

S 2533 IS

110th CONGRESS
2d Session
S. 2533

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, and Mr. LEAHY) 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'State Secrets Protection Act'.

SEC. 2. STATE SECRETS PROTECTION.

(a) In General- Title 28 of the United States Code is amended by adding after chapter 180, the following:

' CHAPTER 181--STATE SECRETS 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 necessary for adjudication of a claim or counterclaim.
- ` 4056. Interlocutory appeal.
- ` 4057. Security procedures.

- ˘ 4058. Reporting.
- ˘ 4059. Rule of construction.

˘ **Sec. 4051. Definition**

˘ In this chapter, the term 'state secret' refers to any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.

˘ **Sec. 4052. Rules governing procedures related to this chapter**

- ˘ (a) Documents- A Federal court--
 - ˘ (1) shall determine which filings, motions, and affidavits, or portions thereof, submitted under this chapter shall be submitted ex parte;
 - ˘ (2) may order a party to provide a redacted, unclassified, or summary substitute of a filing, motion, or affidavit to other parties; and
 - ˘ (3) shall make decisions under this subsection taking into consideration the interests of justice and national security.
- ˘ (b) Hearings-
 - ˘ (1) IN CAMERA HEARINGS-
 - ˘ (A) IN GENERAL- Except as provided in subparagraph (B), all hearings under this chapter shall be conducted in camera.
 - ˘ (B) EXCEPTION- A court may not conduct a hearing under this chapter in camera based on the assertion of the state secrets privilege if the court determines that the hearing relates only to a question of law and does not present a risk of revealing state secrets.
 - ˘ (2) EX PARTE HEARINGS- A Federal court may conduct hearings or portions thereof ex parte if the court determines, following in camera review of the evidence, that the interests of justice and national security cannot adequately be protected through the measures described in subsections (c) and (d).
 - ˘ (3) RECORD OF HEARINGS- The court shall preserve the record of all hearings conducted under this chapter for use in the event of an appeal. The court shall seal all records to the extent necessary to protect national security.
- ˘ (c) Attorney Security Clearances-
 - ˘ (1) IN GENERAL- A Federal court shall, at the request of the United States, limit participation in hearings conducted under this chapter, or access to motions or affidavits submitted under this chapter, to attorneys with appropriate security clearances, if the court determines that limiting participation in that manner would serve the interests of national security. The court may also appoint a guardian ad litem with the necessary security

clearances to represent any party for the purposes of any hearing conducted under this chapter.

ˆ (2) STAYS- During the pendency of an application for security clearance by an attorney representing a party in a hearing conducted under this chapter, the court may suspend proceedings if the court determines that such a suspension would serve the interests of justice.

ˆ (d) Protective Orders- A Federal court may issue a protective order governing any information or evidence disclosed or discussed at any hearing conducted under this chapter if the court determines that issuing such an order is necessary to protect national security.

ˆ (e) Opinions and Orders- Any opinions or orders issued under this chapter may be issued under seal or in redacted versions if, and to the extent that, the court determines that such measure is necessary to protect national security.

ˆ (f) Special Masters- A Federal court may appoint a special master or other independent advisor who holds the necessary security clearances to assist the court in handling a matter subject to this chapter.

ˆ **Sec. 4053. Procedures for answering a complaint**

ˆ (a) Intervention- The United States may intervene in any civil action in order to protect information the Government determines may be subject to the state secrets privilege.

ˆ (b) Impermissible as Grounds for Dismissal Prior to Hearings- Except as provided in section 4055, the state secrets privilege shall not constitute grounds for dismissal of a case or claim. A ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege shall be deferred pending completion of the discovery and pretrial hearings provided under this chapter.

ˆ (c) Pleading State Secrets- In answering a complaint, if the United States or an officer or agency of the United States is a party to the litigation, the United States may plead the state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial of that allegation in that individual claim or counterclaim would itself divulge a state secret to another party or the public. If the United States has intervened in a civil action, it may invoke the state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial by a party of that allegation in that individual claim or counterclaim would itself divulge a state secret to another party or the public. No adverse inference shall be drawn from a pleading of state secrets in an answer to an item in a complaint.

ˆ (d) Supporting Affidavit- In each instance in which the United States invokes the state secrets privilege in response to 1 or more claims, it shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the

state secrets involved explaining the factual basis for the privilege. The United States shall make public an unclassified version of the affidavit.

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

(a) Invoking the State Secrets Privilege- The United States may, in any civil action to which the United States is a party or in any other civil action before a Federal or State court, invoke the state secrets privilege as a ground for withholding information or evidence in discovery or for preventing the introduction of evidence at trial.

(b) Supporting Affidavit- In each instance in which the United States invokes the state secrets privilege with respect to an item of information or evidence, the United States shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the state secrets involved explaining the factual basis for the claim of privilege. The United States shall make public an unclassified version of the affidavit.

(c) Hearing- A Federal court shall conduct a hearing to review any affidavit provided by the United States under this section and all evidence the United States asserts is protected from disclosure by the state secrets privilege.

(d) Review of Evidence-

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

(2) INDEX OF MATERIALS- The United States shall provide the court with a manageable index of evidence it contends is subject to the state secrets privilege by formulating a system of itemizing and indexing that would correlate statements made in the affidavit provided under subsection (b) with portions of the evidence the United States asserts is subject to the state secrets privilege. The index shall be specific enough to afford the court an adequate foundation to review the basis of the invocation of the privilege by the United States.

