

111TH CONGRESS  
1ST SESSION

# H. R. 984

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

---

## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2009

Mr. NADLER of New York (for himself, Mr. PETRI, Mr. CONYERS, Mr. DELAHUNT, Ms. ZOE LOFGREN of California, Mr. FRANK of Massachusetts, and Mr. DOGGETT) introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret 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 Secret Protection  
5        Act of 2009”.

6        **SEC. 2. STATE SECRET PRIVILEGE.**

7        In any civil action brought in Federal or State court,  
8        the Government has a privilege to refuse to give informa-  
9        tion and to prevent any person from giving information

1 only if the Government shows that public disclosure of the  
2 information that the Government seeks to protect would  
3 be reasonably likely to cause significant harm to the na-  
4 tional defense or the diplomatic relations of the United  
5 States.

6 **SEC. 3. PROTECTION OF SECRETS.**

7 (a) IN GENERAL.—The court shall take steps to pro-  
8 tect sensitive information that comes before the court in  
9 connection with proceedings under this Act. These steps  
10 may include reviewing evidence or pleadings and hearing  
11 arguments ex parte, issuing protective orders, requiring  
12 security clearance for parties or counsel, placing material  
13 under seal, and applying security procedures established  
14 under the Classified Information Procedures Act for clas-  
15 sified information to protect the sensitive information.

16 (b) IN CAMERA PROCEEDINGS.—All hearings and  
17 other proceedings under this Act may be conducted in  
18 camera, as needed to protect information that may be sub-  
19 ject to the privilege.

20 (c) PARTICIPATION OF COUNSEL.—Participation of  
21 counsel in proceedings under this Act shall not be limited  
22 unless the court determines that the limitation is a nec-  
23 essary step to protect information the Government asserts  
24 is protected by the privilege or that supports the claim  
25 of privilege and that no less restrictive means of protection

1 suffice. The court shall give a written explanation of its  
2 decision to the parties and their counsel, which may be  
3 placed under seal.

4 (d) PRODUCTION OF ADEQUATE SUBSTITUTE PEND-  
5 ING RESOLUTION OF THE CLAIM OF PRIVILEGE.—If at  
6 any point during its consideration of the Government’s  
7 claim, the court determines that disclosure of information  
8 to a party or counsel, or disclosure of information by a  
9 party that already possesses it, presents a risk of a harm  
10 described in section 2 that cannot be addressed through  
11 less restrictive means provided in this section, the court  
12 may require the Government to produce an adequate sub-  
13 stitute, such as a redacted version, summary of the infor-  
14 mation, or stipulation regarding the relevant facts, if the  
15 court deems such a substitute feasible. The substitute  
16 must be reviewed and approved by the court and must  
17 provide counsel with a substantially equivalent opportunity  
18 to assess and challenge the Government’s claim of privi-  
19 lege as would the protected information.

20 **SEC. 4. ASSERTION OF THE PRIVILEGE.**

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

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

9 **SEC. 5. PRELIMINARY PROCEEDINGS.**

10 (a) PRELIMINARY REVIEW BY COURT.—Once the  
11 Government has asserted the privilege, and before the  
12 Court makes any determinations under section 6, the  
13 court shall undertake a preliminary review of the informa-  
14 tion the Government asserts is protected by the privilege  
15 and provide the Government an opportunity to seek pro-  
16 tective measures under this Act. After any initial protec-  
17 tive measures are in place, the Court shall proceed to the  
18 consideration of additional preliminary matters under this  
19 section.

20 (b) CONSIDERATION OF WHETHER TO APPOINT SPE-  
21 CIAL MASTER OR EXPERT WITNESS.—The court shall  
22 consider whether the appointment of a special master with  
23 appropriate expertise or an expert witness, or both, would  
24 facilitate the court's duties under this Act.

1           (c) INDEX OF MATERIALS.—The court may order the  
2 Government to provide a manageable index of the informa-  
3 tion that the Government asserts is subject to the privi-  
4 lege. The index must correlate statements made in the af-  
5 fidavit required under this Act with portions of the infor-  
6 mation the Government asserts is subject to the privilege.  
7 The index shall be specific enough to afford the court an  
8 adequate foundation to review the basis of the assertion  
9 of the privilege by the Government.

