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# Legislative Reform of the State Secrets Privilege

Robert M. Chesney\*

Few issues more directly implicate the tension between the rights of the individual and the government's interest in preserving national security than the state secrets privilege. This has long been true, but in recent years the use of the privilege in connection with high-profile litigation arising out of post-9/11 events and policies—most notably the activities within the United States of the National Security Agency and the Central Intelligence Agency's rendition program—has generated an unprecedented level of controversy, as reflected in litigation,<sup>1</sup> in the media,<sup>2</sup> in the work of interest groups,<sup>3</sup> and in legal

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\* Associate Professor, Wake Forest University School of Law. I wish to thank Peter Margulies, David Logan, and the other symposium participants for their thought-provoking comments and questions. A modified version of this essay also appears as written testimony before the Senate Judiciary Committee in connection with a hearing held on February 13, 2008, titled "Examining the State Secrets Privilege: Preserving National Security While Protecting Accountability."

1. See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying motion to dismiss suit relating to NSA activity on state secrets grounds); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (affirming dismissal of rendition lawsuit on state secrets grounds).

2. Various newspapers have criticized the use of the privilege by the Bush administration. See, e.g., Ben Wizner, *Shielded by Secrecy*, L.A. TIMES, Feb. 14, 2008, at A25; Editorial, *Balance of Powers*, S.F. CHRON., Feb. 3, 2008, at E6; Editorial, *Secrets and Rights*, N.Y. TIMES, Feb. 2, 2008, at A18.

3. See, e.g., The Constitution Project, *Reforming the State Secrets Privilege* (May 31, 2007), [http://www.constitutionproject.org/pdf/Reforming\\_the\\_State\\_Secrets\\_Privilege\\_Statement.pdf](http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement.pdf); Robert E. Stein, *Section of Individual Rights and Responsibilities Association of the Bar of the City of New York: Report to the House of Delegates*, 2007 A.B.A. REVISED REPORT 116A, available at <http://fas.org/sgp/jud/statesec/aba081307.pdf>.

scholarship.<sup>4</sup> This controversy has spurred interest in the prospects for legislative reform of the privilege, culminating recently in the introduction of the State Secrets Protection Act (SSPA), a bill that would both codify and reform key aspects of the privilege.<sup>5</sup>

The SSPA warrants attention both for narrow reasons relating to the privilege itself, and broad reasons relating more generally to the theory and practice of separation of powers. From the narrow perspective of the state secrets privilege, the SSPA would introduce a number of significant changes to current practice, including limitations on the government's ability to justify its assertion of the privilege through *ex parte* submissions and its ability to obtain dismissal at the pleading stage of suits implicating state secrets. From the broader perspective of the constitutional separation of powers, the SSPA raises difficult questions concerning the power of Congress to legislate substantive and procedural rules governing the disclosure of information relating to national security and diplomacy, and the degree of deference, if any, that judges should give to executive officials in connection with factual assertions relating to such topics.

I do not propose to resolve all of these issues in this essay. I do hope, however, to enrich the ongoing debate by distinguishing that which should be controversial in the SSPA from that which should not be, by proposing less problematic solutions in a few instances, and by highlighting the relationship of these somewhat technical questions to broad background considerations of constitutional structure.

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4. See, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1249-50 (2007); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007); Amanda Frost, *The States Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005); LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 212, 245 (2006).

5. See State Secrets Protection Act, S. 2533, 110th Cong. (2008).

# I. A THUMBNAIL SKETCH OF THE PRIVILEGE IN CONTEXT WITH RECENT DEBATES

The privilege emerged gradually in U.S. jurisprudence during the 1800s, reaching maturity only after the Supreme Court acknowledged, elaborated, and applied it in its 1953 decision *United States v. Reynolds*.<sup>6</sup> In its modern form, the privilege attaches when two conditions are met. It must be asserted with the requisite formalities,<sup>7</sup> and a judge must be persuaded by the government's assertion that disclosure of the information at issue would pose a reasonable risk of harm to national security or diplomacy.<sup>8</sup> In making that determination, the judge typically considers classified affidavits filed by the government on an *ex parte* basis.<sup>9</sup> In those cases in which the privilege is asserted with respect to a particular document or item, the courts often will also examine that item itself on an *ex parte* basis (though *Reynolds* itself discourages courts from doing this when it can be avoided).<sup>10</sup>

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6. 345 U.S. 1 (1953). For an overview of the origins and evolution of the privilege, see Chesney, *supra* note 4.

7. The privilege can only be asserted by the head of the executive department charged with responsibility for the information in question, who must undertake a personal review of the matter at issue. See *Reynolds*, 345 U.S. at 7-8.

8. See *id.* at 8-10. In the petitioner's brief in *Reynolds*, the government had advanced the view that the government official's invocation of the privilege should be binding upon the court, citing an array of separation of powers arguments boiling down to a claim of exclusive executive authority under Article II with respect to national security and diplomatic matters. See Brief for the Petitioner at 15-16, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378 ("Our position is that under the doctrine of separation of powers and under the statute implementing this doctrine the courts have no power to compel the heads of the executive departments to produce such documents . . ."). The court in *Reynolds* concluded, however, that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. And while it is true that elsewhere in the opinion the court stated that the government's position had "constitutional overtones which we find it unnecessary to pass upon," *id.* at 6, the conclusion the court actually reached regarding the role of the judge in adjudicating an assertion of the privilege nonetheless implicitly rejects the claim that judges constitutionally are bound to accept executive conclusions with respect to the harm that public disclosure might cause in a given case. See *id.* at 7-8.

