

111TH CONGRESS  
1ST SESSION

# S. 417

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

---

IN THE SENATE OF THE UNITED STATES

FEBRUARY 11, 2009

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

---

## 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. 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.

3   **“§ 4051. Definitions**

4           “In this chapter—

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

11                   “(2) the term ‘state secret’ refers to any infor-  
 12           mation that, if disclosed publicly, would be reason-  
 13           ably likely to cause significant harm to the national  
 14           defense or foreign relations of the United States.

15   **“§ 4052. Rules governing procedures related to this**  
 16                                   **chapter**

17           “(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 na-  
25 tional security cannot adequately be protected

1 through the measures described in subsections (c)  
2 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  
10 the request of the United States, limit participation  
11 in hearings conducted under this chapter, or access  
12 to motions or affidavits submitted under this chap-  
13 ter, to attorneys with appropriate security clear-  
14 ances, if the court determines that limiting partici-  
15 pation in that manner would serve the interests of  
16 national security. The court may also appoint a  
17 guardian ad litem with the necessary security clear-  
18 ances to represent any party for the purposes of any  
19 hearing conducted 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  
3 conduct a hearing under this chapter in a reasonable  
4 period of time, the court may review in camera and  
5 ex parte the reasons of the United States for deny-  
6 ing or delaying the clearance to ensure that the  
7 United States is not withholding a security clearance  
8 from a particular attorney or class of attorneys for  
9 any reason other than protection of national secu-  
10 rity.

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

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

21          “(f) SPECIAL MASTERS.—A Federal court may ap-  
22 point a special master or other independent advisor who  
23 holds the necessary security clearances to assist the court  
24 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  
5 secrets privilege.

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

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

1 vidual claim or counterclaim if the admission or denial by  
2 a party of that allegation in that individual claim or coun-  
3 terclaim would itself divulge a state secret to another  
4 party or the public. No adverse inference or admission  
5 shall be drawn from a pleading of state secrets in an an-  
6 swer to an item 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  
11 branch agency with responsibility for, and control over, the  
12 asserted state secrets explaining the factual basis for the  
13 assertion of the privilege and attesting that personal con-  
14 sideration was given to the assertion of the privilege. The  
15 duties of the head of an executive branch agency under  
16 this subsection may not be delegated.

17 **“§ 4054. Procedures for determining whether evi-**  
18 **dence is protected from disclosure by the**  
19 **state 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  
8 responsibility for, and control over, the state secrets in-  
9 volved explaining the factual basis for the claim of privi-  
10 lege. The United States shall make public an unclassified  
11 version of the affidavit.

12       “(c) HEARING.—A Federal court shall conduct a  
13 hearing, consistent with the requirements of section 4052,  
14 to examine the items of evidence that the United States  
15 asserts are subject to the state secrets privilege, as well  
16 as any affidavit submitted by the United States in support  
17 of any assertion of the state secrets privilege, and to deter-  
18 mine the validity of any assertion of the state secrets privi-  
19 lege made by the United States.

20       “(d) REVIEW OF EVIDENCE.—

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



1 crets privilege available for the court to review, con-  
2 sistent with the requirements of section 4052, before  
3 any hearing conducted under this section.

4 “(2) SAMPLING IN CERTAIN CASES.—If the vol-  
5 ume of evidence the United States asserts is pro-  
6 tected by the state secrets privilege precludes a time-  
7 ly review of each item of evidence, or the court oth-  
8 erwise determines that a review of all of that evi-  
9 dence is not feasible, the court may substitute a suf-  
10 ficient sampling of the evidence if the court deter-  
11 mines that there is no reasonable possibility that re-  
12 view of the additional evidence would change the de-  
13 termination on the privilege claim and the evidence  
14 reviewed is sufficient to enable to court to make the  
15 determination required under this section.

