

114TH CONGRESS
2D SESSION

H. R. 4767

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

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 2016

Mr. NADLER (for himself, Mr. MCCLINTOCK, and Mr. CONYERS) 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 Secrets Protec-
5 tion Act”.

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
10 only if the Government shows that public disclosure of the

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

5 **SEC. 3. PROTECTION OF SECRETS.**

6 (a) IN GENERAL.—The court shall take steps to pro-
7 tect sensitive information that comes before the court in
8 connection with proceedings under this Act. These steps
9 may include reviewing evidence or pleadings and hearing
10 arguments ex parte, issuing protective orders, placing ma-
11 terial under seal, and applying security procedures estab-
12 lished under the Classified Information Procedures Act for
13 classified information to protect the sensitive information.

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

18 (c) PARTICIPATION OF COUNSEL.—Participation of
19 counsel in proceedings under this Act may be limited if
20 the court determines that the limitation is a necessary step
21 to protect information the Government asserts is protected
22 by the privilege or that supports the claim of privilege.

23 (d) GUARDIAN AD LITEM.—Where counsel is ex-
24 cluded from a proceeding, the court shall have discretion
25 to appoint a guardian ad litem to represent the absent

1 litigant's interests, drawing, in consultation with the ex-
2 cluded nongovernmental party, from a previously gen-
3 erated list of attorneys who have been granted required
4 security clearances in the past and have agreed to serve
5 in this capacity. The guardian ad litem shall not discuss
6 the information claimed as privileged or its content with
7 any nongovernmental party or nongovernmental party's
8 counsel.

9 (e) PRODUCTION OF ADEQUATE SUBSTITUTE PEND-
10 ING RESOLUTION OF THE CLAIM OF PRIVILEGE.—If, at
11 any point during its consideration of the Government's
12 claim, the court determines that disclosure of information
13 to a party or counsel, or disclosure of information by a
14 party that already possesses it, presents a risk of a harm
15 described in subsection (a) that cannot be addressed
16 through less restrictive means provided in this subsection,
17 the court may require the Government to produce an ade-
18 quate substitute, such as a redacted version, summary of
19 the information, or stipulation regarding the relevant
20 facts, if the court deems such a substitute feasible. The
21 substitute must be reviewed and approved by the court
22 and must provide counsel with a substantially equivalent
23 opportunity to assess and challenge the Government's
24 claim of privilege as would the protected information.

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

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

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

14 **SEC. 5. PRELIMINARY PROCEEDINGS.**

15 (a) PRELIMINARY REVIEW BY COURT.—Once the
16 Government has asserted the privilege, and before the
17 court makes any determinations under section 6, the court
18 shall undertake a preliminary review of the information
19 the Government asserts is protected by the privilege and
20 provide the Government an opportunity to seek protective
21 measures under this Act. After any initial protective meas-
22 ures are in place, the court shall proceed to the consider-
23 ation of additional preliminary matters under this section.

24 (b) CONSIDERATION OF WHETHER TO APPOINT SPE-
25 CIAL MASTER OR EXPERT WITNESS.—The court shall
26 consider whether the appointment of a special master with

1 appropriate expertise or an expert witness, or both, would
2 facilitate the court's duties under this Act.

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

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

15 (1) determine any steps needed to protect sen-
16 sitive information;

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

22 (3) order disclosure to the court of anything
23 needed to assess the claim, including all information
24 the Government asserts is protected by the privilege

1 and other material related to the Government's
2 claim;

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

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

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

11 **SEC. 6. PROCEDURES AND STANDARD FOR ASSESSING THE**
12 **PRIVILEGE CLAIM.**

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

15 (b) BASIS FOR RULING.—

16 (1) GENERALLY.—The court may not deter-
17 mine that the privilege is valid until the court has
18 reviewed—

19 (A) except as provided in paragraph (2),
20 all of the information that the Government as-
21 serts is privileged;

22 (B) the affidavits, evidence, memoranda
23 and other filings submitted by the parties re-
24 lated to the privilege claim; and

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

3 (2) SAMPLING IN CERTAIN CASES.—Where the
4 volume of information the Government asserts is
5 privileged precludes a timely review, or the court
6 otherwise determines a review of all of that informa-
7 tion is not feasible, the court may substitute a suffi-
8 cient sampling of the information if the court deter-
9 mines that there is no reasonable possibility that re-
10 view of the additional information would change the
11 court's determination on the privilege claim and the
12 information reviewed is sufficient to enable the court
13 to make the independent assessment required by this
14 section.