9. See Chesney, *supra* note 4, at 1306.

10. See *Reynolds*, 345 U.S. at 10-11. The Supreme Court in *Reynolds* was dealing with a tort suit brought by widows whose husbands had died during the crash of an Air Force B-29 that had been engaged in a flight to test classified radar equipment. *Id.* at 2-3. The privilege issue arose when the

Notably, the privilege is absolute rather than qualified and thus, once it attaches, it cannot be overcome.<sup>11</sup>

In some contexts application of the privilege merely tends to limit discovery, as occurred in *Reynolds* itself.<sup>12</sup> In such cases, the significance of the privilege is relatively limited; it functions as a ground for resisting discovery requests, permitting the suit to continue on the basis of the non-privileged evidence that may be available to the parties. In other contexts, however, the privilege can be fatal to the litigation, as where the "very subject matter" of the litigation itself constitutes privileged information or litigation of the case otherwise necessitates disclosure of such information.<sup>13</sup> The *El-Masri* extraordinary rendition lawsuit, for example, was dismissed on this basis.<sup>14</sup>

As noted above, post-9/11 invocations of the privilege have generated considerable controversy.<sup>15</sup> By and large, criticisms of the privilege tend to fall under either or both of two headings. First, some contend that the Bush administration elects to resort to the privilege significantly more frequently than did its predecessors.<sup>16</sup> Framed in its most persuasive terms, this is a harmful development not just because it forces more individual litigants to suffer injustice in the name of the greater good, but also because it tends to shield a greater swath of executive branch conduct from judicial review and, hence, from democratic accountability. Second, some contend that apart from numbers, the Bush administration has used the privilege in a qualitatively different way than its predecessors, invoking it as grounds for dismissal at the pleading stage irrespective of whether the plaintiff ever would require discovery of protected information

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widows sought production of the Air Force's post-accident investigative report. *Id.* at 3. Ultimately, the Supreme Court held that there was no need to review the report itself to reach the conclusion that public disclosure of the details of the radar equipment would be harmful to national security. *See id.* at 10-11. Many years later it was revealed, however, that the report did not actually contain details relating to the radar equipment in the first place. *See FISHER, supra* note 4, *passim*.

11. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007).

12. *See Reynolds*, 345 U.S. at 10.

13. *See id.* at 11 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

14. *See, e.g., El-Masri*, 479 F.3d at 306.

15. *See supra* notes 2-5 and accompanying text.

16. *See supra* notes 2-5 and accompanying text.

from the government in order to maintain his or her suit.<sup>17</sup> Again, the cost is framed in terms both of the burden on individual litigants and society's interest in ensuring that the judiciary is available to check unlawful executive branch conduct.<sup>18</sup>

I addressed both lines of argument in an earlier article, reaching conclusions unlikely to please either the administration or its critics.<sup>19</sup> On one hand, I concluded that the quantitative and qualitative critiques are mistaken insofar as they attribute the harms associated with the privilege to the Bush administration in particular.<sup>20</sup> Quantitative criticisms—that is, claims that the Bush administration has misused the privilege by invoking it with greater frequency than in the past—are misguided primarily because the number of suits potentially implicating the privilege vary from year to year, and thus there is no reason to expect the number of invocations to remain constant, or even relatively so, over time.<sup>21</sup> Qualitative claims—that is, claims that the Bush administration is attempting to use the privilege in unprecedented contexts or in search of unprecedented forms of relief—also do not withstand scrutiny.<sup>22</sup> The fact of the matter is that the privilege has had a similarly harsh impact on litigants for decades.<sup>23</sup>

On the other hand, I also recognized that cautious legislative reform might be possible and appropriate in this area, particularly in light of the rule of law and democratic accountability issues bound up in some uses of the privilege.<sup>24</sup> “To say that the privilege has long been with us and has long been harsh is not to say . . . that it is desirable to continue with the status quo.”<sup>25</sup> The

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17. See *supra* notes 2-5 and accompanying text.

18. See, e.g., Frost, *supra* note 4.

19. See Chesney, *supra* note 4, at 1301-07.

20. See *id.* at 1307.

21. We also have no way of knowing with confidence how many privilege invocations actually occurred in any given year, under this administration or its predecessors. Many invocations do ultimately result in published judicial opinions, but not all do so. Numerical claims therefore have to be taken with a rather large grain of salt. I say that advisedly, having provided in my own article a table identifying all of the published opinions adjudicating state secrets claims between 1954 and 2006. See *id.* at 1315-32.

22. See *id.* at 1306-07.

23. See *id.*

24. See *id.* at 1308.

25. *Id.*

real question, then, is how to craft reforms that will improve the lot of meritorious litigants and enhance compliance with the rule of law while simultaneously preserving legitimate national security and diplomatic interests.

## II. THE SCOPE OF CONGRESSIONAL POWER TO REFORM THE PRIVILEGE

Before examining the particular ways in which the SSPA seeks to achieve the aforementioned goals, it is worth pausing to ask whether there are limits to the power of Congress to reform the state secrets privilege.

Everyone agrees that there is a state secrets privilege, but there is sharp disagreement with respect to its actual nature. Those who favor reform tend to describe it as a mere evidentiary rule adopted by judges through the common law process, a conclusion suggesting plenary legislative power to amend or even eliminate the privilege.<sup>26</sup> From this perspective, the question of legislative authority in this context is merely an extension of the well-settled principle that Congress has "power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations concerning the taking of evidence in the federal courts."<sup>27</sup>

Others take the view that the privilege is not mere common law creation, but instead a constitutionally-required doctrine emanating from Article II, with the consequence that Congress either cannot modify the privilege or at least is significantly constrained in doing so.<sup>28</sup> In this account, "the privilege is rooted

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26. See, e.g., *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Kevin S. Bankston) ("The state secrets privilege is an evidentiary privilege . . . well established in the law of evidence, not in Constitutional law . . . it is well within Congress's prerogative to reform the common law of evidence by statute.") (internal quotation marks omitted).

27. *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Hon. Patricia M. Wald).

