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S. 2533

[Report No. 110-442]

To enact a safe, fair, and responsible state secrets privilege Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 3), 2008

Mr. KENNEDY (for himself, Mr. SPECTER, Mr. LEAHY, Mr. FEINGOLD, Mr. WHITEHOUSE, Mr. WEBB, Mrs. CLINTON, Mr. DODD, Mrs. MCCASKILL, Mr. SCHUMER, Mr. BIDEN, Mr. MENENDEZ, and Mr. TESTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

AUGUST 1, 2008

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To enact a safe, fair, and responsible state secrets privilege Act.

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 Secrets Protec-
5 tion Act”.

1 **SEC. 2. STATE SECRETS PROTECTION.**

2 (a) IN GENERAL.—Title 28 of the United States
3 Code is amended by adding after chapter 180, the fol-
4 lowing:

5 **“CHAPTER 181—STATE SECRETS**
6 **PROTECTION**

“Sec.

“4051. Definition.

“4052. Rules governing procedures related to this chapter.

“4053. Procedures for answering a complaint.

“4054. Procedures for determining whether evidence is protected from disclosure
by the state secrets privilege.

“4055. Procedures when evidence protected by the state secrets privilege is nec-
essary for adjudication of a claim or counterclaim.

“4056. Interlocutory appeal.

“4057. Security procedures.

“4058. Reporting.

“4059. Rule of construction.

7 **“§ 4051. Definition**

8 “In this chapter, the term ‘state secret’ refers to any
9 information that, if disclosed publicly, would be reasonably
10 likely to cause significant harm to the national defense or
11 foreign relations of the United States.

12 **“§ 4052. Rules governing procedures related to this**
13 **chapter**

14 “(a) DOCUMENTS.—A Federal court—

15 “(1) shall determine which filings, motions, and
16 affidavits, or portions thereof, submitted under this
17 chapter shall be submitted ex parte;

18 “(2) may order a party to provide a redacted,
19 unclassified, or summary substitute of a filing, mo-
20 tion, or affidavit to other parties; and

1 “(3) shall make decisions under this subsection
2 taking into consideration the interests of justice and
3 national security.

4 “(b) HEARINGS.—

5 “(1) IN CAMERA HEARINGS.—

6 “(A) IN GENERAL.—Except as provided in
7 subparagraph (B), all hearings under this chap-
8 ter shall be conducted in camera.

9 “(B) EXCEPTION.—A court may not con-
10 duct a hearing under this chapter in camera
11 based on the assertion of the state secrets privi-
12 lege if the court determines that the hearing re-
13 lates only to a question of law and does not
14 present a risk of revealing state secrets.

15 “(2) EX PARTE HEARINGS.—A Federal court
16 may conduct hearings or portions thereof ex parte if
17 the court determines, following in camera review of
18 the evidence, that the interests of justice and na-
19 tional security cannot adequately be protected
20 through the measures described in subsections (c)
21 and (d).

22 “(3) RECORD OF HEARINGS.—The court shall
23 preserve the record of all hearings conducted under
24 this chapter for use in the event of an appeal. The

1 court shall seal all records to the extent necessary to
2 protect national security.

3 “(c) ATTORNEY SECURITY CLEARANCES.—

4 “(1) IN GENERAL.—A Federal court shall, at
5 the request of the United States, limit participation
6 in hearings conducted under this chapter, or access
7 to motions or affidavits submitted under this chap-
8 ter, to attorneys with appropriate security clear-
9 ances, if the court determines that limiting partici-
10 pation in that manner would serve the interests of
11 national security. The court may also appoint a
12 guardian ad litem with the necessary security clear-
13 ances to represent any party for the purposes of any
14 hearing conducted under this chapter.

15 “(2) STAYS.—During the pendency of an appli-
16 cation for security clearance by an attorney rep-
17 resenting a party in a hearing conducted under this
18 chapter, the court may suspend proceedings if the
19 court determines that such a suspension would serve
20 the interests of justice.

21 “(d) PROTECTIVE ORDERS.—A Federal court may
22 issue a protective order governing any information or evi-
23 dence disclosed or discussed at any hearing conducted
24 under this chapter if the court determines that issuing
25 such an order is necessary to protect national security.

1 “(e) OPINIONS AND ORDERS.—Any opinions or or-
2 ders issued under this chapter may be issued under seal
3 or in redacted versions if, and to the extent that, the court
4 determines that such measure is necessary to protect na-
5 tional security.

