

110TH CONGRESS  
2D SESSION

# H. R. 5607

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2008

Mr. NADLER (for himself, Mr. PETRI, Mr. CONYERS, and Mr. DELAHUNT) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “State Secret Protection  
5 Act of 2008”.

6 **SEC. 2. STATE SECRET PRIVILEGE.**

7 In any civil action brought in Federal or State court,  
8 the Government has a privilege to refuse to give evidence  
9 and to prevent any person from giving evidence only if  
10 the Government shows that public disclosure of the evi-

1 dence that the Government seeks to protect would be rea-  
2 sonably likely to cause significant harm to the national  
3 defense or the diplomatic relations of the United States.

4 **SEC. 3. PROTECTION OF SECRETS.**

5 (a) IN GENERAL.—The court shall take steps to pro-  
6 tect sensitive information that comes before the court in  
7 connection with proceedings under this Act. These steps  
8 may include reviewing evidence or pleadings and hearing  
9 arguments ex parte, issuing protective orders, requiring  
10 security clearance for parties or counsel, placing material  
11 under seal, and applying security procedures established  
12 under the Classified Information Procedures Act for clas-  
13 sified information to protect the sensitive information.

14 (b) IN CAMERA PROCEEDINGS.—All hearings and  
15 other proceedings under this Act may be conducted in  
16 camera, as needed to protect information or evidence that  
17 may be subject to the privilege.

18 (c) PARTICIPATION OF COUNSEL.—Participation of  
19 counsel in proceedings under this Act shall not be limited  
20 unless the court determines that the limitation is a nec-  
21 essary step to protect evidence the Government asserts is  
22 protected by the privilege or that supports the claim of  
23 privilege and that no less restrictive means of protection  
24 suffice. The court shall give a written explanation of its

1 decision to the parties and their counsel, which may be  
2 placed under seal.

3 (d) PRODUCTION OF ADEQUATE SUBSTITUTE PEND-  
4 ING RESOLUTION OF THE CLAIM OF PRIVILEGE.—If at  
5 any point during its consideration of the Government’s  
6 claim, the court determines that disclosure of information  
7 to a party or counsel, or disclosure of information by a  
8 party that already possesses it, presents a risk of a harm  
9 described in section 2 that cannot be addressed through  
10 less restrictive means provided in this section, the court  
11 may require the Government to produce an adequate sub-  
12 stitute, such as a redacted version, summary of the infor-  
13 mation, or stipulation regarding the relevant facts, if the  
14 court deems such a substitute feasible. The substitute  
15 must be reviewed and approved by the court and must  
16 provide counsel with a substantially equivalent opportunity  
17 to assess and challenge the Government’s claim of privi-  
18 lege as would the protected information.

19 **SEC. 4. ASSERTION OF THE PRIVILEGE.**

20 (a) IN GENERAL.—The Government may assert the  
21 privilege in connection with any claim in a civil action to  
22 which it is a party or may intervene in a civil action to  
23 which it is not a party to do so.

24 (b) SUPPORTING AFFIDAVITS.—If the Government  
25 asserts the privilege, the Government shall provide the

1 court with an affidavit signed by the head of the executive  
2 branch agency with responsibility for, and control over, the  
3 evidence asserted to be subject to the privilege. In the affi-  
4 davit, the head of the agency shall explain the factual basis  
5 for the claim of privilege. The Government shall make  
6 public an unclassified version of the affidavit.

7 **SEC. 5. PRELIMINARY PROCEEDINGS.**

8 (a) **PRELIMINARY REVIEW BY COURT.**—Once the  
9 Government has asserted the privilege, and before the  
10 Court makes any determinations under section 6, the  
11 court shall undertake a preliminary review of the informa-  
12 tion the Government asserts is protected by the privilege  
13 and provide the Government an opportunity to seek pro-  
14 tective measures under this Act. After any initial protec-  
15 tive measures are in place, the Court shall proceed to the  
16 consideration of additional preliminary matters under this  
17 section.

18 (b) **CONSIDERATION OF WHETHER TO APPOINT SPE-**  
19 **CIAL MASTER OR EXPERT WITNESS.**—The court shall  
20 consider whether the appointment of a special master with  
21 appropriate expertise or an expert witness, or both, would  
22 facilitate the court's duties under this Act.

23 (c) **INDEX OF MATERIALS.**—The court may order the  
24 Government to provide a manageable index of evidence the  
25 Government asserts is subject to the privilege. The index

1 must correlate statements made in the affidavit required  
2 under this Act with portions of the evidence the Govern-  
3 ment asserts is subject to the privilege. The index shall  
4 be specific enough to afford the court an adequate founda-  
5 tion to review the basis of the assertion of the privilege  
6 by the Government.

