

lives and limbs of civilians who comprise the vast majority of war casualties today.

The Pentagon continues to insist that cluster munitions have military utility, and that the U.S. should retain the ability to use millions of cluster munitions in its arsenal which have estimated failure rates of 5 to 20 percent.

Of course, any weapon, whether cluster munitions, landmines, or even poison gas, has some military utility. But anyone who has seen the indiscriminate devastation cluster munitions cause over a wide area understands the unacceptable threat they can pose to civilians. These are not the laser guided weapons the Pentagon showed destroying their targets during the invasion of Baghdad.

There is the insidious problem of cluster munitions that fail to explode as designed and remain as active duds, like landmines, until they are triggered by whoever comes into contact with them. Often it is an unsuspecting child, or a farmer. We saw that recently in Lebanon, and in Laos people are still being killed and maimed by U.S. cluster munitions left from the Vietnam War.

Current law prohibits U.S. sales, exports and transfers of cluster munitions that have a failure rate exceeding 1 percent. That law also requires any sale, export or transfer agreement to include a requirement that the cluster munitions will be used only against military targets and not in areas where civilians are known to be present.

Last year, the Pentagon announced that it would meet the failure rate requirement for U.S. use of cluster munitions in 2018. While a step forward, I do not believe we can justify continuing to use weapons that so often fail, so often kill and injure civilians, and which many of our allies have renounced. That is not the kind of leadership the world needs and expects from the United States.

Senator FEINSTEIN's and my bill would apply similar restrictions to the use of cluster munitions beginning immediately on the date of enactment. However, the bill does permit the President to waive the 1 percent requirement if he certifies that it is vital to protect the security of the United States. I urge the Pentagon to work with us by supporting this reasonable step.

I want to express my appreciation to all nations that have signed the treaty, and urge the Obama administration to review its policy on cluster munitions with a view toward putting the U.S. on a path to join the treaty as soon as possible. In the meantime, our legislation would go a long way toward putting the United States on that path.

There are some who dismissed the Cluster Munitions Convention as a pointless exercise, since it does not yet have the support of the United States and other major powers such as Russia, China, Pakistan, India, and Israel. These are some of the same critics of

the Ottawa treaty banning anti-personnel landmines, which the U.S. and the other countries I named have also refused to sign. But that treaty has dramatically reduced the number of landmines produced, used, sold and stockpiled, and the number of mine victims has fallen sharply. Any government that contemplates using landmines today does so knowing that it will be condemned by the international community. I suspect it is only a matter of time before the same is true for cluster munitions.

It is important to note that the U.S. today has the technological ability to produce cluster munitions that would not be prohibited by the treaty. What is lacking is the political will to expend the necessary resources. There is no other excuse for continuing to use cluster munitions that cause unacceptable harm to civilians. I am committed to working in the Defense Appropriations Subcommittee to help secure the resources needed to make this new technology available.

I want to commend Senator FEINSTEIN who has shown real passion and persistence in raising this issue and seeking every opportunity to protect civilians from these indiscriminate weapons.

By Mr. LEAHY (for himself, Mr. SPECTER, Mr. KENNEDY, Mr. FEINGOLD, Mr. WHITEHOUSE, and Mrs. MCCASKILL):

S. 417. A bill to enact a safe, fair, and responsible state secrets privilege Act; to the Committee on the Judiciary.

Mr. LEAHY. Mr. President, today, I am introducing the bipartisan State Secrets Protection Act. I am pleased that Senator KENNEDY, who had so much to do with developing this proposal last Congress is an original cosponsor of the bill along with Senators SPECTER, FEINGOLD, WHITEHOUSE and MCCASKILL. After a lengthy debate, this bill was reported by the Judiciary Committee last April.

The State secrets privilege is a common law doctrine that the Government can claim in court to prevent evidence that could harm national security from being publicly revealed. During the Bush administration, the State secrets privilege was used to avoid judicial review and skirt accountability by ending cases without consideration of the merits. It was used to stymie litigation at its very inception in cases alleging egregious Government misconduct, such as extraordinary rendition and warrantless eavesdropping on the communications of Americans.

