

112TH CONGRESS  
2D SESSION

# H. R. 5956

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

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 2012

Mr. NADLER (for himself, Mr. PETRI, Mr. CONYERS, Ms. ZOE LOFGREN of California, Mr. FILNER, Mr. HINCHEY, and Mr. STARK) 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 secrets 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 Secrets Protec-  
5       tion Act”.

6       **SEC. 2. AMENDMENT TO THE RULES OF EVIDENCE.**

7       Article 5 of the Federal Rules of Evidence is amended  
8       by adding at the end the following:

1 **“Rule 503. State Secrets Privilege**

2       “(a) IN GENERAL.—In any civil action brought in  
3 Federal or State court, the Government has a privilege  
4 to refuse to give information and to prevent any person  
5 from giving information only if the Government shows  
6 that public disclosure of the information that the Govern-  
7 ment seeks to protect would be reasonably likely to cause  
8 significant harm to the national defense or the diplomatic  
9 relations of the United States.

10       “(b) PROTECTION OF SECRETS.—

11               “(1) IN GENERAL.—The court shall take steps  
12 to protect sensitive information that comes before  
13 the court in connection with proceedings under this  
14 Rule. These steps may include reviewing evidence or  
15 pleadings and hearing arguments ex parte, issuing  
16 protective orders, placing material under seal, and  
17 applying security procedures established under the  
18 Classified Information Procedures Act for classified  
19 information to protect the sensitive information.

20               “(2) IN CAMERA PROCEEDINGS.—All hearings  
21 and other proceedings under this Rule may be con-  
22 ducted in camera, as needed to protect information  
23 that may be subject to the privilege.

24               “(3) PARTICIPATION OF COUNSEL.—Participa-  
25 tion of counsel in proceedings under this Rule may  
26 be limited if the court determines that the limitation

1 is a necessary step to protect information the Gov-  
2 ernment asserts is protected by the privilege or that  
3 supports the claim of privilege.

4 “(4) GUARDIAN AD LITEM.—Where counsel is  
5 excluded from a proceeding, the court shall have dis-  
6 cretion to appoint a guardian ad litem to represent  
7 the absent litigant’s interests, drawing, in consulta-  
8 tion with the excluded nongovernmental party, from  
9 a previously generated list of attorneys who have  
10 been granted required security clearances in the past  
11 and have agreed to serve in this capacity. The  
12 guardian ad litem shall not discuss the information  
13 claimed as privileged or its content with any non-  
14 governmental party or nongovernmental party’s  
15 counsel.

16 “(5) PRODUCTION OF ADEQUATE SUBSTITUTE  
17 PENDING RESOLUTION OF THE CLAIM OF PRIVI-  
18 LEGE.—If, at any point during its consideration of  
19 the Government’s claim, the court determines that  
20 disclosure of information to a party or counsel, or  
21 disclosure of information by a party that already  
22 possesses it, presents a risk of a harm described in  
23 subsection (a) that cannot be addressed through less  
24 restrictive means provided in this subsection, the  
25 court may require the Government to produce an

adequate substitute, such as a redacted version, summary of the information, or stipulation regarding the relevant facts, if the court deems such a substitute feasible. The substitute must be reviewed and approved by the court and must provide counsel with a substantially equivalent opportunity to assess and challenge the Government's claim of privilege as would the protected information.

“(c) ASSERTION OF THE PRIVILEGE.—

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

“(2) SUPPORTING AFFIDAVITS.—If the Government asserts the privilege, the Government shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the information asserted to be subject to the privilege. In the affidavit, the head of the agency shall explain the factual basis for the claim of privilege. The Government shall make public an unclassified version of the affidavit.

“(d) PRELIMINARY PROCEEDINGS.—

“(1) PRELIMINARY REVIEW BY COURT.—Once the Government has asserted the privilege, and be-

1       fore the court makes any determinations under sub-  
2       section (e), the court shall undertake a preliminary  
3       review of the information the Government asserts is  
4       protected by the privilege and provide the Govern-  
5       ment an opportunity to seek protective measures  
6       under this Rule. After any initial protective meas-  
7       ures are in place, the court shall proceed to the con-  
8       sideration of additional preliminary matters under  
9       this subsection.

10       “(2) CONSIDERATION OF WHETHER TO AP-  
11       POINT SPECIAL MASTER OR EXPERT WITNESS.—The  
12       court shall consider whether the appointment of a  
13       special master with appropriate expertise or an ex-  
14       pert witness, or both, would facilitate the court’s du-  
15       ties under this Rule.