7 (d) PREHEARING CONFERENCES.—After the prelimi-  
8 nary review the court shall hold one or more conferences  
9 with the parties to—

10 (1) determine any steps needed to protect sen-  
11 sitive information;

12 (2) define the issues presented by the Govern-  
13 ment’s claim of privilege, including whether it is pos-  
14 sible to allow the parties to complete nonprivileged  
15 discovery before determining whether the claim of  
16 privilege is valid;

17 (3) order disclosure of evidence to the court  
18 needed to assess the claim, including all evidence the  
19 Government asserts is protected by the privilege and  
20 other evidence related to the Government’s claim;

21 (4) resolve any disputes regarding participation  
22 of counsel or parties in proceedings relating to the  
23 claim, including access to the Government’s evidence  
24 and arguments;

1           (5) set a schedule for completion of discovery  
2           related to the Government's claim; and

3           (6) take other steps as needed, such as ordering  
4           counsel or parties to obtain security clearances.

5           (e) SECURITY CLEARANCES.—If the court orders a  
6 party or counsel to obtain a security clearance, the Gov-  
7 ernment shall promptly conduct the necessary review and  
8 determine whether or not to provide the clearance. If the  
9 necessary clearance is not promptly provided to counsel  
10 for a party, the party may propose that alternate or addi-  
11 tional counsel be cleared. If within a reasonable time, al-  
12 ternative or additional counsel selected by the party can-  
13 not be cleared, then the court, in consultation with that  
14 party and that party's counsel, shall appoint another at-  
15 torney, who can obtain the necessary clearance promptly,  
16 to represent the party in proceedings under this Act.  
17 When a security clearance for counsel sought under this  
18 Act is denied, the court may require the Government to  
19 present an ex parte explanation of that denial.

20 **SEC. 6. PROCEDURES AND STANDARD FOR ASSESSING THE**  
21 **PRIVILEGE CLAIM.**

22           (a) HEARING.—The court shall conduct a hearing to  
23 determine whether the privilege claim is valid.

24           (b) BASIS FOR RULING.—

1           (1) GENERALLY.—The court may not deter-  
2 mine that the privilege is valid until the court has  
3 reviewed—

4           (A) except as provided in paragraph (2),  
5 all of the evidence that the Government asserts  
6 is privileged;

7           (B) the affidavits, evidence, memoranda  
8 and other filings submitted by the parties re-  
9 lated to the privilege claim; and

10           (C) any other evidence that the court de-  
11 termines it needs to rule on the privilege.

12           (2) SAMPLING IN CERTAIN CASES.—Where the  
13 volume of evidence the Government asserts is privi-  
14 leged precludes a timely review of each item of evi-  
15 dence, or the court otherwise determines a review of  
16 all of that evidence is not feasible, the court may  
17 substitute a sufficient sampling of the evidence if the  
18 court determines that there is no reasonable possi-  
19 bility that review of the additional evidence would  
20 change the court’s determination on the privilege  
21 claim and the evidence reviewed is sufficient to en-  
22 able to court to make the independent assessment  
23 required by this section.

24           (c) STANDARD.—In ruling on the validity of the privi-  
25 lege, the court shall make an independent assessment of

1 whether the harm identified by the Government, as re-  
2 quired by section 2, is reasonably likely to occur should  
3 the privilege not be upheld. The court shall weigh testi-  
4 mony from Government experts in the same manner as  
5 it does, and along with, any other expert testimony.

6 (d) BURDEN OF PROOF.—The Government shall have  
7 the burden of proof as to the nature of the harm and as  
8 to the likelihood of its occurrence.

9 **SEC. 7. EFFECT OF COURT DETERMINATION.**

10 (a) IN GENERAL.—If the court determines that the  
11 privilege is not validly asserted as to an item of evidence,  
12 the item may be disclosed to a nongovernmental party or  
13 admitted at trial, subject to the other rules of evidence.  
14 If the court determines that the privilege is validly as-  
15 serted as to an item, that item shall not be disclosed to  
16 a nongovernmental party or the public.

17 (b) NONPRIVILEGED SUBSTITUTE.—

18 (1) COURT CONSIDERATION OF SUBSTITUTE.—  
19 If the court finds that the privilege is validly as-  
20 serted as to an item of material evidence and it is  
21 possible to craft a nonprivileged substitute, such as  
22 those described in section 3(d), for the privileged  
23 evidence that would provide the parties a substan-  
24 tially equivalent opportunity to litigate the case, the



1 court shall order the Government to produce the  
2 substitute to the satisfaction of the court.

3 (2) REFUSAL TO PROVIDE.—In a civil action  
4 brought against the Government, if the court orders  
5 the Government to provide a nonprivileged substitute  
6 for evidence or information and the Government  
7 fails to comply, in addition to any other appropriate  
8 sanctions, the court shall find against the Govern-  
9 ment on the factual or legal issue to which the privi-  
10 leged information is relevant. If the action is not  
11 brought against the Government, the court shall  
12 weigh the equities and make appropriate orders as  
13 provided in subsection (d).