6 “(f) SPECIAL MASTERS.—A Federal court may ap-
7 point a special master or other independent advisor who
8 holds the necessary security clearances to assist the court
9 in handling a matter subject to this chapter.

10 **“§ 4053. Procedures for answering a complaint**

11 “(a) INTERVENTION.—The United States may inter-
12 vene in any civil action in order to protect information
13 the Government determines may be subject to the state
14 secrets privilege.

15 “(b) IMPERMISSIBLE AS GROUNDS FOR DISMISSAL
16 PRIOR TO HEARINGS.—Except as provided in section
17 4055, the state secrets privilege shall not constitute
18 grounds for dismissal of a case or claim. A ruling on a
19 motion to dismiss, or for summary judgment, based on
20 the state secrets privilege shall be deferred pending com-
21 pletion of the discovery and pretrial hearings provided
22 under this chapter.

23 “(c) PLEADING STATE SECRETS.—In answering a
24 complaint, if the United States or an officer or agency
25 of the United States is a party to the litigation, the United

1 States may plead the state secrets privilege in response
2 to any allegation in any individual claim or counterclaim
3 if the admission or denial of that allegation in that indi-
4 vidual claim or counterclaim would itself divulge a state
5 secret to another party or the public. If the United States
6 has intervened in a civil action, it may invoke the state
7 secrets privilege in response to any allegation in any indi-
8 vidual claim or counterclaim if the admission or denial by
9 a party of that allegation in that individual claim or coun-
10 terclaim would itself divulge a state secret to another
11 party or the public. No adverse inference shall be drawn
12 from a pleading of state secrets in an answer to an item
13 in a complaint.

14 “(d) SUPPORTING AFFIDAVIT.—In each instance in
15 which the United States invokes the state secrets privilege
16 in response to 1 or more claims, it shall provide the court
17 with an affidavit signed by the head of the executive
18 branch agency with responsibility for, and control over, the
19 state secrets involved explaining the factual basis for the
20 privilege. The United States shall make public an unclassi-
21 fied version of the affidavit.

1 **“§ 4054. Procedures for determining whether evi-**
2 **dence is protected from disclosure by the**
3 **state secrets privilege**

4 **“(a) INVOKING THE STATE SECRETS PRIVILEGE.—**

5 The United States may, in any civil action to which the
6 United States is a party or in any other civil action before
7 a Federal or State court, invoke the state secrets privilege
8 as a ground for withholding information or evidence in dis-
9 covery or for preventing the introduction of evidence at
10 trial.

11 **“(b) SUPPORTING AFFIDAVIT.—**In each instance in

12 which the United States invokes the state secrets privilege
13 with respect to an item of information or evidence, the
14 United States shall provide the court with an affidavit
15 signed by the head of the executive branch agency with
16 responsibility for, and control over, the state secrets in-
17 volved explaining the factual basis for the claim of privi-
18 lege. The United States shall make public an unclassified
19 version of the affidavit.

20 **“(c) HEARING.—**A Federal court shall conduct a

21 hearing to review any affidavit provided by the United
22 States under this section and all evidence the United
23 States asserts is protected from disclosure by the state se-
24 crets privilege.

25 **“(d) REVIEW OF EVIDENCE.—**

1 “(1) SUBMISSION OF EVIDENCE.—In addition
2 to the affidavit provided under subsection (b), the
3 United States shall make all evidence the United
4 States claims is subject to the state secrets privilege
5 available for the court to review, consistent with the
6 requirements of section 4052, before any hearing
7 conducted under this section.

8 “(2) INDEX OF MATERIALS.—The United
9 States shall provide the court with a manageable
10 index of evidence it contends is subject to the state
11 secrets privilege by formulating a system of
12 itemizing and indexing that would correlate state-
13 ments made in the affidavit provided under sub-
14 section (b) with portions of the evidence the United
15 States asserts is subject to the state secrets privi-
16 lege. The index shall be specific enough to afford the
17 court an adequate foundation to review the basis of
18 the invocation of the privilege by the United States.

19 “(c) DETERMINATIONS AS TO APPLICABILITY OF
20 STATE SECRETS PRIVILEGE.—

21 “(1) IN GENERAL.—As to each item of evidence
22 that the United States asserts is protected by the
23 state secrets privilege, the court shall review, con-
24 sistent with the requirements of section 4052, the
25 specific item of evidence to determine whether the

1 claim of the United States is valid. Evidence is sub-
2 ject to the state secrets privilege if it contains a
3 state secret, or there is no possible means of effec-
4 tively segregating it from other evidence that con-
5 tains a state secret.