The 2006 case of Khaled El-Masri, who was kidnapped and transported against his will to Afghanistan, where he was detained and tortured as part of the Bush administration's extraordinary rendition program, is one such example. He sued the government alleging unlawful detention and treatment. A district court judge dismissed the entire lawsuit after the Government invoked the State secrets privilege, sole-

ly on the basis of an ex parte declaration from the Director of the Central Intelligence Agency, and despite the fact that the Government had admitted that the rendition program exists. Mr. El-Masri has no other remedy. Our justice system is off limits to him, and no judge ever reviewed any of the actual evidence.

The State secrets privilege serves important goals where properly invoked. But there are serious consequences for litigants and for the American public when the privilege is used to terminate litigation alleging serious Government misconduct. For the aggrieved parties, it means that the courthouse doors are closed forever regardless of the severity of their injury. They will never have their day in court. For the American public, it means less accountability, because there will be no judicial scrutiny of improper actions of the executive, and no check or balance.

The State Secrets Protection Act will help guide the courts to balance the Government's interests in secrecy with accountability and the rights of citizens to seek judicial redress. The bill does not restrict the Government's ability to assert the privilege in appropriate cases. Rather, the bill would allow judges to look at the actual evidence the Government submits so that they, neutral judges, rather than self-interested executive branch officials, would render the ultimate decision whether the State secrets privilege should apply. This is consistent with the procedure for other privileges recognized in our courts.

We held a Committee hearing on this issue last year, and the appropriate use of this privilege remains an area of concern for me and for the cosponsors of this bill. In light of the pending cases where this privilege has been invoked, involving issues including torture, rendition and warrantless wiretapping, we can ill-afford to delay consideration of this important legislation. I hope all Senators will join us in supporting this bill.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be placed in the RECORD, as follows:

S. 417

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. 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 necessary for adjudication of a claim or counterclaim.

“4056. Interlocutory appeal.
 “4057. Security procedures.
 “4058. Reporting.
 “4059. Rule of construction.

“§ 4051. Definitions

“In this chapter—

“(1) the term ‘evidence’ means any document, witness testimony, discovery response, affidavit, object, or other material that could be admissible in court under the Federal Rules of Evidence or discoverable under the Federal Rules of Civil Procedure; and

“(2) 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.

“§ 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.

“(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.

“(3) COURT OVERSIGHT.—If the United States fails to provide a security clearance necessary to conduct a hearing under this chapter in a reasonable period of time, the court may review in camera and ex parte the reasons of the United States for denying or delaying the clearance to ensure that the

United States is not withholding a security clearance from a particular attorney or class of attorneys for any reason other than protection of national security.

“(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.

“(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.

“(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.

“§ 4053. Procedures for answering a complaint

“(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.

“(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. If a motion to dismiss or for summary judgment is based in whole or in part on the state secrets privilege, or may be affected by the assertion of the state secrets privilege, a ruling on that motion shall be deferred pending completion of the hearings provided under this chapter, unless the motion can be granted on grounds unrelated to, and unaffected by, the assertion of the state secrets privilege.

“(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 assert 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 or admission shall be drawn from a pleading of state secrets in an answer to an item in a complaint.

“(d) SUPPORTING AFFIDAVIT.—In each instance in which the United States asserts 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 asserted state secrets explaining the factual basis for the assertion of the privilege and attesting that personal consideration was given to the assertion of the privilege. The duties of the head of an executive branch agency under this subsection may not be delegated.

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

“(a) ASSERTING 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, assert the state secrets privilege as a ground for withholding information or evidence in discovery or for preventing

the disclosure of information through court filings or through the introduction of evidence.

“(b) SUPPORTING AFFIDAVIT.—In each instance in which the United States asserts 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, consistent with the requirements of section 4052, to examine the items of evidence that the United States asserts are subject to the state secrets privilege, as well as any affidavit submitted by the United States in support of any assertion of the state secrets privilege, and to determine the validity of any assertion of the state secrets privilege made by the United States.

“(d) REVIEW OF EVIDENCE.—

“(1) SUBMISSION OF EVIDENCE.—In addition to the affidavit provided under subsection (b), and except as provided in paragraph (2) of this subsection, 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) SAMPLING IN CERTAIN CASES.—If the volume of evidence the United States asserts is protected by the state secrets privilege precludes a timely review of each item of evidence, or the court otherwise determines that a review of all of that evidence is not feasible, the court may substitute a sufficient sampling of the evidence if the court determines that there is no reasonable possibility that review of the additional evidence would change the determination on the privilege claim and the evidence reviewed is sufficient to enable to court to make the determination required under this section.

