE STATE SECRET PROTECTION ACT OF 2008 PROTECTING NATIONAL SECURITY AND THE RULE OF LAW THROUGH SAFE, FAIR, AND RESPONSIBLE PROCEDURES AND STANDARDS

HON. JERROLD NADLER

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 13, 2008

Mr. NADLER. Madam Speaker, the state secrets privilege is a common law doctrine that allows the Government to protect sensitive national security information from harmful disclosure in litigation.

This privilege was first recognized by the U.S. Supreme Court in the 1953 case of U.S. v. Reynolds, a case brought by the widows of three civilian engineers against the U.S. Government for negligence in a military airplane crash. The Government refused to produce an accident report of the crash, claiming that disclosure of the report would reveal secret military information harmful to national security. The Court accepted the Government's state secret claim and allowed the Government to withhold the report without ever reviewing it. When the report was discovered through an internet search 50 years later, it did not reveal any secret military information but, instead, showed the Government's negligence in the crash.

Unfortunately, Reynolds is not the only instance where the secrecy claims have been abused. Exaggerated claims of national security were made in an effort to conceal information about U.S. conduct in Vietnam and the bombing of Cambodia in the ''Pentagon Papers'' case and to prevent prosecution for the unlawful sale of arms to Iran and the funneling of proceeds from those sales to the Nicaraguan Contras. In the ''Pentagon Papers'' case, N.Y. Times Co. v. United States, 403 U.S. 713, Solicitor General Griswold warned the Supreme Court that publication of the information would pose a ''grave and immediate danger to the security of the United States.'' Eighteen years later, he acknowledged that he had never seen ''any trace of a threat to the national security'' from publication of the information and that ''there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.''

What these examples teach is that when a government is allowed to escape accountability by hiding behind unexamined claims of national security, it often will, making judicial oversight of state secrets privilege claim critical to our constitutional system of checks and balances. Unfortunately, in the years following Reynolds, courts have proven reluctant to test Government claims of secrecy, often failing to examine evidence independently and accepting the Government's secrecy claim at face value.

Concerns about the lack of judicial oversight of the state secrets privilege have increased as the current administration has responded to cases challenging the most troubling aspects of its '' war on terror''—including rendition, torture, and warrantless wiretapping—with blanket claims that these cases must be dismissed outright, before any discovery can proceed. As a result, injured plaintiffs have been denied justice and the courts have failed to address fundamental questions of constitutional rights. Take, for example, the case of Khaled el-Masri, a German citizen who was kidnapped, rendered to a CIA black site, and tortured before the administration realized that it had the wrong man. There is extensive public evidence supporting Mr. El-Masri's case, including a Council of Europe report verifying the accuracy of Mr. El-Masri's claims and the administration's public disclosure and defense of the rendition and interrogation of terror suspects as a valuable tool in its ''war on terror.'' Yet the administration successfully argued that Mr. El-Masri's case should be dismissed before any discovery could occur based on the state secret privilege.

The transformation of a governmental privilege to withhold specific items of evidence into a claim of absolute immunity, and the overall lack of consistency in how courts handle state secret claims, requires Congressional reform. In 1980, Congress enacted the Classified Information Procedures Act—known as CIPA—to provide courts with clear statutory guidance on handling secret evidence in criminal cases. Congress also authorized courts to review and rule upon sensitive materials under the Freedom of Information Act and the Foreign Intelligence Surveillance Act. For the past several decades, courts have effectively and safely applied these laws—under the procedures and standards articulated by Congress—to protect sensitive information while also respecting the rule of law and providing fairness and justice to litigants.

It is time to enact procedures and standards for civil cases similar to those that we already have provided for criminal cases. Many have called for this reform, including the American Bar Association, which recently issued a report calling upon Congress to enact procedures and standards that promote meaningful, independent judicial review and ''bring uniformity to a significant issue on which courts have adopted divergent approaches.'' The bipartisan Constitution Project has similarly urged us to ''craft statutory language to clarify that judges, not the executive branch, have the final say about whether disputed evidence is subject to the state secret privilege,'' reminding us that ''reforms are critical to ensure the independence of our judiciary and to provide a necessary check on executive power.''

In a recent hearing held by the Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Civil Liberties, which I chair, experts like retired Federal judges Patricia Wald and William Webster supported legislative efforts to require independent judicial review. According to Judge Webster:

''As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security.''

The State Secret Protection Act of 2008 provides much-needed reform by establishing rules and standards for determining state secret privilege claims. The act will strengthen national security by ensuring that legitimate secrets are protected from harmful disclosure, and it will strengthen the rule of law by preventing abuse of the privilege and maximizing the ability of litigants to achieve justice in court.

Modeled on CIPA, but adjusted for civil litigation, the State Secret Protection Act provides for secure judicial proceedings and other safeguards to protect valid state secrets. Under the act, a judge may not blindly rely upon assertions of secrecy and harm contained in an official's affidavit. Judges must review the information that the Government seeks to protect, along with any other evidence or argument relevant to the claim, to determine whether the harm identified by the Government is reasonably likely to occur. Where this standard is met, a judge may not order disclosure of the information. The judge must, however, consider whether a non-privileged substitute can be created that would allow the litigation to continue.

If a substitute is possible—for example, a redacted version of a document or a summary of the information—the government has the choice of producing the substitute or having the court resolve the issue to which the evidence is relevant against it, as happens in CIPA. Where there is no possible substitute, the judge may issue appropriate orders, including dismissing a claim or finding for or against a party on a factual or legal issue. The act allows the Government to raise a claim of privilege to avoid answering allegations in a complaint but prevents premature dismissal of claims before all issues of privilege are resolved and the parties have the opportunity to conduct non-privileged discovery.

Through these procedures and standards, the act allows parties the opportunity to make a preliminary case and provides courts with the flexibility to craft solutions that protect valid state secrets from harmful and serve the interests of justice. Congress has clear constitutional authority to establish rules of procedure and evidence for the courts, and reform of the state secrets privilege in civil litigation is long overdue. I urge all of you, my colleagues in the House, to join us in this important effort.

IN RECOGNITION OF THE CENTRAL VALLEY HEALTH NETWORK

HON. DENNIS A. CARDOZA

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 13, 2008

Mr. CARDOZA. Madam Speaker, it is with the greatest pleasure that I rise today in recognition of the Central Valley Health Network as they celebrate their tenth anniversary. Comprised of 13 private, non-profit community health center systems, the Central Valley Health Network currently operates 116 clinic sites throughout 20 counties in California, providing high quality health care to those most in need.