6 “(2) ADMISSIBILITY.—If the court agrees that
7 an item of evidence is subject to the state secrets
8 privilege, that item shall not be disclosed or admis-
9 sible as evidence.

10 “(3) DISCLOSURE.—If the court determines
11 that an item of evidence is not subject to the state
12 secrets privilege, the state secrets privilege does not
13 prohibit the disclosure of that item to the opposing
14 party or the admission of that item at trial, subject
15 to the other rules of evidence.

16 “(f) NON-PRIVILEGED SUBSTITUTE.—If the court
17 finds that material evidence is subject to the state secrets
18 privilege and it is possible to craft a non-privileged sub-
19 stitute for that privileged material evidence that provides
20 a substantially equivalent opportunity to litigate the claim
21 or defense as would that privileged material evidence, the
22 court shall order the United States to provide such a sub-
23 stitute, which may consist of—

24 “(1) a summary of such privileged information;

1 “(2) a version of the evidence with privileged
2 information redacted;

3 “(3) a statement admitting relevant facts that
4 the privileged information would tend to prove; or

5 “(4) any other alternative as directed by the
6 court in the interests of justice and protecting na-
7 tional security.

8 “(g) REFUSAL TO PROVIDE NON-PRIVILEGED SUB-
9 STITUTE.—In a suit against the United States or an offi-
10 cer or agent of the United States acting in the official ca-
11 pacity of that officer or agent, if the court orders the
12 United States to provide a non-privileged substitute for
13 evidence in accordance with this section, and the United
14 States fails to comply, the court shall resolve the disputed
15 issue of fact or law to which the evidence pertains in the
16 non-government party’s favor.

17 **“§ 4055. Procedures when evidence protected by the**
18 **state secrets privilege is necessary for ad-**
19 **judication of a claim or counterclaim**

20 “After reviewing all available evidence, privileged and
21 non-privileged, a Federal court may dismiss a claim or
22 counterclaim on the basis of the state secrets privilege only
23 if the court determines that—

24 “(1) it is impossible to create for privileged ma-
25 terial evidence a non-privileged substitute under sec-

1 tion 4054(f) that provides a substantially equivalent
2 opportunity to litigate the claim or counterclaim as
3 would that privileged material evidence;

4 “(2) dismissal of the claim or counterclaim
5 would not harm national security; and

6 “(3) continuing with litigation of the claim or
7 counterclaim in the absence of the privileged mate-
8 rial evidence would substantially impair the ability of
9 a party to pursue a valid defense to the claim or
10 counterclaim.

11 **“§ 4056. Interlocutory appeal**

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

16 “(b) APPEAL.—

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

20 “(2) DURING TRIAL.—If an appeal is taken
21 during trial, the district court shall adjourn the trial
22 until the appeal is resolved and the court of ap-
23 peals—

1 “(A) shall hear argument on appeal as ex-
2 peditionally as possible after adjournment of the
3 trial by the district court;

4 “(B) may dispense with written briefs
5 other than the supporting materials previously
6 submitted to the trial court;

7 “(C) shall render its decision as expedi-
8 tiously as possible after argument on appeal;
9 and

10 “(D) may dispense with the issuance of a
11 written opinion in rendering its decision.

12 **“§ 4057. Security procedures**

13 “(a) IN GENERAL.—The security procedures estab-
14 lished under the Classified Information Procedures Act
15 (18 U.S.C. App.) by the Chief Justice of the United States
16 for the protection of classified information shall be used
17 to protect against unauthorized disclosure of evidence pro-
18 tected by the state secrets privilege.

19 “(b) RULES.—The Chief Justice of the United
20 States, in consultation with the Attorney General, the Di-
21 rector of National Intelligence, and the Secretary of De-
22 fense, may create additional rules or amend the rules to
23 implement this chapter and shall submit any such addi-
24 tional rules or amendments to the Permanent Select Com-
25 mittee on Intelligence and the Committee on the Judiciary

1 of the House of Representatives and the Select Committee
 2 on Intelligence and the Committee on the Judiciary of the
 3 Senate. Any such rules or amendments shall become effec-
 4 tive 90 days after such submission, unless Congress pro-
 5 vides otherwise. Rules and amendments shall comply with
 6 the letter and spirit of this chapter, and may include pro-
 7 cedures concerning the role of magistrate judges and spe-
 8 cial masters in assisting courts in carrying out this chap-
 9 ter.