“(3) 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.—Except as provided in subsection (d)(2), 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. An item of 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 AND DISCLOSURE.—

“(A) PRIVILEGED EVIDENCE.—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.

“(B) NON-PRIVILEGED EVIDENCE.—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 Federal Rules of Civil Procedure and the Federal Rules of Evidence.

“(3) STANDARD OF REVIEW.—The court shall give substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States. The court shall weigh the testimony of a Government expert in the same manner as the court weighs, and along with, any other expert testimony in the applicable case.

“(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.

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

“After reviewing all pertinent 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.

“§ 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.

“§ 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. The rules or amendments under this subsection may include procedures to ensure that a sufficient number of attorneys with appropriate security clearances are available in each of the judicial districts of the United States to serve as guardians ad litem under section 4052(c)(1).

“§ 4058. Reporting

“(a) ASSERTION OF STATE SECRETS PRIVILEGE.—

“(1) IN GENERAL.—The Attorney General shall submit 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 a report on any case in which the United States asserts the state secrets privilege, not later than 30 calendar days after the date of such assertion.

“(2) CONTENTS.—Each report submitted under this subsection shall include any affidavit filed in support of the assertion of the state secrets privilege and the index required under section 4054(d)(2).

“(3) EVIDENCE.—Upon a request by any member of the Permanent Select Committee on Intelligence or the Committee on the Judiciary of the House of Representatives or the Select Committee on Intelligence or the Committee on the Judiciary of the Senate, the Attorney General shall provide to that member any item of evidence relating to which the United States has asserted the state secrets privilege.

“(4) PROTECTION OF INFORMATION.—An affidavit, index, or item of evidence provided under this subsection may be included in a classified annex or provided under any other appropriate security measures.

“(b) OPERATION AND EFFECTIVENESS.—

“(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.

“(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.

“§ 4059. Rule of construction

“Nothing in this chapter—

“(1) is intended to supersede any further or additional limit on the state secrets privilege under any other provision of law; or

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

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following:

181. State secrets protection 4051
SEC. 3. SEVERABILITY.

If any provision of this Act, any amendment made by the Act, or the application of such provision or amendment to any person or circumstances is held to be invalid, the remainder of this Act, the amendments made by the Act, and the application of such provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

SEC. 4. 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.

Mr. FEINGOLD. Mr. President, I am proud to join Senators LEAHY, SPECTER, and KENNEDY in introducing the State Secrets Protection Act of 2009. This bill establishes uniform procedures for courts to use when evaluating governmental assertions of the state secrets privilege in civil litigation. It takes an important step toward restoring the rule of law by ensuring that the privilege will be used only to protect true state secrets, and not as a means for the Government to avoid accountability for its actions.

In a democracy, the public should have the right to know what its government is doing. That should be the rule, and secrecy should be the rare exception, reserved for the very few cases in which the national security is truly at stake. Unfortunately, the Bush administration stood that presumption on its head, cloaking its actions in secrecy whenever possible and grudgingly submitting to public scrutiny only when it couldn't be avoided. The “state secrets” privilege was a favorite weapon in that administration's arsenal of secrecy.

None of us disputes that information may properly be withheld as a “state secret” when disclosing the information would cause grave damage to national security. The problem arises when the privilege is abused and invoked to shield Government wrongdoing. Indeed, that is exactly what happened the first time the Supreme Court recognized the privilege in 1953, in the case of *United States v. Reynolds*. The Government had been sued after a military aircraft crash killed nine people, and it invoked the “state secrets” privilege to shield an internal investigative report. Decades later, when the report was declassified, it revealed nothing that could fairly be characterized as a “state secret” but it did reveal faulty maintenance of the aircraft.

Abuses like these can be prevented, but only if the courts fulfill their responsibility to carefully review claims

of privilege. In the Reynolds case, no court actually looked at the supposedly privileged report. That simple step would have prevented the miscarriage of justice that ensued. Yet, despite the fact that courts have the acknowledged authority to order in camera review of the evidence, fewer than one third of courts have actually exercised that option when the Government has asserted the "state secrets" privilege. And a host of other tools available to the courts to evaluate and respond to claims of privilege have been employed inconsistently at best, resulting in a confused body of case law that preserves accountability in some cases while granting the government a "get out of jail free" card in others.