28. See *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Patrick F. Philbin).

in the constitutional authority of the President as Commander in Chief and representative of the Nation in foreign affairs to protect the national security of the United States,”<sup>29</sup> and “is not merely a common law evidentiary privilege subject to plenary regulation by Congress.”<sup>30</sup>

The best explanation, arguably, incorporates both perspectives. As a historical matter, there is little doubt that the privilege emerged as a common law evidentiary rule, very much as did the attorney-client privilege and similar rules that function to exclude from litigation otherwise-relevant information in order to serve a higher public purpose.<sup>31</sup> It does not follow, however, that the privilege has no constitutionally-required aspect. In at least some circumstances, for example, the state secrets privilege conceptually overlaps with executive privilege—a doctrine explicitly derived from constitutional considerations.<sup>32</sup> And although executive privilege is merely a qualified rather than an absolute privilege in most contexts, the Supreme Court did go out of its way in *United States v. Nixon* to raise the possibility that the answer might differ with respect to an assertion of executive privilege pertaining to military or diplomatic secrets.<sup>33</sup>

In any event, let us assume for the sake of argument that the state secrets privilege serves constitutionally-protected values

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29. *State Secrets Privilege: Rep. Jerrold Nadler Holds a Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (statement of Hon. Patricia M. Wald).

30. *Id.*

31. For an account of the emergence of the privilege, highlighting the role that influential treatise writers played in constructing and spreading awareness of the concept in the 1800s, see Chesney, *supra* note 4, at 1270-80. For a different perspective, one that emphasizes the British experience with a comparable doctrine, see William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege* (on file with author), available at [http://works.bepress.com/william\\_weaver/1/](http://works.bepress.com/william_weaver/1/).

32. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705-13 (1974); Attorney General Janet Reno, Memorandum for the President: Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti (Sep. 20, 1996), available at <http://www.usdoj.gov/olc/haitipot.htm>; Morton Rosenberg, CRS Report for Congress: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments (Sep. 17, 2007), at 1, available at <http://fas.org/sgp/crs/secrecy/RL30319.pdf>.

33. 418 U.S. at 706, 710.



relating to the executive branch's national security and diplomatic functions. Would it follow that Congress is disabled from regulating in this area? It is not obvious that it would. Indeed, some forms of regulation would seem clearly to remain within the control of Congress in the exercise of the authorities mentioned above, even if other forms of legislation might prove more controversial. The key is to distinguish between legislation regulating the *process* by which privilege assertions are to be adjudicated, and legislation that functions to override or waive the privilege itself.

At a minimum, Congress should have authority to regulate the process through which assertions of the privilege are adjudicated. This would include, for example, the power to codify prerequisites to the assertion of the privilege (such as the *Reynolds* requirement that the privilege be invoked by the head of the relevant department based on personal consideration of the matter)<sup>34</sup> or to require particular procedures to be followed by the court in the course of resolving the government's invocation. Whether Congress should be able to override the privilege once it attaches—for example, by compelling the executive branch to choose between conceding liability in civil litigation and disclosure of privileged information in a public setting—is far less clear. That question may be academic, however, at least so far as the SSPA is concerned. A close review of the bill suggests that most if not all of its provisions are best viewed as process regulations.

It does not follow, of course, that all the changes contemplated in the SSPA are wise. On the contrary, there are at least a few elements in the bill that go too far in seeking to ameliorate the impact of the privilege. Congress may have the authority to adopt these measures notwithstanding the competing constitutional values involved, but it is advisable to emphasize less-intrusive reform options whenever possible.

### III. THE SSPA IN COMPARISON TO THE STATUS QUO

Perhaps the best way to come to grips with the SSPA is to compare its provisions to current practices relating to the privilege, with an eye towards distinguishing that which is mere codification of the status quo from that which constitutes a

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34. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

substantial change. It helps, moreover, to conduct this comparison in a way that corresponds to the conceptual sequence of questions a judge must resolve when confronted with an invocation of the privilege. This approach demonstrates that a substantial part of the SSPA merely codifies practices that either are required or at least are common under the status quo, and should not be objectionable now. That said, there are a few aspects of the legislation that constitute significant breaks with current practice. Those provisions warrant more careful consideration. In a few instances, there are alternative approaches that might strike a better—and more sustainable—balance among the competing equities.

#### A. The Formalities of Invoking the Privilege

The threshold question in any state secrets privilege scenario is whether the privilege has been invoked with the requisite formalities. In theory, such requirements serve to reduce the risk that the privilege will be invoked gratuitously. The SSPA does not introduce any significant innovations under this heading, but rather codifies existing practice.

Under the SSPA, “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.”<sup>35</sup> This closely tracks current practice. *Reynolds* requires a “formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”<sup>36</sup> Both the SSPA and current practice, moreover, limit invocation of the privilege to the United States.<sup>37</sup>

#### B. The Substantive Test for Application of the Privilege

The substantive scope of the state secrets privilege is a function of three variables: subject matter, magnitude of harm that might follow from public disclosure, and the degree of risk that such harm might be realized. Though there is room for

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35. See State Secrets Protection Act, S. 2533, 110th Cong. § 4054(b) (2008).

36. *Reynolds*, 345 U.S. at 7-8.

37. Compare S. 2533, § 4054(a) with *Reynolds*, 345 U.S. at 7.

disagreement on this point, the best view is that the SSPA does not depart significantly from the status quo with respect to any of these three variables.

Consider first the question of subject matter. Under the SSPA, information must relate to "national defense or foreign relations" in order to qualify for privilege.<sup>38</sup> The status quo at least arguably encompasses a similar range of topics.<sup>39</sup>

The next question is whether the SSPA tracks the status quo with respect to the magnitude of harm that might follow from public disclosure of the information in question. The SSPA frames the inquiry in terms of "significant harm."<sup>40</sup> There is no comparable terminology in *Reynolds*, nor has any standard terminology on this question of calibration emerged in that case's progeny. Nonetheless, it is difficult to view the "significant harm" standard as a meaningful change from the status quo. *Reynolds* itself admonished that the privilege was "not to be lightly invoked,"<sup>41</sup> implying that *de minimus* harms should not come within its scope.

The third issue under this heading concerns the probability that disclosure of the information actually will precipitate the feared harm. Under both the status quo and the SSPA, that variable is framed in terms of "reasonable" risk.<sup>42</sup>

38. State Secrets Protection Act, S. 2533, § 4051.

39. See Chesney, *supra* note 4, at 1315-32 (specifying nature of information at issue in published state secrets adjudications between 1954 and 2006).