16       “(3) INDEX OF MATERIALS.—The court may  
17       order the Government to provide a manageable index  
18       of the information that the Government asserts is  
19       subject to the privilege. The index must correlate  
20       statements made in the affidavit required under this  
21       Rule with portions of the information the Govern-  
22       ment asserts is subject to the privilege. The index  
23       shall be specific enough to afford the court an ade-  
24       quate foundation to review the basis of the assertion  
25       of the privilege by the Government.

1           “(4) PREHEARING CONFERENCES.—After the  
2 preliminary review, the court shall hold one or more  
3 conferences with the parties to—

4           “(A) determine any steps needed to protect  
5 sensitive information;

6           “(B) define the issues presented by the  
7 Government’s claim of privilege, including  
8 whether it is possible to allow the parties to  
9 complete nonprivileged discovery before deter-  
10 mining whether the claim of privilege is valid;

11           “(C) order disclosure to the court of any-  
12 thing needed to assess the claim, including all  
13 information the Government asserts is protected  
14 by the privilege and other material related to  
15 the Government’s claim;

16           “(D) resolve any disputes regarding par-  
17 ticipation of counsel or parties in proceedings  
18 relating to the claim, including access to the  
19 Government’s evidence and arguments;

20           “(E) set a schedule for completion of dis-  
21 covery related to the Government’s claim; and

22           “(F) take other steps as needed, such as  
23 ordering counsel or parties to obtain security  
24 clearances.

1       “(e) PROCEDURES AND STANDARD FOR ASSESSING  
2 THE PRIVILEGE CLAIM.—

3               “(1) HEARING.—The court shall conduct a  
4 hearing to determine whether the privilege claim is  
5 valid.

6               “(2) BASIS FOR RULING.—

7                       “(A) GENERALLY.—The court may not de-  
8 termine that the privilege is valid until the  
9 court has reviewed—

10                               “(i) except as provided in subpara-  
11 graph (B), all of the information that the  
12 Government asserts is privileged;

13                               “(ii) the affidavits, evidence, memo-  
14 randa and other filings submitted by the  
15 parties related to the privilege claim; and

16                               “(iii) any other evidence that the  
17 court determines it needs to rule on the  
18 privilege.

19               “(B) SAMPLING IN CERTAIN CASES.—

20 Where the volume of information the Govern-  
21 ment asserts is privileged precludes a timely re-  
22 view, or the court otherwise determines a review  
23 of all of that information is not feasible, the  
24 court may substitute a sufficient sampling of  
25 the information if the court determines that

1           there is no reasonable possibility that review of  
2           the additional information would change the  
3           court’s determination on the privilege claim and  
4           the information reviewed is sufficient to enable  
5           the court to make the independent assessment  
6           required by this subsection.

7           “(3) STANDARD.—In ruling on the validity of  
8           the privilege, the court shall make an independent  
9           assessment of whether the harm identified by the  
10          Government, as required by subsection (a), is rea-  
11          sonably likely to occur should the privilege not be  
12          upheld. The court shall weigh testimony from Gov-  
13          ernment experts in the same manner as it does, and  
14          along with, any other expert testimony.

15          “(4) BURDEN OF PROOF.—The Government  
16          shall have the burden of proof as to the nature of  
17          the harm and as to the likelihood of its occurrence.

18          “(f) EFFECT OF COURT DETERMINATION.—

19                 “(1) IN GENERAL.—If the court determines  
20                 that the privilege is not validly asserted, the court  
21                 shall issue appropriate orders regarding the disclo-  
22                 sure of the information to a nongovernmental party  
23                 and its admission at trial, subject to the other rules  
24                 of evidence, with the right to interlocutory appeal as  
25                 provided in subsection (g) for any such orders. If the

1 court determines that the privilege is validly as-  
2 serted, that information shall not be disclosed to a  
3 nongovernmental party or the public.

4 “(2) NONPRIVILEGED SUBSTITUTE.—

5 “(A) COURT CONSIDERATION OF SUB-  
6 STITUTE.—If the court finds that the privilege  
7 is validly asserted and it is possible to craft a  
8 nonprivileged substitute, such as those de-  
9 scribed in subsection (b)(5), for the privileged  
10 information that would provide the parties a  
11 substantially equivalent opportunity to litigate  
12 the case, the court shall order the Government  
13 to produce the substitute to the satisfaction of  
14 the court.

