

AMENDMENT NO.

Calendar No.

Purpose: To establish a state secrets privilege in connection with civil actions against the United States or other litigation involving state secrets.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that Act, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by

Viz:

1 On page 55, before line 8, insert the following:

2 **SEC. 206. STATE SECRETS PRIVILEGE IN CONNECTION**

3 **WITH CIVIL ACTIONS AGAINST THE UNITED**

4 **STATES OR OTHER LITIGATION INVOLVING**

5 **STATE SECRETS.**

6 (a) STATE SECRETS GENERALLY.—For the purpose
7 of any civil action brought against the United States or
8 other litigation involving state secrets, evidence of state
9 secrets shall be excluded, and no disclosure ordered or

1 compelled, where the court, upon receipt of a qualifying
2 affidavit, finds that—

3 (1) the interests of national security asserted in
4 the qualifying affidavit are genuine and show a rea-
5 sonable danger of harm from disclosure; or

6 (2) the needs of the litigants can be substan-
7 tially met through less intrusive means than disclo-
8 sure.

9 (b) PROCEDURE.—In evaluating a claim of state se-
10 crets under this section, the court shall examine in camera
11 all classified evidence, addenda, and pleadings filed under
12 seal and ex parte, and shall determine whether there is
13 sufficient cause to support application of the privilege. In
14 making its determination, the court shall give substantial
15 weight to the claims made in the qualifying affidavit un-
16 less those claims are found by the court to be frivolous,
17 unsupported, or substantially outweighed by the need for
18 disclosure as part of further litigation. No need for disclo-
19 sure may be found to exist in any case in which a court
20 can fashion rules and presumptions to permit further pro-
21 ceedings without disclosure or where military secrets are
22 at stake.

23 (c) FURTHER PROCEEDINGS AND PRESUMPTIONS.—
24 If the assertion of the state secrets privilege substantially
25 and unfairly prejudices the claims or interests of a liti-

1 gant, the court, to the extent practicable, shall fashion
2 rules and presumptions to remove any unfair prejudice
3 and to allow for further proceedings without disclosure.

4 (d) QUALIFYING AFFIDAVIT.—In this section, the
5 term “qualifying affidavit” means a written statement,
6 made under oath or pursuant to section 1746 of title 28,
7 United States Code, on behalf of the United States by the
8 head of the department or agency over the matter at issue,
9 that asserts—

10 (1) the disclosure of certain evidence or infor-
11 mation would be inimical to the national security;

12 (2) a specific privilege log and description of
13 the evidence or information at issue (or, with leave
14 of the court, a redacted privilege log and generalized
15 description of the same with a more detailed adden-
16 dum submitted to the court in camera and ex parte);

17 (3) the nature and degree of harm to the na-
18 tional security that could result from disclosure; and

19 (4) that the affiant has personally considered
20 the matters described in the affidavit.

21 (e) PROCEEDINGS GOVERNED BY RULE 1101(D).—
22 Any proceedings under this section shall be governed by
23 rule 1101(d) of the Federal Rule of Evidence.