40. State Secrets Protection Act, S. 2533, § 4051.

41. *Reynolds*, 345 U.S. at 7.

42. State Secrets Protection Act, S. 2533, § 4051 ("[T]he term 'state secrets' 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.") (emphasis added). *Reynolds* actually is vague with respect to the question of how strong the likelihood of harm from disclosure must be (most of its discussion of risk concerns the distinct question of whether and when judges should personally examine allegedly privileged documents en route to making a decision on the privilege), but courts nonetheless appear to understand *Reynolds* to require a reasonable-risk standard. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

C. Authority to Decide Whether the Privilege Attaches: The Role of the Judge and the Question of Deference

In its brief to the Supreme Court in *Reynolds*, the government had contended, that “the power of determination is the Secretary’s alone.”<sup>43</sup> That is to say, the government argued that courts cannot and should not second-guess the determination of the relevant executive branch official that disclosure of the information in question would be harmful.<sup>44</sup> Among other things, the government reasoned that executive officials are far better situated than judges to assess the probable consequences of a disclosure.<sup>45</sup> On the other hand, unchecked authority to assert the privilege naturally would give rise to assert the privilege in circumstances where the substantive standard is not met, whether out of an excess of caution or even as a shield for misfeasance. The Supreme Court ultimately gave greater weight to that offsetting concern, holding in *Reynolds* that “[j]udicial control over the evidence in the case cannot be abdicated to the caprice of executive officers,” and insisting that the judge have the final say with respect to whether the privilege attaches.<sup>46</sup>

This general principle is no longer seriously contested, but the relative authority of the judge and the executive branch nonetheless continues to be a matter of controversy because of lingering questions regarding how much deference the judge should give to the executive’s claim, even if the claim is not strictly binding.<sup>47</sup> In *El-Masri*, for example, the Fourth Circuit concluded that the “court is obliged to accord the ‘utmost deference’ to the responsibilities of the executive branch” when determining the harm that might follow from a disclosure.<sup>48</sup> Such deference was owed both “for constitutional reasons” and for “practical ones: the Executive and the intelligence agencies under

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43. See Brief for the Petitioner, *supra* note 8, at 47.

44. See *id.*

45. See *id.* (stating that the government’s position rests in part “on reasons of policy arising from the fact that the department head alone is truly qualified and in a position to make the determination”).

46. *Reynolds*, 345 U.S. at 9-10.

47. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (“The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met.”).

48. *Id.* (quoting *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)).

his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.”<sup>49</sup> Similarly, the Ninth Circuit stated in *Al-Haramain* that it “acknowledge[d] the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”<sup>50</sup> In light of such statements, some might argue that judges have final authority to determine the applicability of the privilege only in formal terms, while the mechanism of deference shifts that authority back to the executive branch in practical terms.

The SSPA codifies the status quo insofar as it plainly contemplates that the judge shall have the ultimate responsibility for determining whether the privilege should attach.<sup>51</sup> In its current form, however, it makes no attempt to regulate the degree of deference, if any, that judges should give to the executive branch’s judgment regarding the consequences of a disclosure.

#### D. The Mechanics of the Judge’s Review: Evidentiary Basis for the Ruling

##### 1. When Specific Documents Are in Issue

The paradigm state secrets privilege scenario involves an attempt by a private litigant to obtain a particular item during discovery, as occurred with respect to the post-accident investigative report in *Reynolds*.<sup>52</sup> When the government claims privilege in that context, it typically justifies its assertion with an explanatory affidavit from the official asserting the privilege.<sup>53</sup> But should the judge also review the item in question in the course of determining whether the privilege should apply?

The SSPA departs from the status quo to a small extent with

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49. *Id.*

50. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

51. See State Secrets Protection Act, S. 2533, 110th Cong. § 4054(e) (2008) (describing the judge’s role in determining whether the privilege attaches).

52. See *United States v. Reynolds*, 345 U.S. 1, 3 (1953).

53. See, e.g., *Al-Haramain*, 507 F.3d at 1202 (referring to “classified and unclassified declarations” filed by the Director of National Intelligence and the Director of the NSA).

respect to this issue. Under the SSPA, judges not only can, but *must* review the actual item of evidence.<sup>54</sup> Under the status quo, in contrast, they are expressly admonished in *Reynolds* to be reluctant to require such *in camera* production unless the litigant has shown great need for the document.<sup>55</sup>

The SSPA's requirement of *in camera* disclosure reflects a lesson derived from the original *Reynolds* litigation. Famously, the plaintiffs in *Reynolds* had sought production of an Air Force post-accident investigative report in connection with their tort suit, prompting the government to invoke the state secrets privilege on the ground that the report contained details of classified radar equipment.<sup>56</sup> The Supreme Court concluded such details could not be disclosed publicly, which is a plausible conclusion under the substantive test described above.<sup>57</sup> Although it did not follow that the accident report necessarily contained such details, the court assumed that it did and found the privilege applicable on that basis.<sup>58</sup> Notoriously, it turned out much later that the report did not contain substantial details about the radar.<sup>59</sup> Thus conventional wisdom holds that the privilege ought not to have been invoked on that basis, something that almost certainly would have been revealed by judicial inspection of the document.<sup>60</sup>

*Reynolds* thus has come to stand for an important, common-

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54. See State Secrets Protection Act, S. 2533, § 4054(d)(1) (requiring the United States to submit for the court's review not only an explanatory affidavit but also all evidence as to which the privilege has been asserted).

55. See *Reynolds*, 345 U.S. at 10-12.

56. See *id.* at 3-4.

57. *Id.* at 12.

