

110TH CONGRESS  
2D SESSION

# S. 2533

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

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## IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 3), 2008

Mr. KENNEDY (for himself, Mr. SPECTER, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## 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”.

6 **SEC. 2. STATE SECRETS PROTECTION.**

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

1           **“CHAPTER 181—STATE SECRETS**  
 2                                   **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.

3   **“§ 4051. Definition**

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

8   **“§ 4052. Rules governing procedures related to this**  
 9                                   **chapter**

10          “(a) DOCUMENTS.—A Federal court—

11               “(1) shall determine which filings, motions, and  
 12 affidavits, or portions thereof, submitted under this  
 13 chapter shall be submitted ex parte;

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

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

1 “(b) HEARINGS.—

2 “(1) IN CAMERA HEARINGS.—

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

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

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

19 “(3) RECORD OF HEARINGS.—The court shall  
20 preserve the record of all hearings conducted under  
21 this chapter for use in the event of an appeal. The  
22 court shall seal all records to the extent necessary to  
23 protect national security.

24 “(c) ATTORNEY SECURITY CLEARANCES.—

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

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

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

23           “(e) OPINIONS AND ORDERS.—Any opinions or or-  
24          ders issued under this chapter may be issued under seal  
25          or in redacted versions if, and to the extent that, the court

1 determines that such measure is necessary to protect na-  
2 tional security.

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

7 **“§ 4053. Procedures for answering a complaint**

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

12 “(b) IMPERMISSIBLE AS GROUNDS FOR DISMISSAL  
13 PRIOR TO HEARINGS.—Except as provided in section  
14 4055, the state secrets privilege shall not constitute  
15 grounds for dismissal of a case or claim. A ruling on a  
16 motion to dismiss, or for summary judgment, based on  
17 the state secrets privilege shall be deferred pending com-  
18 pletion of the discovery and pretrial hearings provided  
19 under this chapter.

20 “(c) PLEADING STATE SECRETS.—In answering a  
21 complaint, if the United States or an officer or agency  
22 of the United States is a party to the litigation, the United  
23 States may plead the state secrets privilege in response  
24 to any allegation in any individual claim or counterclaim  
25 if the admission or denial of that allegation in that indi-

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

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

19 **“§ 4054. Procedures for determining whether evi-**  
20 **dence is protected from disclosure by the**  
21 **state secrets privilege**

22 “(a) INVOKING THE STATE SECRETS PRIVILEGE.—  
23 The United States may, in any civil action to which the  
24 United States is a party or in any other civil action before  
25 a Federal or State court, invoke the state secrets privilege

1 as a ground for withholding information or evidence in dis-  
2 covery or for preventing the introduction of evidence at  
3 trial.

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

13 “(c) HEARING.—A Federal court shall conduct a  
14 hearing to review any affidavit provided by the United  
15 States under this section and all evidence the United  
16 States asserts is protected from disclosure by the state se-  
17 crets privilege.

18 “(d) REVIEW OF EVIDENCE.—

19 “(1) SUBMISSION OF EVIDENCE.—In addition  
20 to the affidavit provided under subsection (b), the  
21 United States shall make all evidence the United  
22 States claims is subject to the state secrets privilege  
23 available for the court to review, consistent with the  
24 requirements of section 4052, before any hearing  
25 conducted under this section.

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

12           “(e) DETERMINATIONS AS TO APPLICABILITY OF  
13 STATE SECRETS PRIVILEGE.—

14           “(1) IN GENERAL.—As to each item of evidence  
15 that the United States asserts is protected by the  
16 state secrets privilege, the court shall review, con-  
17 sistent with the requirements of section 4052, the  
18 specific item of evidence to determine whether the  
19 claim of the United States is valid. Evidence is sub-  
20 ject to the state secrets privilege if it contains a  
21 state secret, or there is no possible means of effec-  
22 tively segregating it from other evidence that con-  
23 tains a state secret.