In the last Congress, Senators KENNEDY, SPECTER, and LEAHY introduced the State Secrets Protection Act to standardize the procedures courts use in cases where the Government asserts the "state secrets" privilege and to ensure adequate scrutiny of such claims. The bill was reported by the Judiciary Committee last April after extensive debate. Much of the credit for this legislation goes to Senator KENNEDY, whose unflinching commitment to the rule of law inspired both the concept and the particulars of this bill. I had the honor of working with him to develop this legislation, and it is a pleasure now to cosponsor its reintroduction, with Senator LEAHY as the lead sponsor.

The bill makes use of existing tools that are available to the courts when handling national security information. Perhaps the most fundamental of these is in camera review of the allegedly privileged evidence, which the bill requires. The idea here is simple: Determining what information the evidence contains is the threshold step in determining whether that evidence is privileged. This step is far too important to be left to a party with a built-in conflict of interest. Just as a court would never accept a private litigant's description of his or her evidence in lieu of the evidence itself, the court should not rely solely on the Government's description of the evidence when the Government has a clear interest in the outcome of the case.

That courts may examine sensitive national security information in camera is beyond any serious dispute. Since 1974, the Freedom of Information Act has allowed courts to engage in in camera review of any records that the Government claims are exempt from disclosure under the Act. Courts have also reviewed the most sensitive national security information in criminal cases, pursuant to the Classified Information Procedures Act. In fact, courts handle highly classified information on a regular basis. There is no legitimate justification for skipping this crucial step.

The bill also requires courts to hold in camera hearings on the question of whether the evidence is privileged. Based on the court's previous review of

the evidence, the court may conduct the hearing *ex parte* i.e., without any participation by the plaintiff or the plaintiff's lawyers but only if the court finds that national security cannot adequately be protected through other means. For example, the court may limit attendance at the hearing to attorneys with the requisite clearances, or the court may appoint a guardian ad litem to represent the plaintiff's interests at the hearing. The bill thus preserves the adversarial process to the maximum extent consistent with protecting national security.

That's important, for at least two reasons. First, our justice system is premised on the notion of fairness, and that principle of fairness is undermined any time a party to litigation is excluded from the proceedings. But fairness isn't the only principle at stake. For all its complications and occasional inefficiencies, the adversarial process remains the best system for getting to the truth. If only one party is present at the hearing, the court is more likely to reach the wrong result it's as simple as that.

Taken together, the requirements of in camera review of the evidence and an in camera hearing ensure that the Government's claim of privilege is evaluated fairly and thoroughly. A fair, thorough review is necessary, because the bill makes absolutely clear that once evidence is found to be privileged, it cannot be disclosed, however great the plaintiff's need for the evidence may be. The interest of national security, once the court determines that interest is truly at stake, is given absolute protection.

That may mean the end of the lawsuit but it may not. As Congress recognized when it passed the Classified Information Procedures Act, courts have many tools at their disposal to move litigation forward even when some of the evidence cannot be disclosed. For example, courts can require the Government to submit non-privileged substitutes for the privileged evidence, such as summaries of the evidence, redacted versions, or admissions of certain facts. Under the bill, where the court finds that it would be feasible for the Government to craft a non-privileged substitute for privileged evidence, it may order the Government to do so. Again, however, the court can never compel the production of privileged evidence. If the Government refuses to craft a non-privileged substitute, the remedy is the same one that exists in the CIPA: the court may resolve the relevant issue of fact or law against the Government.

The bill does not allow courts to dismiss lawsuits at the pleadings stage based on a claim of "subject matter privilege." As the Fourth Circuit has explained, "subject matter privilege" applies if the case is so pervaded with state secrets, it would be impossible to conduct the lawsuit without revealing them. Such cases undoubtedly exist. But until all of the relevant evidence is

identified and the privilege determinations are made, any conclusion that a case will be pervaded with state secrets is simply a prediction. Only by proceeding through discovery and pre-trial hearings can that prediction be replaced with certainty. And this can be done without revealing a single state secret, since the bill allows privilege determinations to be made in camera and *ex parte*.