58. *Id.*

59. See FISHER, *supra* note 4, 167-68.

60. See *Reynolds*, 345 U.S. at 10-12. But see *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*, 110th Cong. (2008) [hereinafter Nichols] (statement of Deputy Assistant Attorney General, Carl Nichols, House Comm. on the Judiciary), available at <http://www.usdoj.gov/ola/views-letters/110-2/02-26-08-s2449-sunshine-litigation-act.pdf> (arguing that the report in privilege invocation in *Reynolds* was proper because the report contained technical details relating to the operations of B-29 bombers, separate and apart from details relating to the radar equipment); *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at \*5-6, \*9 (E.D. Pa. 2004) (holding that the Air Force had not committed fraud in *Reynolds* because the B-29 data justified application of the privilege), *aff'd*, 424 F.3d 384 (3d Cir. 2005).

sense proposition: where the privilege is asserted in connection with a particular document the government seeks to withhold from discovery, the judge should ensure that the item in question actually contains the allegedly-sensitive information said by the government to warrant application of the privilege. It is important to note, however, that this type of mistake does not seem to occur frequently under the state secret privilege today. Notwithstanding language in *Reynolds* cautioning judges not to conduct *in camera* inspections unnecessarily, courts today routinely do examine documents personally in an effort to determine whether the privilege should attach.<sup>61</sup> The change that would be wrought by the SSPA on this issue, accordingly, is to remove any question as to whether this should be done.

## 2. When Abstract Information Is in Issue

Not every invocation of the privilege arises in connection with requests for production of specific documents or records capable of being inspected. The government may also have occasion to invoke the privilege in connection with discovery requests seeking protected information in the abstract, as with an interrogatory or a deposition question. In such cases there is no specific document or item for the court to review, other than the explanation offered by the government in the form of an affidavit from the official asserting the privilege. In that respect, the SSPA's requirement that such an affidavit be submitted merely codifies the status quo.<sup>62</sup>

## 3. When Pleading Would Require Revelation of Privileged Information

A similar scenario arises at the pleading stage when the allegations in a complaint would reveal state secrets if admitted or

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61. See, e.g., *Al-Haramain*, 507 F.3d at 1203 ("We reviewed the Sealed Document *in camera* . . .").

62. See State Secrets Protection Act, S. 2533, § 4054(b). In that sense, the SSPA's adoption of an affidavit requirement is unexceptionable. But there is a problem with respect to the related requirement that the classified affidavit be accompanied by an unclassified version for public release: one might read that provision to preclude the judge from being able to order the unclassified document to be sealed. As a general proposition, it seems unwise to deprive (or to risk depriving) judges of discretion to seal any particular document in this sensitive context.

denied. Here, however, the SSPA introduces a useful innovation that functions to put off the question of whether the privilege properly applies to the information at issue. Under SSPA § 4053(c), the government may simply plead the privilege in response to such allegations, rather than admitting or denying them as otherwise required by Federal Rule of Civil Procedure 8(b).<sup>63</sup> The allegation(s) in question presumably then would be deemed denied,<sup>64</sup> without any need for the judge at that stage to consider whether the privilege in fact attaches to the information at issue. Arguably the government could have achieved the same result under the status quo by objecting on privilege grounds to particular allegations in a complaint, though it is not clear that the government ever pursued such a course. In any event, this aspect of the SSPA at a minimum is a useful clarification, even if not an outright alteration of what is permitted under current practice.

#### E. The Mechanics of the Judge's Review: *Ex Parte* and *In Camera* Procedures

When reviewing the government's invocation of the privilege, should the judge permit the government to submit some or all of its explanation on an *in camera*, *ex parte* basis? In current practice, the government routinely submits classified documents and affidavits on an *ex parte* basis in the course of asserting the privilege.<sup>65</sup> The court alone reviews these submissions; they are not made available to opposing counsel.<sup>66</sup> As a result, the process of determining whether the privilege attaches is in an important sense non-adversarial. This approach is optimal from the perspective of ensuring against an improper disclosure of the information, but it is far from optimal from the perspective of ensuring against inaccurate determinations by the court.

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63. Compare State Secrets Protection Act, S. 2533, § 4053(c) with FED. R. CIV. P. 8(b).

64. The text currently provides that "[n]o adverse inference shall be drawn from a pleading of state secrets in an answer to an item in a complaint." State Secrets Protection Act, S. 2533, § 4053(c). This language should be amended to more clearly state that a privilege plea should be treated as a denial for pleading purposes.

65. See Chesney, *supra* note 4, at Appendix.

66. See *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).



Both values are substantial. The question, therefore, is whether there are solutions that would sufficiently preserve the government's interest in security while simultaneously reducing the risk of error by introducing elements of adversariality in the review process. In a major departure from the status quo, the SSPA seeks to accomplish precisely this.

### 1. Ex Parte Proceedings

The SSPA would break with current practice significantly by limiting the ability of the government to justify its invocation of the privilege through *ex parte* submissions. First, § 4052(a)(3) recognizes that the judge has discretion as to whether *ex parte* submissions will be allowed at all, subject to the "interests of justice and national security."<sup>67</sup> There is little doubt that judges in most cases would exercise this authority wisely.<sup>68</sup> Even if the judge decides to permit *ex parte* filings in the first instance, however, § 4052(c)(1) appears to ensure that before ruling upon the government's invocation of the privilege, the otherwise *ex parte* filings will be subject to at least some degree of adversarial testing:

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67. State Secrets Protection Act, S. 2533, § 4052(a)(3). As an alternative to precluding *ex parte* filings, § 4052(a)(2) permits the judge to order the government to provide the other litigants with a "redacted, unclassified, or summary substitute" of its *ex parte* submissions. State Secrets Protection Act, S. 2533, § 4052(a)(2). This authority in practice may turn out to track status quo procedures in which the government typically provides both a classified affidavit justifying its assertion of the privilege and also an unclassified version that can be made available to opposing parties and to the public.

68. The comparable provision in the Classified Information Procedures Act (CIPA) permits but does not on its face require the government to submit its filings *ex parte*. See CIPA, 18 U.S.C. app. § 3, § 4 (1980). That said, it appears that no court has ever barred the government from making its application *ex parte*. See DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 24.7 (2007) (observing that "[a]lthough this procedure denies the defendant the ability to make a meaningful challenge to the government's arguments, no court in a published decision has prevented the government from filing its Section 4 application *ex parte* and *in camera*"). This suggests that judges can be trusted not to act rashly, but perhaps also that there is little point in providing an option to bar such filings. CIPA § 6 hearings, in contrast, are required to be *in camera* but are not normally *ex parte*. See CIPA, 18 U.S.C. app. § 6(a). Such hearings arise in a distinguishable context, however, insofar as the defendant in that scenario already possesses classified information, information that the government seeks to suppress.