10           (d) PREHEARING CONFERENCES.—After the prelimi-  
11 nary review the court shall hold one or more conferences  
12 with the parties to—

13                 (1) determine any steps needed to protect sen-  
14 sitive information;

15                 (2) define the issues presented by the Govern-  
16 ment’s claim of privilege, including whether it is pos-  
17 sible to allow the parties to complete nonprivileged  
18 discovery before determining whether the claim of  
19 privilege is valid;

20                 (3) order disclosure to the court of anything  
21 needed to assess the claim, including all information  
22 the Government asserts is protected by the privilege  
23 and other material related to the Government’s  
24 claim;

1           (4) resolve any disputes regarding participation  
2 of counsel or parties in proceedings relating to the  
3 claim, including access to the Government's evidence  
4 and arguments;

5           (5) set a schedule for completion of discovery  
6 related to the Government's claim; and

7           (6) take other steps as needed, such as ordering  
8 counsel or parties to obtain security clearances.

9       (e) SECURITY CLEARANCES.—If the court orders a  
10 party or counsel to obtain a security clearance, the Gov-  
11 ernment shall promptly conduct the necessary review and  
12 determine whether or not to provide the clearance. If the  
13 necessary clearance is not promptly provided to counsel  
14 for a party, the party may propose that alternate or addi-  
15 tional counsel be cleared. If within a reasonable time, al-  
16 ternative or additional counsel selected by the party can-  
17 not be cleared, then the court, in consultation with that  
18 party and that party's counsel, shall appoint another at-  
19 torney, who can obtain the necessary clearance promptly,  
20 to represent the party in proceedings under this Act.  
21 When a security clearance for counsel sought under this  
22 Act is denied, the court may require the Government to  
23 present an ex parte explanation of that denial.

1 **SEC. 6. PROCEDURES AND STANDARD FOR ASSESSING THE**  
2 **PRIVILEGE CLAIM.**

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

5 (b) BASIS FOR RULING.—

6 (1) GENERALLY.—The court may not deter-  
7 mine that the privilege is valid until the court has  
8 reviewed—

9 (A) except as provided in paragraph (2),  
10 all of the information that the Government as-  
11 serts is privileged;

12 (B) the affidavits, evidence, memoranda  
13 and other filings submitted by the parties re-  
14 lated to the privilege claim; and

15 (C) any other evidence that the court de-  
16 termines it needs to rule on the privilege.

17 (2) SAMPLING IN CERTAIN CASES.—Where the  
18 volume of information the Government asserts is  
19 privileged precludes a timely review, or the court  
20 otherwise determines a review of all of that informa-  
21 tion is not feasible, the court may substitute a suffi-  
22 cient sampling of the information if the court deter-  
23 mines that there is no reasonable possibility that re-  
24 view of the additional information would change the  
25 court's determination on the privilege claim and the  
26 information reviewed is sufficient to enable to court

1 to make the independent assessment required by this  
2 section.

3 (c) STANDARD.—In ruling on the validity of the privi-  
4 lege, the court shall make an independent assessment of  
5 whether the harm identified by the Government, as re-  
6 quired by section 2, is reasonably likely to occur should  
7 the privilege not be upheld. The court shall weigh testi-  
8 mony from Government experts in the same manner as  
9 it does, and along with, any other expert testimony.

10 (d) BURDEN OF PROOF.—The Government shall have  
11 the burden of proof as to the nature of the harm and as  
12 to the likelihood of its occurrence.

13 **SEC. 7. EFFECT OF COURT DETERMINATION.**

14 (a) IN GENERAL.—If the court determines that the  
15 privilege is not validly asserted, the information may be  
16 disclosed to a nongovernmental party or admitted at trial,  
17 subject to the other rules of evidence. If the court deter-  
18 mines that the privilege is validly asserted, that informa-  
19 tion shall not be disclosed to a nongovernmental party or  
20 the public.

21 (b) NONPRIVILEGED SUBSTITUTE.—

22 (1) COURT CONSIDERATION OF SUBSTITUTE.—  
23 If the court finds that the privilege is validly as-  
24 serted and it is possible to craft a nonprivileged sub-  
25 stitute, such as those described in section 3(d), for



1 the privileged information that would provide the  
2 parties a substantially equivalent opportunity to liti-  
3 gate the case, the court shall order the Government  
4 to produce the substitute to the satisfaction of the  
5 court.