10 **“§ 4058. Reporting**

11 “(a) IN GENERAL.—The Attorney General shall re-
 12 port in writing to the Permanent Select Committee on In-
 13 telligence of the House of Representatives, the Select
 14 Committee on Intelligence of the Senate, and the chairmen
 15 and ranking minority members of the Committees on the
 16 Judiciary of the Senate and House of Representatives on
 17 any case in which the United States invokes the state se-
 18 crets privilege, not later than 30 calendar days after the
 19 date of such assertion. Each report submitted under this
 20 subsection shall include all affidavits filed under this chap-
 21 ter by the United States.

22 “(b) OPERATION AND EFFECTIVENESS.—

23 “(1) IN GENERAL.—The Attorney General shall
 24 deliver to the committees of Congress described in
 25 subsection (a) a report concerning the operation and

1 effectiveness of this chapter and including suggested
2 amendments to this chapter.

3 ~~“(2) DEADLINE.—The Attorney General shall~~
4 ~~submit a report under paragraph (1) not later than~~
5 ~~1 year after the date of enactment of this chapter,~~
6 ~~and every year there after until the date that is 3~~
7 ~~years after that date of enactment. After the date~~
8 ~~that is 3 years after that date of enactment, the At-~~
9 ~~torney General shall submit a report under para-~~
10 ~~graph (1) as necessary.~~

11 **“§ 4059. Rule of construction**

12 ~~“Nothing in this chapter is intended to supersede any~~
13 ~~other limit on the state secrets privilege under any other~~
14 ~~provision of law.”.~~

15 ~~(b) TECHNICAL AND CONFORMING AMENDMENT.—~~
16 ~~The table of chapters for title 28, United States Code,~~
17 ~~is amended by adding at the end the following:~~

181. State secrets protection 4051

18 **SEC. 3. APPLICATION TO PENDING CASES.**

19 The amendments made by this Act shall apply to any
20 civil case pending on or after the date of enactment of
21 this Act.

22 **SECTION 1. SHORT TITLE.**

23 *This Act may be cited as the “State Secrets Protection*
24 *Act”.*

1 **SEC. 2. STATE SECRETS PROTECTION.**

2 (a) *IN GENERAL.*—Title 28 of the United States Code
3 is amended by adding after chapter 180, the following:

4 **“CHAPTER 181—STATE SECRETS**
5 **PROTECTION**

“Sec.

“4051. *Definitions.*

“4052. *Rules governing procedures related to this chapter.*

“4053. *Procedures for answering a complaint.*

“4054. *Procedures for determining whether evidence is protected from disclosure
by the state secrets privilege.*

“4055. *Procedures when evidence protected by the state secrets privilege is nec-
essary for adjudication of a claim or counterclaim.*

“4056. *Interlocutory appeal.*

“4057. *Security procedures.*

“4058. *Reporting.*

“4059. *Rule of construction.*

6 **“§ 4051. Definitions**

7 *“In this chapter—*

8 “(1) the term ‘evidence’ means any document,
9 witness testimony, discovery response, affidavit, ob-
10 ject, or other material that could be admissible in
11 court under the Federal Rules of Evidence or discover-
12 able under the Federal Rules of Civil Procedure; and

13 “(2) the term ‘state secret’ refers to any informa-
14 tion that, if disclosed publicly, would be reasonably
15 likely to cause significant harm to the national de-
16 fense or foreign relations of the United States.

17 **“§ 4052. Rules governing procedures related to this**
18 **chapter**

19 “(a) *DOCUMENTS.*—A Federal court—

1 “(1) shall determine which filings, motions, and
2 affidavits, or portions thereof, submitted under this
3 chapter shall be submitted *ex parte*;

4 “(2) may order a party to provide a redacted,
5 unclassified, or summary substitute of a filing, mo-
6 tion, or affidavit to other parties; and

7 “(3) shall make decisions under this subsection
8 taking into consideration the interests of justice and
9 national security.

10 “(b) HEARINGS.—

11 “(1) IN CAMERA HEARINGS.—

12 “(A) IN GENERAL.—Except as provided in
13 subparagraph (B), all hearings under this chap-
14 ter shall be conducted in camera.