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

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

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

2 (a) IN GENERAL.—If the court determines that the
3 privilege is not validly asserted, the court shall issue ap-
4 propriate orders regarding the disclosure of the informa-
5 tion to a nongovernmental party and its admission at trial,
6 subject to the other rules of evidence, with the right to
7 interlocutory appeal as provided in section 8 for any such
8 orders. If the court determines that the privilege is validly
9 asserted, that information shall not be disclosed to a non-
10 governmental party or the public.

11 (b) NONPRIVILEGED SUBSTITUTE.—

12 (1) COURT CONSIDERATION OF SUBSTITUTE.—

13 If the court finds that the privilege is validly as-
14 serted and it is possible to craft a nonprivileged sub-
15 stitute, such as those described in section 3(e), for
16 the privileged information that would provide the
17 parties a substantially equivalent opportunity to liti-
18 gate the case, the court shall order the Government
19 to produce the substitute to the satisfaction of the
20 court.

21 (2) REFUSAL TO PROVIDE.—In a civil action
22 brought against the Government, if the court orders
23 the Government to provide a nonprivileged substitute
24 for information and the Government fails to comply,
25 in addition to any other appropriate sanctions, the
26 court shall find against the Government on the fac-

1 tual or legal issue to which the privileged informa-
2 tion is relevant. If the action is not brought against
3 the Government, the court shall weigh the equities
4 and make appropriate orders as provided in sub-
5 section (d).

6 (c) OPPORTUNITY TO COMPLETE DISCOVERY.—The
7 court shall not resolve any issue or claim and shall not
8 grant a motion to dismiss or motion for summary judg-
9 ment based on the state secrets privilege and adversely
10 to any party against whom the Government's privilege
11 claim has been upheld until that party has had a full op-
12 portunity to complete nonprivileged discovery and to liti-
13 gate the issue or claim to which the privileged information
14 is relevant without regard to that privileged information.

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

1 party based in whole or in part on privileged information
2 that was not disclosed to that party.

3 **SEC. 8. INTERLOCUTORY APPEAL.**

4 (a) IN GENERAL.—The courts of appeal shall have
5 jurisdiction of an appeal from a decision or order of a dis-
6 trict court determining that the state secrets privilege is
7 not validly asserted, sanctioning a refusal to provide an
8 adequate or nonprivileged substitute required under this
9 Act, or refusing protective steps sought by the Govern-
10 ment under this Act pending the resolution of the claim
11 of state secrets privilege.

12 (b) APPEAL.—

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

16 (2) DURING TRIAL.—If an appeal is taken dur-
17 ing trial, the district court shall adjourn the trial
18 until the appeal is resolved and the court of ap-
19 peals—

20 (A) shall hear argument on appeal as expe-
21 ditiously as possible after adjournment of the
22 trial by the district court;

23 (B) may dispense with written briefs other
24 than the supporting materials previously sub-
25 mitted to the trial court;

1 (C) shall render its decision as expedi-
2 tiously as possible after argument on appeal;
3 and

4 (D) may dispense with the issuance of a
5 written opinion in rendering its decision.

6 **SEC. 9. REPORTING.**

7 (a) IN GENERAL.—Consistent with applicable au-
8 thorities and duties, including those conferred by the Con-
9 stitution of the United States upon the executive and legis-
10 lative branches, the Attorney General shall report in writ-
11 ing to the Permanent Select Committee on Intelligence of
12 the House of Representatives, the Select Committee on In-
13 telligence of the Senate, and the chairmen and ranking
14 minority members of the Committees on the Judiciary of
15 the House of Representatives and the Senate on any case
16 in which the Government invokes a state secrets privilege,
17 not later than 30 calendar days after the date of such as-
18 sertion. Each report submitted under this subsection shall
19 include all affidavits filed under this Act by the Govern-
20 ment.

21 (b) OPERATION AND EFFECTIVENESS.—

22 (1) IN GENERAL.—The Attorney General shall
23 deliver to the committees of Congress described in
24 subsection (a) a report concerning the operation and

1 effectiveness of this Act and including suggested
2 amendments to the Act.

3 (2) DEADLINE.—The Attorney General shall
4 submit this report not later than 1 year after the
5 date of enactment of this Act, and every year there-
6 after until the date that is 3 years after that date
7 of enactment. After the date that is 3 years after
8 that date of enactment, the Attorney General shall
9 submit a report under paragraph (1) as necessary.

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

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

15 **SEC. 11. APPLICATION.**

16 This Act applies to claims pending on or after the
17 date of enactment of this Act. A court also may relieve
18 a party or its legal representative from a final judgment,
19 order, or proceeding that was based, in whole or in part,
20 on the state secrets privilege if—

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

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

4 (3) the claim on which the judgment, order, or
5 proceeding is based is—

6 (A) against the Government; or

7 (B) arises out of conduct by persons acting
8 in the capacity of a Government officer, em-
9 ployee, or agent.

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