24           “(2) ADMISSIBILITY.—If the court agrees that  
25 an item of evidence is subject to the state secrets

1 privilege, that item shall not be disclosed or admis-  
2 sible as evidence.

3 “(3) DISCLOSURE.—If the court determines  
4 that an item of evidence is not subject to the state  
5 secrets privilege, the state secrets privilege does not  
6 prohibit the disclosure of that item to the opposing  
7 party or the admission of that item at trial, subject  
8 to the other rules of evidence.

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

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

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

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

22 “(4) any other alternative as directed by the  
23 court in the interests of justice and protecting na-  
24 tional security.

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

10       **“§ 4055. Procedures when evidence protected by the**  
11                               **state secrets privilege is necessary for ad-**  
12                               **judication of a claim or counterclaim**

13       “After reviewing all available evidence, privileged and  
14       non-privileged, a Federal court may dismiss a claim or  
15       counterclaim on the basis of the state secrets privilege only  
16       if the court determines that—

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

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

24               “(3) continuing with litigation of the claim or  
25       counterclaim in the absence of the privileged mate-

1 rial evidence would substantially impair the ability of  
2 a party to pursue a valid defense to the claim or  
3 counterclaim.

4 **“§ 4056. Interlocutory appeal**

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

9 “(b) APPEAL.—

10 “(1) IN GENERAL.—An appeal taken under this  
11 section either before or during trial shall be exped-  
12 ited by the court of appeals.

13 “(2) DURING TRIAL.—If an appeal is taken  
14 during trial, the district court shall adjourn the trial  
15 until the appeal is resolved and the court of ap-  
16 peals—

17 “(A) shall hear argument on appeal as ex-  
18 peditiously as possible after adjournment of the  
19 trial by the district court;

20 “(B) may dispense with written briefs  
21 other than the supporting materials previously  
22 submitted to the trial court;

23 “(C) shall render its decision as expedi-  
24 tiously as possible after argument on appeal;  
25 and

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

3   **“§ 4057. Security procedures**

4           “(a) IN GENERAL.—The security procedures estab-  
5   lished under the Classified Information Procedures Act  
6   (18 U.S.C. App.) by the Chief Justice of the United States  
7   for the protection of classified information shall be used  
8   to protect against unauthorized disclosure of evidence pro-  
9   tected by the state secrets privilege.

10          “(b) RULES.—The Chief Justice of the United  
11   States, in consultation with the Attorney General, the Di-  
12   rector of National Intelligence, and the Secretary of De-  
13   fense, may create additional rules or amend the rules to  
14   implement this chapter and shall submit any such addi-  
15   tional rules or amendments to the Permanent Select Com-  
16   mittee on Intelligence and the Committee on the Judiciary  
17   of the House of Representatives and the Select Committee  
18   on Intelligence and the Committee on the Judiciary of the  
19   Senate. Any such rules or amendments shall become effec-  
20   tive 90 days after such submission, unless Congress pro-  
21   vides otherwise. Rules and amendments shall comply with  
22   the letter and spirit of this chapter, and may include pro-  
23   cedures concerning the role of magistrate judges and spe-  
24   cial masters in assisting courts in carrying out this chap-  
25   ter.

1 **“§ 4058. Reporting**

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

13       “(b) OPERATION AND EFFECTIVENESS.—

14               “(1) IN GENERAL.—The Attorney General shall  
15 deliver to the committees of Congress described in  
16 subsection (a) a report concerning the operation and  
17 effectiveness of this chapter and including suggested  
18 amendments to this chapter.

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

1 **“§ 4059. Rule of construction**

2 “Nothing in this chapter is intended to supersede any  
3 other limit on the state secrets privilege under any other  
4 provision of law.”.

5 (b) **TECHNICAL AND CONFORMING AMENDMENT.—**

6 The table of chapters for title 28, United States Code,  
7 is amended by adding at the end the following:

181. State secrets protection ..... 4051

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

9 The amendments made by this Act shall apply to any  
10 civil case pending on or after the date of enactment of  
11 this Act.