15 “(B) EXCEPTION.—A court may not con-
16 duct a hearing under this chapter in camera
17 based on the assertion of the state secrets privi-
18 lege if the court determines that the hearing re-
19 lates only to a question of law and does not
20 present a risk of revealing state secrets.

21 “(2) EX PARTE HEARINGS.—A Federal court
22 may conduct hearings or portions thereof *ex parte* if
23 the court determines, following in camera review of
24 the evidence, that the interests of justice and national

1 *security cannot adequately be protected through the*
2 *measures described in subsections (c) and (d).*

3 “(3) *RECORD OF HEARINGS.*—*The court shall*
4 *preserve the record of all hearings conducted under*
5 *this chapter for use in the event of an appeal. The*
6 *court shall seal all records to the extent necessary to*
7 *protect national security.*

8 “(c) *ATTORNEY SECURITY CLEARANCES.*—

9 “(1) *IN GENERAL.*—*A Federal court shall, at the*
10 *request of the United States, limit participation in*
11 *hearings conducted under this chapter, or access to*
12 *motions or affidavits submitted under this chapter, to*
13 *attorneys with appropriate security clearances, if the*
14 *court determines that limiting participation in that*
15 *manner would serve the interests of national security.*
16 *The court may also appoint a guardian ad litem with*
17 *the necessary security clearances to represent any*
18 *party for the purposes of any hearing conducted*
19 *under this chapter.*

20 “(2) *STAYS.*—*During the pendency of an appli-*
21 *cation for security clearance by an attorney rep-*
22 *resenting a party in a hearing conducted under this*
23 *chapter, the court may suspend proceedings if the*
24 *court determines that such a suspension would serve*
25 *the interests of justice.*

1 “(3) *COURT OVERSIGHT.*—*If the United States*
2 *fails to provide a security clearance necessary to con-*
3 *duct a hearing under this chapter in a reasonable pe-*
4 *riod of time, the court may review in camera and ex*
5 *parte the reasons of the United States for denying or*
6 *delaying the clearance to ensure that the United*
7 *States is not withholding a security clearance from a*
8 *particular attorney or class of attorneys for any rea-*
9 *son other than protection of national security.*

10 “(d) *PROTECTIVE ORDERS.*—*A Federal court may*
11 *issue a protective order governing any information or evi-*
12 *dence disclosed or discussed at any hearing conducted under*
13 *this chapter if the court determines that issuing such an*
14 *order is necessary to protect national security.*

15 “(e) *OPINIONS AND ORDERS.*—*Any opinions or orders*
16 *issued under this chapter may be issued under seal or in*
17 *redacted versions if, and to the extent that, the court deter-*
18 *mines that such measure is necessary to protect national*
19 *security.*

20 “(f) *SPECIAL MASTERS.*—*A Federal court may ap-*
21 *point a special master or other independent advisor who*
22 *holds the necessary security clearances to assist the court*
23 *in handling a matter subject to this chapter.*

1 **“§ 4053. Procedures for answering a complaint**

2 “(a) *INTERVENTION.*—*The United States may inter-*
3 *vene in any civil action in order to protect information*
4 *the Government determines may be subject to the state se-*
5 *crets privilege.*

6 “(b) *IMPERMISSIBLE AS GROUNDS FOR DISMISSAL*
7 *PRIOR TO HEARINGS.*—*Except as provided in section 4055,*
8 *the state secrets privilege shall not constitute grounds for*
9 *dismissal of a case or claim. If a motion to dismiss or for*
10 *summary judgment is based in whole or in part on the state*
11 *secrets privilege, or may be affected by the assertion of the*
12 *state secrets privilege, a ruling on that motion shall be de-*
13 *ferred pending completion of the hearings provided under*
14 *this chapter, unless the motion can be granted on grounds*
15 *unrelated to, and unaffected by, the assertion of the state*
16 *secrets privilege.*

17 “(c) *PLEADING STATE SECRETS.*—*In answering a*
18 *complaint, if the United States or an officer or agency of*
19 *the United States is a party to the litigation, the United*
20 *States may plead the state secrets privilege in response to*
21 *any allegation in any individual claim or counterclaim if*
22 *the admission or denial of that allegation in that individual*
23 *claim or counterclaim would itself divulge a state secret to*
24 *another party or the public. If the United States has inter-*
25 *vened in a civil action, it may assert the state secrets privi-*
26 *lege in response to any allegation in any individual claim*

1 or counterclaim if the admission or denial by a party of
 2 that allegation in that individual claim or counterclaim
 3 would itself divulge a state secret to another party or the
 4 public. No adverse inference or admission shall be drawn
 5 from a pleading of state secrets in an answer to an item
 6 in a complaint.