The bill does not change the ordinary rules of summary judgment. If a court determines, after discovery and pre-trial hearings are completed, that the key evidence is privileged and the plaintiff cannot prove his or her case using non-privileged evidence, then the Government may move for summary judgment and prevail. The bill thus retains the concept of "subject matter privilege" it simply requires a more thorough testing of the claim.

Nor does the bill ever put the Government to the "Hobson's choice" of either revealing privileged evidence or conceding the lawsuit. Under the bill, even if the plaintiff has made out a *prima facie* case, the court can and must dismiss the lawsuit if the Government would need to disclose privileged evidence in order to present a valid defense. The Government's interests, as well as the national security, are thus scrupulously protected.

Finally, the bill facilitates congressional oversight by requiring the executive branch to share with the Judiciary and Intelligence Committees the documents it makes available to the courts: the Government affidavit explaining why the evidence is privileged, the index of privileged evidence, and, where requested, the evidence itself. This information will help Congress monitor the Government's use of the privilege and assess the need for any further legislation.

Perhaps even more important, it will provide a means of accountability in those cases where the privilege prevents a court from ruling on allegations of Government wrongdoing. The idea of simply letting such allegations go unaddressed should be profoundly troubling to anyone who respects the rule of law yet for eight years, the response of the Bush administration was little more than a shrug. This bill rejects such a cavalier attitude toward the rule of law. The citizens of this country should never again be told that there is simply no remedy for wrongs their Government has committed. In cases where the courts cannot provide that remedy, then Congress should step in and providing the necessary information to the relevant committees of Congress will enable that to happen.

I am pleased that both the new Attorney General, Eric Holder, and the nominee for Associate Attorney General, Thomas Perrelli, have indicated a willingness to review this bill and work with us on it. I hope that it will be possible to fashion legislation that the Administration can support. The public

deserves to have confidence that the state secrets privilege is not going to be used to cover up Government misconduct. This bill provides the courts a system for resolving claims of privilege that will inspire that confidence.

A country where the Government need not answer to allegations of wrongdoing is a country that has strayed dangerously far from the rule of law. We must ensure that the "state secrets" privilege does not become a license for the Government to evade the laws that we pass. This bill accomplishes that goal, while simultaneously providing the strongest of protections to those items of evidence that truly qualify as state secrets. I urge all of my colleagues to support the rule of law by supporting this legislation.

By Ms. KLOBUCHAR (for herself and Mr. HATCH):

S. 418. A bill to require secondary metal recycling agents to keep records of their transactions in order to deter individuals and enterprises engaged in the theft and interstate sale of stolen secondary metal, and for other purposes; to the Committee on Commerce, Science, and Transportation.

Mr. HATCH. Mr. President, I rise today to introduce with my friend from Minnesota, Senator AMY KLOBUCHAR, the Secondary Metal Theft Prevention Act of 2009.

Once again, I am partnering with Senator KLOBUCHAR to combat metal theft in our country. Last Congress we introduced the Copper Theft Prevention Act of 2008, S. 3666, which focused solely on copper theft. Since then, after a series of meetings with industry stakeholders, we concluded that the bill would be more effective if it were expanded to address secondary metal thefts, including those involving copper.

There is no doubt that we are living in difficult economic times. As we witness the unfortunate job losses spreading across the country, I am mindful of those who are struggling to make ends meet. Unfortunately some, motivated by quick profits and a variety of vulnerable targets, are engaging in the fast-growing crime of metal theft.

On the surface, stealing precious metal, like copper, appears to be a relatively small theft. However, metal thieves compromise U.S. critical infrastructure by targeting electrical substations, cellular towers, telephone land lines, railroads, water wells, construction sites, and vacant homes—all for fast cash.

Some argue that there is no need for this legislation because metal is being traded at low prices. I disagree. As we know, the market shifts and prices will eventually increase as demand surges. Moreover, law enforcement officials confirm that thieves are only stealing more metal to offset current metal prices.

On September 15, 2008, the Federal Bureau of Investigation released an unclassified intelligence assessment enti-

tled, *Copper Thefts Threaten U.S. Critical Infrastructure*.