(e) Determinations as to Applicability of State Secrets Privilege-

(1) IN GENERAL- As to each item of evidence that the United States asserts is protected by the state secrets privilege, the court shall review, consistent with the requirements of section 4052, the specific item of evidence to determine whether the claim of the United States is valid. Evidence is subject to the state secrets privilege if it contains a state secret, or there is no possible means of effectively segregating it from other evidence that contains a state secret.

- ˘ (2) ADMISSIBILITY- If the court agrees that an item of evidence is subject to the state secrets privilege, that item shall not be disclosed or admissible as evidence.
- ˘ (3) DISCLOSURE- If the court determines that an item of evidence is not subject to the state secrets privilege, the state secrets privilege does not prohibit the disclosure of that item to the opposing party or the admission of that item at trial, subject to the other rules of evidence.
- ˘ (f) Non-Privileged Substitute- If the court finds that material evidence is subject to the state secrets privilege and it is possible to craft a non-privileged substitute for that privileged material evidence that provides a substantially equivalent opportunity to litigate the claim or defense as would that privileged material evidence, the court shall order the United States to provide such a substitute, which may consist of--
 - ˘ (1) a summary of such privileged information;
 - ˘ (2) a version of the evidence with privileged information redacted;
 - ˘ (3) a statement admitting relevant facts that the privileged information would tend to prove; or
 - ˘ (4) any other alternative as directed by the court in the interests of justice and protecting national security.
- ˘ (g) Refusal To Provide Non-Privileged Substitute- In a suit against the United States or an officer or agent of the United States acting in the official capacity of that officer or agent, if the court orders the United States to provide a non-privileged substitute for evidence in accordance with this section, and the United States fails to comply, the court shall resolve the disputed issue of fact or law to which the evidence pertains in the non-government party's favor.

˘ Sec. 4055. Procedures when evidence protected by the state secrets privilege is necessary for adjudication of a claim or counterclaim

- ˘ After reviewing all available evidence, privileged and non-privileged, a Federal court may dismiss a claim or counterclaim on the basis of the state secrets privilege only if the court determines that--
 - ˘ (1) it is impossible to create for privileged material evidence a non-privileged substitute under section 4054(f) that provides a substantially equivalent opportunity to litigate the claim or counterclaim as would that privileged material evidence;
 - ˘ (2) dismissal of the claim or counterclaim would not harm national security; and
 - ˘ (3) continuing with litigation of the claim or counterclaim in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim.

Sec. 4056. Interlocutory appeal

- ^ (a) In General- The courts of appeal shall have jurisdiction of an appeal by any party from any interlocutory decision or order of a district court of the United States under this chapter.
- ^ (b) Appeal-
 - ^ (1) IN GENERAL- An appeal taken under this section either before or during trial shall be expedited by the court of appeals.
 - ^ (2) DURING TRIAL- If an appeal is taken during trial, the district court shall adjourn the trial until the appeal is resolved and the court of appeals--
 - ^ (A) shall hear argument on appeal as expeditiously as possible after adjournment of the trial by the district court;
 - ^ (B) may dispense with written briefs other than the supporting materials previously submitted to the trial court;
 - ^ (C) shall render its decision as expeditiously as possible after argument on appeal; and
 - ^ (D) may dispense with the issuance of a written opinion in rendering its decision.

Sec. 4057. Security procedures

- ^ (a) In General- The security procedures established under the Classified Information Procedures Act (18 U.S.C. App.) by the Chief Justice of the United States for the protection of classified information shall be used to protect against unauthorized disclosure of evidence protected by the state secrets privilege.
- ^ (b) Rules- The Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, may create additional rules or amend the rules to implement this chapter and shall submit any such additional rules or amendments to the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate. Any such rules or amendments shall become effective 90 days after such submission, unless Congress provides otherwise. Rules and amendments shall comply with the letter and spirit of this chapter, and may include procedures concerning the role of magistrate judges and special masters in assisting courts in carrying out this chapter.

Sec. 4058. Reporting

- ^ (a) In General- The Attorney General shall report in writing to the Permanent Select Committee on Intelligence of the House of

Representatives, the Select Committee on Intelligence of the Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives on any case in which the United States invokes the state secrets privilege, not later than 30 calendar days after the date of such assertion. Each report submitted under this subsection shall include all affidavits filed under this chapter by the United States.

ˆ (b) Operation and Effectiveness-

ˆ (1) IN GENERAL- The Attorney General shall deliver to the committees of Congress described in subsection (a) a report concerning the operation and effectiveness of this chapter and including suggested amendments to this chapter.

ˆ (2) DEADLINE- The Attorney General shall submit a report under paragraph (1) not later than 1 year after the date of enactment of this chapter, and every year thereafter until the date that is 3 years after that date of enactment. After the date that is 3 years after that date of enactment, the Attorney General shall submit a report under paragraph (1) as necessary.

ˆ **Sec. 4059. Rule of construction**

ˆ Nothing in this chapter is intended to supersede any other limit on the state secrets privilege under any other provision of law.'

(b) Technical and Conforming Amendment- The table of chapters for title 28, United States Code, is amended by adding at the end the following:

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SEC. 3. APPLICATION TO PENDING CASES.

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