7 “(d) *SUPPORTING AFFIDAVIT.*—In each instance in
 8 which the United States asserts the state secrets privilege
 9 in response to 1 or more claims, it shall provide the court
 10 with an affidavit signed by the head of the executive branch
 11 agency with responsibility for, and control over, the asserted
 12 state secrets explaining the factual basis for the assertion
 13 of the privilege and attesting that personal consideration
 14 was given to the assertion of the privilege. The duties of
 15 the head of an executive branch agency under this sub-
 16 section may not be delegated.

17 **“§ 4054. Procedures for determining whether evidence**
 18 **is protected from disclosure by the state**
 19 **secrets privilege**

20 “(a) *ASSERTING THE STATE SECRETS PRIVILEGE.*—
 21 The United States may, in any civil action to which the
 22 United States is a party or in any other civil action before
 23 a Federal or State court, assert the state secrets privilege
 24 as a ground for withholding information or evidence in dis-
 25 covery or for preventing the disclosure of information

1 *through court filings or through the introduction of evi-*
2 *dence.*

3 “(b) *SUPPORTING AFFIDAVIT.*—*In each instance in*
4 *which the United States asserts the state secrets privilege*
5 *with respect to an item of information or evidence, the*
6 *United States shall provide the court with an affidavit*
7 *signed by the head of the executive branch agency with re-*
8 *sponsibility for, and control over, the state secrets involved*
9 *explaining the factual basis for the claim of privilege. The*
10 *United States shall make public an unclassified version of*
11 *the affidavit.*

12 “(c) *HEARING.*—*A Federal court shall conduct a hear-*
13 *ing, consistent with the requirements of section 4052, to ex-*
14 *amine the items of evidence that the United States asserts*
15 *are subject to the state secrets privilege, as well as any affi-*
16 *davit submitted by the United States in support of any as-*
17 *sertion of the state secrets privilege, and to determine the*
18 *validity of any assertion of the state secrets privilege made*
19 *by the United States.*

20 “(d) *REVIEW OF EVIDENCE.*—

21 “(1) *SUBMISSION OF EVIDENCE.*—*In addition to*
22 *the affidavit provided under subsection (b), and ex-*
23 *cept as provided in paragraph (2) of this subsection,*
24 *the United States shall make all evidence the United*
25 *States claims is subject to the state secrets privilege*

1 *available for the court to review, consistent with the*
2 *requirements of section 4052, before any hearing con-*
3 *ducted under this section.*

4 “(2) *SAMPLING IN CERTAIN CASES.—If the vol-*
5 *ume of evidence the United States asserts is protected*
6 *by the state secrets privilege precludes a timely review*
7 *of each item of evidence, or the court otherwise deter-*
8 *mines that a review of all of that evidence is not fea-*
9 *sible, the court may substitute a sufficient sampling*
10 *of the evidence if the court determines that there is no*
11 *reasonable possibility that review of the additional*
12 *evidence would change the determination on the privi-*
13 *lege claim and the evidence reviewed is sufficient to*
14 *enable to court to make the determination required*
15 *under this section.*

16 “(3) *INDEX OF MATERIALS.—The United States*
17 *shall provide the court with a manageable index of*
18 *evidence it contends is subject to the state secrets*
19 *privilege by formulating a system of itemizing and*
20 *indexing that would correlate statements made in the*
21 *affidavit provided under subsection (b) with portions*
22 *of the evidence the United States asserts is subject to*
23 *the state secrets privilege. The index shall be specific*
24 *enough to afford the court an adequate foundation to*

1 *review the basis of the invocation of the privilege by*
2 *the United States.*

3 “(e) *DETERMINATIONS AS TO APPLICABILITY OF*
4 *STATE SECRETS PRIVILEGE.—*

5 “(1) *IN GENERAL.—Except as provided in sub-*
6 *section (d)(2), as to each item of evidence that the*
7 *United States asserts is protected by the state secrets*
8 *privilege, the court shall review, consistent with the*
9 *requirements of section 4052, the specific item of evi-*
10 *dence to determine whether the claim of the United*
11 *States is valid. An item of evidence is subject to the*
12 *state secrets privilege if it contains a state secret, or*
13 *there is no possible means of effectively segregating it*
14 *from other evidence that contains a state secret.*