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.<sup>69</sup>

There is considerable wisdom in injecting some degree of adversariality into the *ex parte* portion of the privilege adjudication process. The trick, however, is to manage this without undermining the overriding goal of ensuring that there is no disclosure of the assertedly-protected information unless and until the judge determines that it is not in fact protected. Under the SSPA approach, the parties' own attorneys might be given direct access to the government's most sensitive secrets prior to determining whether they are in fact privileged. This goes too far, assuming that there are less intrusive alternatives available that might also address the accuracy considerations described above. And, as noted above, § 4052(c)(1) actually contains such a middle ground alternative, in the form of a guardian ad litem mechanism.<sup>70</sup>

The guardian ad litem approach has the virtue of ensuring at least some degree of adversarial testing, while reducing the risk of a leak (to the parties themselves or to the public at large) in comparison to having the party's own attorneys involved. For this reason, other countries are experimenting with precisely this approach in analogous contexts. Canada, for example, recently adopted a "special advocate" system in which attorneys are appointed for the specific purpose of contesting otherwise *ex parte* information used by the government in connection with removal of non-citizens from the country.<sup>71</sup> The U.K. has a comparable

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69. State Secrets Protection Act, S. 2533, § 4052(c)(1).

70. *See id.*

71. *See* An Act to Amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, B. C-3, 39th Parliament, 2nd Sess. (2007) (as reported by Comm. on Pub. Safety and Nat'l Sec., Dec. 10, 2007) *available at* <http://www2>.

system, originally designed for comparable immigration removals.<sup>72</sup> Unlike the SSPA's guardian mechanism, however, the Canadian system does not allow the court to appoint just any attorney to this sensitive role, but instead requires the appointee to be chosen from a pre-determined list of screened and qualified individuals.<sup>73</sup>

In order to strike a more reasonable and sustainable balance between the competing equities at stake in this sensitive context, § 4052(c) should be amended to focus attention on the guardian mechanism as a solution to the adversariality problem (that is to say, the more extreme alternative of ordering the government to provide access directly to the parties' attorneys should be removed). At the same time, the guardian mechanism should be amended to create a pre-selected list of attorneys eligible for such an appointment. Such a list could be created by the Chief Justice of the United States, for example, and following the Canadian example might also involve substantial training for the potential appointees.<sup>74</sup> This solution is not ideal from the litigant's perspective, but even from that viewpoint it does constitute a substantial improvement over the status quo.<sup>75</sup>

## 2. *In Camera* Proceedings

Beyond the question of whether filings and arguments will take place on an *ex parte* basis is the question of whether and when privilege litigation should take place *in camera*, without public access.<sup>76</sup> Under the status quo, judges typically employ a blend of ordinary and *in camera* procedures when adjudicating an assertion of the privilege.<sup>77</sup>

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parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3\_2/C-3\_2.PDF.

72. Special Immigration Appeals Act, 1997, c. 68, § 6 (Eng.).

73. See *supra* note 71, at B, C-3, § 85.

74. See Richard Foot, *Lawyers Line Up To Become Special "Terror" Advocates*, NAT. POST., Feb. 17, 2008, available at <http://www.nationalpost.com/news/canada/story.html?id=315669>.

75. It is worth noting, in that regard, that nothing comparable is available to criminal defendants—whose very liberty is at stake—in the analogous context of § 4 proceedings under the CIPA, in which *ex parte* review is the rule. See *supra* note 68.

76. An *in camera* procedure is not necessarily *ex parte*, though the two concepts are conflated often. See, e.g., CIPA, 18 U.S.C. app. § 4, § 6(a).

77. See, e.g., *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (noting courts consideration of *ex parte*

The impact SSPA § 4052(b)(1) would have on this practice is unclear but it will likely not constitute a significant departure from the status quo. This section establishes a default presumption that hearings concerning the state secrets privilege will be conducted *in camera*, and permits public access only "if the court determines that the hearing relates only to a question of law and does not present a risk of revealing state secrets."<sup>78</sup>

#### F. The Mechanics of the Judge's Review: Special Masters

One of the core difficulties associated with judicial review of the state secrets privilege involves the question of expertise. Critics of the status quo argue that judges in practice merely rubber-stamp executive invocations of the privilege because the judges do not feel confident that they can evaluate the executive's claims regarding the impact of disclosure on security or diplomacy,<sup>79</sup> while others draw on the same notions to contend that judges should in fact be extremely, if not entirely, deferential.<sup>80</sup> And certainly it is true that a federal judge on average will not be as well-situated in terms of experience and fact-gathering resources as the Director of National Intelligence or the Secretary of State to assess such impacts.<sup>81</sup> At the same time, *Reynolds* itself acknowledges that the judge has ultimate responsibility for ensuring the validity and propriety of privilege assertions, lest the privilege become a temptation to abuse.<sup>82</sup>

The tension between these values appears intractable at first glance, but there are mechanisms for ameliorating the problem. Some scholars point out, for example, that judges currently have authority to appoint expert advisers such as special masters under Federal Rule of Civil Procedure 53 and independent experts under Federal Rule of Evidence 706.<sup>83</sup> Section 4052(f) of the SSPA

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submissions in addition to public filings).