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

1 court an adequate foundation to review the basis of  
2 the invocation of the privilege by 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 se-  
8 crets privilege, the court shall review, consistent with  
9 the requirements of section 4052, the specific item  
10 of evidence to determine whether the claim of the  
11 United States is valid. An item of evidence is subject  
12 to the state secrets privilege if it contains a state se-  
13 cret, or there is no possible means of effectively seg-  
14 regating it from other evidence that contains a state  
15 secret.

16 “(2) ADMISSIBILITY AND DISCLOSURE.—

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

21 “(B) NON-PRIVILEGED EVIDENCE.—If the  
22 court determines that an item of evidence is not  
23 subject to the state secrets privilege, the state  
24 secrets privilege does not prohibit the disclosure  
25 of that item to the opposing party or the admis-

1           sion of that item at trial, subject to the Federal  
2           Rules of Civil Procedure and the Federal Rules  
3           of Evidence.

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

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

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

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

24                  “(3) a statement admitting relevant facts that  
25          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 offi-  
6           cer or agent of the Unites States acting in the official ca-  
7           pacity of that officer or agent, if the court orders the  
8           United States to provide a non-privileged substitute for  
9           evidence in accordance with this section, and the United  
10          States fails to comply, the court shall resolve the disputed  
11          issue of fact or law to which the evidence pertains in the  
12          non-government 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 mate-  
5 rial evidence would substantially impair the ability of  
6 a party to pursue a valid defense to the claim or  
7 counterclaim.

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  
12 States under this chapter.

13           “(b) APPEAL.—

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

17           “(2) DURING TRIAL.—If an appeal is taken  
18 during 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  
2           other than the supporting materials previously  
3           submitted 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  
12       (18 U.S.C. App.) by the Chief Justice of the United States  
13       for the protection of classified information shall be used  
14       to protect against unauthorized disclosure of evidence pro-  
15       tected by the state secrets privilege.

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

1 tive 90 days after such submission, unless Congress pro-  
2 vides otherwise. Rules and amendments shall comply with  
3 the letter and spirit of this chapter, and may include pro-  
4 cedures concerning the role of magistrate judges and spe-  
5 cial masters in assisting courts in carrying out this chap-  
6 ter. The rules or amendments under this subsection may  
7 include procedures to ensure that a sufficient number of  
8 attorneys with appropriate security clearances are avail-  
9 able in each of the judicial districts of the United States  
10 to serve as guardians ad litem 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  
17 on Intelligence and the Committee on the Judiciary  
18 of the Senate a report on any case in which the  
19 United States asserts the state secrets privilege, not  
20 later than 30 calendar days after the date of such  
21 assertion.

22 “(2) CONTENTS.—Each report submitted under  
23 this subsection shall include any affidavit filed in  
24 support of the assertion of the state secrets privilege  
25 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 Intel-  
3           ligence or the Committee on the Judiciary of the  
4           House of Representatives or the Select Committee  
5           on Intelligence or the Committee on the Judiciary of  
6           the Senate, the Attorney General shall provide to  
7           that member any item of evidence relating to which  
8           the United States has asserted the state secrets  
9           privilege.

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

15           “(b) OPERATION AND EFFECTIVENESS.—

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

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



1 that is 3 years after that date of enactment, the At-  
 2 torney General shall submit a report under para-  
 3 graph (1) as necessary.

4 **“§ 4059. Rule of construction**

5 “Nothing in this chapter—

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

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

13 (b) TECHNICAL AND CONFORMING AMENDMENT.—

14 The table of chapters for part VI of title 28, United States  
 15 Code, is amended by adding at the end the following:

“181. State secrets protection ..... 4051”.

16 **SEC. 3. SEVERABILITY.**

17 If any provision of this Act, any amendment made  
 18 by the Act, or the application of such provision or amend-  
 19 ment to any person or circumstances is held to be invalid,  
 20 the remainder of this Act, the amendments made by the  
 21 Act, and the application of such provisions to persons or  
 22 circumstances other than those to which it is held invalid,  
 23 shall 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  
4 this Act.

○