15 “(2) *ADMISSIBILITY AND DISCLOSURE.—*

16 “(A) *PRIVILEGED EVIDENCE.—If the court*
17 *agrees that an item of evidence is subject to the*
18 *state secrets privilege, that item shall not be dis-*
19 *closed or admissible as evidence.*

20 “(B) *NON-PRIVILEGED EVIDENCE.—If the*
21 *court determines that an item of evidence is not*
22 *subject to the state secrets privilege, the state se-*
23 *crets privilege does not prohibit the disclosure of*
24 *that item to the opposing party or the admission*
25 *of that item at trial, subject to the Federal Rules*

1 *of Civil Procedure and the Federal Rules of Evi-*
2 *dence.*

3 “(3) *STANDARD OF REVIEW.*—*The court shall*
4 *give substantial weight to an assertion by the United*
5 *States relating to why public disclosure of an item of*
6 *evidence would be reasonably likely to cause signifi-*
7 *cant harm to the national defense or foreign relations*
8 *of the United States. The court shall weigh the testi-*
9 *mony of a Government expert in the same manner as*
10 *the court weighs, and along with, any other expert*
11 *testimony in the applicable case.*

12 “(f) *NON-PRIVILEGED SUBSTITUTE.*—*If the court*
13 *finds that material evidence is subject to the state secrets*
14 *privilege and it is possible to craft a non-privileged sub-*
15 *stitute for that privileged material evidence that provides*
16 *a substantially equivalent opportunity to litigate the claim*
17 *or defense as would that privileged material evidence, the*
18 *court shall order the United States to provide such a sub-*
19 *stitute, which may consist of—*

20 “(1) *a summary of such privileged information;*

21 “(2) *a version of the evidence with privileged in-*
22 *formation redacted;*

23 “(3) *a statement admitting relevant facts that*
24 *the privileged information would tend to prove; or*

1 “(4) any other alternative as directed by the
2 court in the interests of justice and protecting na-
3 tional security.

4 “(g) *REFUSAL TO PROVIDE NON-PRIVILEGED SUB-*
5 *STITUTE.*—*In a suit against the United States or an officer*
6 *or agent of the United States acting in the official capacity*
7 *of that officer or agent, if the court orders the United States*
8 *to provide a non-privileged substitute for evidence in ac-*
9 *cordance with this section, and the United States fails to*
10 *comply, the court shall resolve the disputed issue of fact or*
11 *law to which the evidence pertains in the non-government*
12 *party’s favor.*

13 “**§4055. Procedures when evidence protected by the**
14 **state secrets privilege is necessary for ad-**
15 **judication of a claim or counterclaim**

16 “*After reviewing all pertinent evidence, privileged and*
17 *non-privileged, a Federal court may dismiss a claim or*
18 *counterclaim on the basis of the state secrets privilege only*
19 *if the court determines that—*

20 “(1) *it is impossible to create for privileged ma-*
21 *terial evidence a non-privileged substitute under sec-*
22 *tion 4054(f) that provides a substantially equivalent*
23 *opportunity to litigate the claim or counterclaim as*
24 *would that privileged material evidence;*

1 “(2) *dismissal of the claim or counterclaim*
2 *would not harm national security; and*

3 “(3) *continuing with litigation of the claim or*
4 *counterclaim in the absence of the privileged material*
5 *evidence would substantially impair the ability of a*
6 *party to pursue a valid defense to the claim or coun-*
7 *terclaim.*

8 **“§ 4056. Interlocutory appeal**

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

13 “(b) *APPEAL.—*

14 “(1) *IN GENERAL.—An appeal taken under this*
15 *section either before or during trial shall be expedited*
16 *by the court of appeals.*

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

21 “(A) *shall hear argument on appeal as ex-*
22 *peditiously as possible after adjournment of the*
23 *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 **“§ 4057. Security procedures**

10 “(a) *IN GENERAL.*—The security procedures estab-
11 lished under the Classified Information Procedures Act (18
12 U.S.C. App.) by the Chief Justice of the United States for
13 the protection of classified information shall be used to pro-
14 tect against unauthorized disclosure of evidence protected
15 by the state secrets privilege.