78. State Secrets Protection Act, S. 2533, § 4052(b)(1).

79. See FISHER, *supra* note 4, at 167-68.

80. See Nichols, *supra* note 60.

81. See, e.g., *Al-Haramain*, 507 F.3d at 1203 ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

82. See *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

83. See, e.g., Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 A.B.A. NAT'L

would clarify that such authorities in fact can be used in connection with state secrets litigation, an approach that may prove particularly valuable in cases involving assertion of the privilege with respect to voluminous materials.<sup>84</sup>

#### G. Consequences Once the Privilege Attaches: Substitutions

SSPA § 4054(f) provides that where the privilege attaches, courts should consider whether it is “possible to craft a non-privileged substitute” that provides “a substantially equivalent opportunity to litigate the claim or defense.”<sup>85</sup> Drawing on the model set forth in the Classified Information Procedures Act (CIPA) § 6,<sup>86</sup> the SSPA goes on to specify several options that might be used in that context, including an unclassified summary, a redacted version of a particular item of evidence, and a statement of admitted facts.<sup>87</sup> Where the court believes that such an alternative is available, it may order the United States to produce it in lieu of the protected information.<sup>88</sup> The U.S. must comply with such an order if the issue arises in a suit to which the U.S. is a party (or a U.S. official is a party in his or her official capacity), or else “the court shall resolve the disputed issue of fact or law to which the evidence pertains in the non-government party’s favor.”<sup>89</sup>

It is not clear that any of these provisions depart from what a court could order even in the absence of the SSPA. But in any event, it is certainly advisable to codify the judge’s obligation to exhaust options that would permit relevant and otherwise-admissible information to be used without actually compelling disclosure of that which is subject to the protection of the privilege.

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SECURITY L. REP. 1, 3-5 (2006), *available at* [http://www.abanet.org/natsecurity/nslr/2006/NSL\\_Report\\_2006\\_11.pdf](http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_11.pdf).

84. *See* State Secrets Protection Act, S. 2533, § 4052(f).

85. *Id.*

86. *See* CIPA, 18 U.S.C. App. 3, § 6.

87. State Secrets Protection Act, S. 2533m, 110th Cong. § 4052(f) (2008).

88. *See* State Secrets Protection Act, S. 2533, § 4054(f)(1)-(3).

89. *Id.* § 4054(g). No sanction is provided by the SSPA for scenarios in which the U.S. is merely an intervenor. *See id.*

## H. Consequences Once the Privilege Attaches: Ending Litigation

The most controversial aspect of current doctrine may well be the sometimes fatal impact it has on litigation once the privilege is found to attach to some item of evidence or information. As discussed earlier, this phenomenon is not new. The government has moved to dismiss (or in the alternative for summary judgment) in these circumstances with some frequency since the 1950s, and such motions frequently have been granted.<sup>90</sup> But the use of this approach in high-profile post-9/11 cases—particularly those relating to NSA surveillance and to rendition—has proven especially controversial, drawing attention to the fact that application of the state secrets privilege can have harsh consequences for litigants even where the litigants allege unlawful government conduct.<sup>91</sup> Accordingly, one of the most important questions associated with the SSPA is whether it would limit the set of circumstances in which application of the privilege proves fatal to a suit.

### 1. When Denial of Discovery Precipitates Summary Judgment

Under current doctrine, application of the privilege can prove fatal to a suit in more than one way. First, the privilege may function to deprive a litigant of evidence needed in order to create a triable issue of fact, and hence survive a summary judgment motion.

Let us assume that a judge has denied a discovery request based on the state secrets privilege. If it so happens that the plaintiff has no other admissible evidence sufficient to raise a triable issue of fact with respect to a necessary element of his or her claim, this discovery ruling necessarily exposes that plaintiff to summary judgment under Rule 56.<sup>92</sup> In that setting, the Rule 56 ruling conceptually is subsequent to the state secrets ruling, rather than based directly on it. The discovery ruling is no less fatal to the plaintiff's case for that, however, and if the motions

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90. See Chesney, *supra* note 4, at 1306-07, 1315-32.

91. See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying motion to dismiss suit relating to NSA activity on state secrets grounds); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (affirming dismissal of rendition lawsuit on state secrets grounds).

92. See FED. R. CIV. P. 56.

happen to be adjudicated simultaneously, it might even appear that the court has granted summary judgment "on" state secrets grounds. It does not appear that the SSPA is intended to alter the outcome in this scenario, though it might be wise to clarify that this is so in the text of the legislation.

## 2. When the Government Must Choose Between Disclosing Protected Information and Presenting a Defense

A second scenario that can prove fatal to a claim under current doctrine arises when the government would be obliged to reveal protected information in order to present a defense to a claim. This scenario differs from the first in that the plaintiff may be able to survive summary judgment with the evidence it has assembled. The problem here is not the plaintiff's efforts to acquire evidence, then, but the fact that the government must opt between presenting a defense and maintaining the secrecy of protected information. In that setting, current doctrine provides for dismissal on state secrets grounds.

In some senses, the SSPA codifies this result. Under § 4055 a judge may dismiss a claim on privilege grounds upon a determination that litigation in the absence of the privileged information "would substantially impair the ability of a party to pursue a valid defense,"<sup>93</sup> and that there is no viable option for creating a non-privileged substitute that would provide a "substantially equivalent opportunity to litigate" the issue.<sup>94</sup> But § 4055 also mandates that the judge first review "all available evidence, privileged and non-privileged" before determining whether the "valid defense" standard has been met.<sup>95</sup> This suggests that the judge is not merely to assess the *legal* sufficiency of the defense (assuming the truth of the government's version of events, in a style akin to adjudication of a Rule 12(b)(6) motion), but instead is to resolve the actual merits of the defense (including resolution of related factual disputes).<sup>96</sup> If that is the correct interpretation, it would seem to follow that § 4055

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93. State Secrets Protection Act, S. 2533, § 4055(3).

94. *Id.* § 4055(1). For what it is worth, § 4055(2) also requires a finding that dismissal of the claim or counterclaim "would not harm national security." *Id.*

95. *See id.* § 4055.