15 “(B) REFUSAL TO PROVIDE.—In a civil ac-  
16 tion brought against the Government, if the  
17 court orders the Government to provide a non-  
18 privileged substitute for information and the  
19 Government fails to comply, in addition to any  
20 other appropriate sanctions, the court shall find  
21 against the Government on the factual or legal  
22 issue to which the privileged information is rel-  
23 evant. If the action is not brought against the  
24 Government, the court shall weigh the equities

1           and make appropriate orders as provided in  
2           paragraph (4).

3           “(3) OPPORTUNITY TO COMPLETE DIS-  
4           COVERY.—The court shall not resolve any issue or  
5           claim and shall not grant a motion to dismiss or mo-  
6           tion for summary judgment based on the state se-  
7           crets privilege and adversely to any party against  
8           whom the Government’s privilege claim has been  
9           upheld until that party has had a full opportunity to  
10          complete nonprivileged discovery and to litigate the  
11          issue or claim to which the privileged information is  
12          relevant without regard to that privileged informa-  
13          tion.

14          “(4) APPROPRIATE ORDERS IN THE INTEREST  
15          OF JUSTICE.—After reviewing all available evidence,  
16          and only after determining that privileged informa-  
17          tion, for which it is impossible to create a nonprivi-  
18          leged substitute, is necessary to decide a factual or  
19          legal issue or claim, the court shall weigh the equi-  
20          ties and make appropriate orders in the interest of  
21          justice, such as striking the testimony of a witness,  
22          finding in favor of or against a party on a factual  
23          or legal issue to which the information is relevant,  
24          or dismissing a claim or counterclaim. This para-  
25          graph does not permit an award of money damages

1 against a party based in whole or in part on privi-  
2 leged information that was not disclosed to that  
3 party.

4 “(g) INTERLOCUTORY APPEAL.—

5 “(1) IN GENERAL.—The courts of appeal shall  
6 have jurisdiction of an appeal from a decision or  
7 order of a district court determining that the state  
8 secrets privilege is not validly asserted, sanctioning  
9 a refusal to provide an adequate or nonprivileged  
10 substitute required under this Rule, or refusing pro-  
11 tective steps sought by the Government under this  
12 Rule pending the resolution of the claim of state se-  
13 crets privilege.

14 “(2) APPEAL.—

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

18 “(B) DURING TRIAL.—If an appeal is  
19 taken during trial, the district court shall ad-  
20 journ the trial until the appeal is resolved and  
21 the court of appeals—

22 “(i) shall hear argument on appeal as  
23 expeditiously as possible after adjournment  
24 of the trial by the district court;

1 “(ii) may dispense with written briefs  
2 other than the supporting materials pre-  
3 viously submitted to the trial court;

4 “(iii) shall render its decision as expe-  
5 ditiously as possible after argument on ap-  
6 peal; and

7 “(iv) may dispense with the issuance  
8 of a written opinion in rendering its deci-  
9 sion.

10 “(h) REPORTING.—

11 “(1) IN GENERAL.—Consistent with applicable  
12 authorities and duties, including those conferred by  
13 the Constitution of the United States upon the exec-  
14 utive and legislative branches, the Attorney General  
15 shall report in writing to the Permanent Select Com-  
16 mittee on Intelligence of the House of Representa-  
17 tives, the Select Committee on Intelligence of the  
18 Senate, and the chairmen and ranking minority  
19 members of the Committees on the Judiciary of the  
20 House of Representatives and Senate on any case in  
21 which the Government invokes a state secrets privi-  
22 lege, not later than 30 calendar days after the date  
23 of such assertion. Each report submitted under this  
24 subsection shall include all affidavits filed under this  
25 Rule by the Government.

1 “(2) OPERATION AND EFFECTIVENESS.—

2 “(A) IN GENERAL.—The Attorney General  
3 shall deliver to the committees of Congress de-  
4 scribed in paragraph (1) a report concerning  
5 the operation and effectiveness of this Rule and  
6 including suggested amendments to the Rule.

7 “(B) DEADLINE.—The Attorney General  
8 shall submit this report not later than 1 year  
9 after the date of enactment of this Rule, and  
10 every year thereafter until the date that is 3  
11 years after that date of enactment. After the  
12 date that is 3 years after that date of enact-  
13 ment, the Attorney General shall submit a re-  
14 port under subparagraph (A) as necessary.

15 “(i) RULE OF CONSTRUCTION.—This Rule provides  
16 the only privilege that may be asserted in civil cases based  
17 on state secrets and the standards and procedures set  
18 forth in this Rule apply to any assertion of the privilege.

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

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 judgment, order, or  
8           proceeding is based is—

9                   “(A) against the Government; or

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

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