16 “(b) *RULES.*—The Chief Justice of the United States,
17 in consultation with the Attorney General, the Director of
18 National Intelligence, and the Secretary of Defense, may
19 create additional rules or amend the rules to implement this
20 chapter and shall submit any such additional rules or
21 amendments to the Permanent Select Committee on Intel-
22 ligence and the Committee on the Judiciary of the House
23 of Representatives and the Select Committee on Intelligence
24 and the Committee on the Judiciary of the Senate. Any such
25 rules or amendments shall become effective 90 days after

1 *such submission, unless Congress provides otherwise. Rules*
2 *and amendments shall comply with the letter and spirit of*
3 *this chapter, and may include procedures concerning the*
4 *role of magistrate judges and special masters in assisting*
5 *courts in carrying out this chapter. The rules or amend-*
6 *ments under this subsection may include procedures to en-*
7 *sure that a sufficient number of attorneys with appropriate*
8 *security clearances are available in each of the judicial dis-*
9 *tricts of the United States to serve as guardians ad litem*
10 *under section 4052(c)(1).*

11 **“§ 4058. Reporting**

12 *“(a) ASSERTION OF STATE SECRETS PRIVILEGE.—*

13 *“(1) IN GENERAL.—The Attorney General shall*
14 *submit to the Permanent Select Committee on Intel-*
15 *ligence and the Committee on the Judiciary of the*
16 *House of Representatives and the Select Committee on*
17 *Intelligence and the Committee on the Judiciary of*
18 *the Senate a report on any case in which the United*
19 *States asserts the state secrets privilege, not later than*
20 *30 calendar days after the date of such assertion.*

21 *“(2) CONTENTS.—Each report submitted under*
22 *this subsection shall include any affidavit filed in*
23 *support of the assertion of the state secrets privilege*
24 *and the index required under section 4054(d)(2).*

1 “(3) *EVIDENCE.*—Upon a request by any mem-
2 ber of the Permanent Select Committee on Intelligence
3 or the Committee on the Judiciary of the House of
4 Representatives or the Select Committee on Intel-
5 ligence or the Committee on the Judiciary of the Sen-
6 ate, the Attorney General shall provide to that mem-
7 ber any item of evidence relating to which the United
8 States has asserted the state secrets privilege.

9 “(4) *PROTECTION OF INFORMATION.*—An affi-
10 davit, index, or item of evidence provided under this
11 subsection may be included in a classified annex or
12 provided under any other appropriate security meas-
13 ures.

14 “(b) *OPERATION AND EFFECTIVENESS.*—

15 “(1) *IN GENERAL.*—The Attorney General shall
16 deliver to the committees of Congress described in sub-
17 section (a) a report concerning the operation and ef-
18 fectiveness of this chapter and including suggested
19 amendments to this chapter.

20 “(2) *DEADLINE.*—The Attorney General shall
21 submit a report under paragraph (1) not later than
22 1 year after the date of enactment of this chapter, and
23 every year there after until the date that is 3 years
24 after that date of enactment. After the date that is 3
25 years after that date of enactment, the Attorney Gen-

1 *eral shall submit a report under paragraph (1) as*
 2 *necessary.*

3 **“§ 4059. Rule of construction**

4 *“Nothing in this chapter—*

5 *“(1) is intended to supersede any further or ad-*
 6 *ditional limit on the state secrets privilege under any*
 7 *other provision of law; or*

8 *“(2) may be construed to preclude a court from*
 9 *dismissing a claim or counterclaim or entering judg-*
 10 *ment on grounds unrelated to, and unaffected by, the*
 11 *assertion of the state secrets privilege.”.*

12 *(b) TECHNICAL AND CONFORMING AMENDMENT.—The*
 13 *table of chapters for title 28, United States Code, is amend-*
 14 *ed by adding at the end the following:*

15 *181. State secrets protection 4051*

15 **SEC. 3. SEVERABILITY.**

16 *If any provision of this Act, any amendment made by*
 17 *the Act, or the application of such provision or amendment*
 18 *to any person or circumstances is held to be invalid, the*
 19 *remainder of this Act, the amendments made by the Act,*
 20 *and the application of such provisions to persons or cir-*
 21 *cumstances other than those to which it is held invalid, shall*
 22 *not be affected thereby.*

1 **SEC. 4. APPLICATION TO PENDING CASES.**

2 *The amendments made by this Act shall apply to any*
3 *civil case pending on or after the date of enactment of this*
4 *Act.*

Calendar No. 938

110TH CONGRESS
2^D SESSION

S. 2533

[Report No. 110-442]

A BILL

To enact a safe, fair, and responsible state secrets
privilege Act.

AUGUST 1, 2008

Reported with an amendment