14 (c) OPPORTUNITY TO COMPLETE DISCOVERY.—The  
15 court shall not resolve any issue or claim and shall not  
16 grant a motion to dismiss or motion for summary judg-  
17 ment based on the state secrets privilege and adversely  
18 to any party against whom the Government's privilege  
19 claim has been upheld until that party has had a full op-  
20 portunity to complete discovery of nonprivileged evidence  
21 and to litigate the issue or claim to which the privileged  
22 evidence is relevant without regard to that privileged infor-  
23 mation.

24 (d) APPROPRIATE ORDERS IN THE INTEREST OF  
25 JUSTICE.—After reviewing all available evidence, and only

1 after determining that privileged evidence, for which it is  
2 impossible to create a nonprivileged substitute, is nec-  
3 essary to decide a factual or legal issue or claim, the court  
4 shall weigh the equities and make appropriate orders in  
5 the interest of justice, such as striking the testimony of  
6 a witness, finding in favor of or against a party on a fac-  
7 tual or legal issue to which the evidence is relevant, or  
8 dismissing a claim or counterclaim.

9 **SEC. 8. INTERLOCUTORY APPEAL.**

10 (a) IN GENERAL.—The courts of appeal shall have  
11 jurisdiction of an appeal by any party from any interlocu-  
12 tory decision or order of a district court of the United  
13 States under this Act.

14 (b) APPEAL.—

15 (1) IN GENERAL.—An appeal taken under this  
16 section either before or during trial shall be expe-  
17 dited by the court of appeals.

18 (2) DURING TRIAL.—If an appeal is taken dur-  
19 ing trial, the district court shall adjourn the trial  
20 until the appeal is resolved and the court of ap-  
21 peals—

22 (A) shall hear argument on appeal as expe-  
23 ditiously as possible after adjournment of the  
24 trial by the district court;

1 (B) may dispense with written briefs other  
2 than the supporting materials previously sub-  
3 mitted to the trial court;

4 (C) shall render its decision as expedi-  
5 tiously as possible after argument on appeal;  
6 and

7 (D) may dispense with the issuance of a  
8 written opinion in rendering its decision.

9 **SEC. 9. REPORTING.**

10 (a) IN GENERAL.—Consistent with applicable au-  
11 thorities and duties, including those conferred by the Con-  
12 stitution of the United States upon the executive and legis-  
13 lative branches, the Attorney General shall report in writ-  
14 ing to the Permanent Select Committee on Intelligence of  
15 the House of Representatives, the Select Committee on In-  
16 telligence of the Senate, and the chairmen and ranking  
17 minority members of the Committees on the Judiciary of  
18 the House of Representatives and Senate on any case in  
19 which the Government invokes a state secrets privilege,  
20 not later than 30 calendar days after the date of such as-  
21 sertion. Each report submitted under this subsection shall  
22 include all affidavits filed under this Act by the Govern-  
23 ment.

24 (b) OPERATION AND EFFECTIVENESS.—

1           (1) IN GENERAL.—The Attorney General shall  
2 deliver to the committees of Congress described in  
3 subsection (a) a report concerning the operation and  
4 effectiveness of this Act and including suggested  
5 amendments to the Act.

6           (2) DEADLINE.—The Attorney General shall  
7 submit this report not later than 1 year after the  
8 date of enactment of this Act, and every year there-  
9 after until the date that is 3 years after that date  
10 of enactment. After the date that is 3 years after  
11 that date of enactment, the Attorney General shall  
12 submit a report under paragraph (1) as necessary.

13 **SEC. 10. RULE OF CONSTRUCTION.**

14           This Act provides the only privilege that may be as-  
15 serted based on state secrets and the standards and proce-  
16 dures set forth in this Act apply to any assertion of the  
17 privilege.

18 **SEC. 11. APPLICATION.**

19           This Act applies to claims pending on or after the  
20 date of enactment of this Act. A court also may relieve  
21 a party or its legal representative from a final judgment,  
22 order, or proceeding that was based, in whole or in part,  
23 on the state secrets privilege if—

1           (1) the motion for relief is filed with the ren-  
2           dering court within one year of the date of enact-  
3           ment of this Act;

4           (2) the underlying judgment, order, or pro-  
5           ceeding from which the party seeks relief was en-  
6           tered after January 1, 2002; and

7           (3) the claim on which the judgement, order, or  
8           proceeding is based is—

9                   (A) against the Government; or

10                   (B) arises out of conduct by persons acting  
11           in the capacity of a Government officer, em-  
12           ployee, or agent.

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