This assessment states that "thieves are typically individuals or organized groups who operate independently or in loose association with each other and commit thefts in conjunction with fencing activities and the sale of contraband. Organized groups of drug addicts, gang members, and metal thieves are conducting large scale thefts from electric utilities, warehouses, foreclosed and vacant properties, and oil well sites for tens of thousands of dollars in illicit proceeds per month."

I am mindful of the hardworking scrap metal dealers in my home state. Recycling secondary metal not only generates revenue but is environmentally friendly and saves energy, it takes a lot less energy to melt down secondary metal and recycle it than it does to produce new metal.

Take for example the City Creek project in downtown Salt Lake City, Utah. It is my understanding that when the construction contractors tore down the downtown malls to make way for the 20-acre retail-office-residential complex, more than half of what came down was reused either in the City Creek development or somewhere else. Steel frames were sold as scrap metal, which was recycled and used for other purposes.

Utah metal recyclers deal with hundreds of people and thousands of pounds of metal on a regular basis. I imagine in some cases it is difficult to tell if the scrap metal is stolen, especially if a customer has, what appears to be, a legitimate story. I know that many of Utah's scrap metal dealers are not turning a blind eye to this problem. In fact, several metal recycling companies have partnered with local law enforcement and use a theft alert system to warn and watch for reported stolen items. I commend them for their efforts and hope that police, prosecutors, and members of the metal recycling industry continue to communicate and work together to combat metal theft along the Wasatch Front.

Yet on the Federal level, we need a baseline from which all states must operate. This is important because many states in the Union do not have metal theft laws and lure thieves across State lines. It should be noted that the proposed bill does not preempt states from enacting their own laws.

I believe the proposed legislation will help tighten-up how secondary metal transactions are performed across the country and, in return, send a clear message that metal theft will be met with serious consequences. The bill calls for enforcement by the Federal Trade Commission and gives state attorneys general the ability to bring a civil action to enforce the provisions of the legislation.

This bill also contains a "Do Not Buy" provision wherein specific items listed cannot be purchased by scrap metal dealers unless sellers establish, by written documentation, that they

are authorized to sell the secondary metal in question.

Additionally, the bill requires scrap metal dealers to keep records of secondary metal purchases, including the name and address of the seller, the date of the transaction, the quantity and description of the secondary metal being purchased, an identifying number from a driver's license or other government-issued identification and, where possible, the make, model and tag number of the vehicle used to deliver the metal to the dealer.

Secondary metal dealers must maintain these records for a minimum of two years from the date of the transaction and make them available to law enforcement agencies for use in tracking down and prosecuting secondary metal theft crimes.

There is real concern about how easy it is to access cash in scrap metal transactions. For this reason, the bill requires that checks will be the method of payment for transactions over \$75. While that may sound low for some, it is important to recognize that it takes a lot of secondary metal to obtain even \$75 in return.

To discourage multiple cash transactions from one seller, the bill limits metal dealers from paying cash to the same seller within a 48-hour period. The intent of this provision is not to be a hardship on the honest seller. The purpose is to dissuade some sellers from going around the bill's check payment requirement by making multiple cash transactions. Again, we must remove the incentives for thieves to access fast cash.

I am aware that some scrap metal dealers do not want to issue checks for fear of check fraud or additional transactional costs. Senator KLOBUCHAR and I have given careful consideration to these concerns and have consulted law enforcement officials to determine how best to proceed. We believe that checks are a valuable benefit to law enforcement because they provide trace evidence by creating a paper trail, a signature, and possibly even a fingerprint.

Let me conclude my remarks by saying that considering our country's serious economic situation, I believe we need to ensure that our critical infrastructure is not viewed as a treasure trove for desperate metal thieves.

I am committed to moving this bill forward and hope that my colleagues will join me in perfecting this bill as it moves through the legislative process.

Mr. President, I ask unanimous consent that the support material be printed in the RECORD.

There being no objection, the material was ordered to be placed in the RECORD, as follows:

COPPER THEFTS THREATEN US CRITICAL
INFRASTRUCTURE
SCOPE NOTE

The assessment highlights copper theft and its impact on US critical infrastructure. Copper thefts are occurring throughout the United States and are perpetrated by individuals and organized groups motivated by