96. *See id.*

contemplates a mini-trial on the merits of the defense.<sup>97</sup>

The problem with this approach is that the court may or may not permit the use of *ex parte* and *in camera* procedures in this context.<sup>98</sup> Denying either protection (but especially the latter) would put the government on the horns of a dilemma, forcing it to choose between waiving a potentially-meritorious defense, and revealing privileged information to persons other than the judge even in the face of the judge's conclusion that the information is subject to the privilege. This approach is questionable from a policy perspective insofar as it would force the government to elect between partial or even complete exposure of concededly protected information and the loss of a meritorious defense and hence potential civil liability (including injunctive as well as financial consequences). And for similar reasons, this approach presumably will precipitate constitutional objections as well. At a minimum, therefore, § 4055 should be amended to provide that the judge's assessment of the merits of a defense must take place on an *in camera* basis. Any move away from *ex parte* procedures in this context, moreover, should be limited to the modified guardian-ad-litem mechanism recommended above. Beyond that, it might also be wise to structure the judge's review of the defense at issue in terms of a Rule 12(b)(6)-style legal-sufficiency inquiry rather than as a mini-trial.<sup>99</sup>

### 3. When the Very Subject Matter of the Action Implicates State Secrets

One scenario remains. Under current doctrine, "some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked."<sup>100</sup> The idea here is not that certain discovery should be denied to the plaintiff, nor that the government has a defense it could present if only it were not necessary to preserve certain secrets. Rather, the notion is that some types of claims are not actionable as a matter of law because they inevitably would require disclosure or confirmation of state secrets in order to be properly adjudicated. Under this

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97. *See id.*

98. *See id.*

99. *See* FED. R. CIV. P. 12(b)(6).

100. *See* El-Masri v. United States, 479 F.3d 296, 306 (4th Cir. 2007).



approach, a suit may be dismissed at the pleading stage even if the plaintiff could have assembled sufficient evidence to create triable issues of fact on all the necessary elements of a claim, and even if the government is not prevented by its secrecy obligation from presenting a defense to that claim. Not surprisingly, this is the most controversial dismissal scenario in current doctrine.

The SSPA overrides this result in the narrow sense that it permits suits to survive that under current doctrine would have been dismissed at the very outset. First, as noted above, the SSPA permits the government to avoid affirming or denying sensitive fact allegations by citing the privilege in its responsive pleading.<sup>101</sup> Second, § 4053(b) plainly states that "the state secrets privilege shall not constitute grounds for dismissal of a case or claim" unless, as described above, the government has a "valid defense" it would present but for privilege concerns.<sup>102</sup> Taken together, these provisions require cases in what might be called the "very subject matter"<sup>103</sup> category to go forward at least to the discovery stage.

Ultimately, however, the SSPA will not necessarily spare such suits from dismissal. During the course of discovery, the privilege remains wholly functional as a shield against production of protected documents or information, which may expose the plaintiff to summary judgment in the end. The SSPA expressly authorizes the government to use the privilege as a sword, moreover, enhancing the prospects for dismissal in the "very subject matter" scenario.<sup>104</sup> Specifically, § 4054(a) states that the government may not only use the privilege to resist discovery, but also "for preventing the introduction of evidence at trial."<sup>105</sup> Much turns on the interpretation of this language.

This language appears to allow the government to move to suppress otherwise-admissible evidence in the plaintiff's possession, on state secrets grounds. In that case, a plaintiff who is otherwise able to assemble sufficient evidence to create a triable issue of fact without discovery from the government, nonetheless,

101. See State Secrets Protection Act, S. 2533, § 4053(c).

102. *Id.* § 4053(b).

103. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

104. See State Secrets Protection Act, S. 2533, § 4054(a).

105. *Id.*

may find himself or herself without critical evidence at trial, necessitating judgment in the government's favor. The only question then would be whether the government must await the plaintiff's case-in-chief in order to exercise this suppression power, setting the stage for judgment as a matter of law pursuant to Rule 50(a), or if it, instead, could exercise this option prior to trial and thus proceed under Rule 56.<sup>106</sup> The language of § 4054(a) suggests the former, but if the option is to be allowed at all it makes far more sense from an efficiency perspective to permit pre-trial resolution.<sup>107</sup> Section 4054(a) accordingly should be amended to say as much.<sup>108</sup>

The important point is that the "sword" aspect of § 4054(a)<sup>109</sup> will likely produce an end result comparable to that under the current doctrine's "very subject matter" line of cases.<sup>110</sup> The difference, which is by no means unimportant, is that under the SSPA the litigation process will proceed through the pleading and discovery stages, with the privilege being wielded as a scalpel rather than a bludgeon. Combined with the other procedural elements of the SSPA—including especially the role of special masters, guardians-ad-litem, and the emphasis on finding substitutions when possible—the net effect of this "proceduralization" of the privilege should ensure more careful tailoring to the facts and evidence in a particular case. This in turn should reduce the risk of erroneous application (and thus injustice). Though this benefit will come at the cost of increased litigation expense and complexity, it is a cost that is most likely worth bearing. At the very least, the experiment is worth undertaking.

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106. See FED. R. CIV. P. 50(a) and 56.

107. See State Secrets Protection Act, S. 2533, § 4054(a).

108. The statute also needs to be amended to ensure that the government has an adequate opportunity to use the privilege in this fashion, meaning that some form of notice will have to be given to the government by a party intended to make use of information that may be subject to the privilege. This precise dilemma is addressed in the criminal prosecution context by CIPA § 5, which has been upheld against constitutional challenge on many occasions. Presumably a comparable procedure can be added to the SSPA.

109. See State Secrets Protection Act, S. 2533, § 4054(a).

110. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

## IV. CONCLUSION

The SSPA will not entirely please either critics or supporters of the state secrets status quo. By subjecting the privilege to a more rigorous procedural framework, the SSPA may reduce the range of cases in which the privilege is found to apply, and in some respects it may cause marginal increases in the risk that sensitive information will be disclosed (though with the amendments proposed above such risks would be significantly diminished). On the other hand, even under the SSPA, the privilege will continue to have a harsh impact on litigants who bring claims that implicate protected information: discovery will still be denied, complaints will still be dismissed, and summary judgment will still be granted. Such tradeoffs are inevitable, however, in crafting legislation designed to reconcile such important public values as national security, access to justice, and democratic accountability. The SSPA has its flaws, to be sure, but subject to the caveats noted above it marks an important step forward in the ongoing evolution of the state secrets privilege.