6 (2) REFUSAL TO PROVIDE.—In a civil action  
7 brought against the Government, if the court orders  
8 the Government to provide a nonprivileged substitute  
9 for information and the Government fails to comply,  
10 in addition to any other appropriate sanctions, the  
11 court shall find against the Government on the fac-  
12 tual or legal issue to which the privileged informa-  
13 tion is relevant. If the action is not brought against  
14 the Government, the court shall weigh the equities  
15 and make appropriate orders as provided in sub-  
16 section (d).

17 (c) OPPORTUNITY TO COMPLETE DISCOVERY.—The  
18 court shall not resolve any issue or claim and shall not  
19 grant a motion to dismiss or motion for summary judg-  
20 ment based on the state secrets privilege and adversely  
21 to any party against whom the Government's privilege  
22 claim has been upheld until that party has had a full op-  
23 portunity to complete nonprivileged discovery and to liti-  
24 gate the issue or claim to which the privileged information  
25 is relevant without regard to that privileged information.

1 (d) APPROPRIATE ORDERS IN THE INTEREST OF  
2 JUSTICE.—After reviewing all available evidence, and only  
3 after determining that privileged information, for which  
4 it is impossible to create a nonprivileged substitute, is nec-  
5 essary to decide a factual or legal issue or claim, the court  
6 shall weigh the equities and make appropriate orders in  
7 the interest of justice, such as striking the testimony of  
8 a witness, finding in favor of or against a party on a fac-  
9 tual or legal issue to which the information is relevant,  
10 or dismissing a claim or counterclaim.

11 **SEC. 8. 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 Act.

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 dur-  
21 ing 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 expediently as possible after adjournment of the  
2 trial by the district court;

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

5 (C) shall render its decision as expeditiously 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 **SEC. 9. REPORTING.**

10 (a) IN GENERAL.—Consistent with applicable authorities and duties, including those conferred by the  
11 Constitution of the United States upon the executive and legislative branches, the Attorney General shall report in writing to the Permanent Select Committee on Intelligence of  
12 the House of Representatives, the Select Committee on Intelligence of the Senate, and the chairmen and ranking  
13 minority members of the Committees on the Judiciary of the House of Representatives and Senate on any case in  
14 which the Government invokes a state secrets privilege, not later than 30 calendar days after the date of such  
15 assertion. Each report submitted under this subsection shall

1 include all affidavits filed under this Act by the Govern-  
2 ment.

3 (b) OPERATION AND EFFECTIVENESS.—

4 (1) IN GENERAL.—The Attorney General shall  
5 deliver to the committees of Congress described in  
6 subsection (a) a report concerning the operation and  
7 effectiveness of this Act and including suggested  
8 amendments to the Act.

9 (2) DEADLINE.—The Attorney General shall  
10 submit this report not later than 1 year after the  
11 date of enactment of this Act, and every year there-  
12 after until the date that is 3 years after that date  
13 of enactment. After the date that is 3 years after  
14 that date of enactment, the Attorney General shall  
15 submit a report under paragraph (1) as necessary.

16 **SEC. 10. RULE OF CONSTRUCTION.**

17 This Act provides the only privilege that may be as-  
18 serted in civil cases based on state secrets and the stand-  
19 ards and procedures set forth in this Act apply to any  
20 assertion of the privilege.

21 **SEC. 11. APPLICATION.**

22 This Act applies to claims pending on or after the  
23 date of enactment of this Act. A court also may relieve  
24 a party or its legal representative from a final judgment,

1 order, or proceeding that was based, in whole or in part,  
2 on the state secrets privilege if—

3 (1) the motion for relief is filed with the ren-  
4 dering court within one year of the date of enact-  
5 ment of this Act;

6 (2) the underlying judgment, order, or pro-  
7 ceeding from which the party seeks relief was en-  
8 tered after January 1, 2002; and

9 (3) the claim on which the judgement, order, or  
10 proceeding is based is—

11 (A) against the Government; or

12 (B) arises out of conduct by persons acting  
13 in the capacity of a Government officer, em-  
14 ployee, or agent.

○