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"Examining the State Secrets Privilege:
Preserving National Security While Protecting Accountability"

Senator Leahy, Senator Specter, and distinguished members of the committee, thank you for giving me an opportunity to discuss the state secrets privilege with you.

My name is Robert Chesney. I am an associate professor of law at Wake Forest University School of Law, where I teach constitutional law, evidence, civil procedure, and a variety of specialty courses relating to national security in general and terrorism in particular. I recently completed a term as chair of the Section on National Security Law of the Association of American Law Schools, and currently serve as the editor of the National Security Law Report, published by the Standing Committee on Law and National Security of the American Bar Association.

I have addressed an array of national security law topics in my scholarship, including an article published in the George Washington Law Review called "State Secrets and the Limits of National Security Litigation."[1] In that article I examined the origins and evolution of the state secrets privilege, as well as current controversies surrounding its use in recent years. I reached conclusions that both critics and supporters of the administration might find unsatisfying.

On one hand, I concluded that criticisms directed specifically against use of the privilege during the Bush administration are unwarranted. 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.[2] 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

[1] Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007), available at http://ssrn.com/abstract=946676.

[2] 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 1315-1332.

do not withstand scrutiny. The fact of the matter is that the privilege has had a harsh impact on litigants for decades.

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. "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."[3] The real question, then, is how to craft reforms that will improve the lot of meritorious litigants while preserving legitimate national security and diplomatic interests.

Today the Committee turns its attention to a bill that seeks to achieve these twin goals: the State Secrets Protection Act ("SSPA"). In my opinion, there is much to be applauded in this bill, though also a few elements that warrant closer scrutiny. In the pages that follow I will explain how the SSPA matches up with or departs from the status quo, offering endorsements, suggestions, and criticisms along the way. Before doing so, however, I think it best to at least touch upon the threshold question of the authority of Congress to undertake such a reform.

I. Common Law Rule of Evidence or Constitutional Command?

Everyone agrees that there is a state secrets privilege, but there is sharp disagreement with respect to its 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. Those who resist reform tend to describe it as 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. But 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.[4] 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.[5] And even outside the context of communications implicating executive privilege in the traditional sense, one can expect

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[3] *Id.* at 1308.

[4] I describe the emergence of the privilege in my article, highlighting the role that influential treatise writers played in constructing and spreading awareness of the concept in the 1800s. *See id.* at 1270-80.

[5] *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.

arguments to the effect that at least some information relating to foreign and military affairs should be protected as a matter of constitutional requirement.

Let us assume for the sake of argument that these latter arguments are correct, and that the state secrets privilege has constitutional foundations. At a minimum, this would suggest that courts would have an obligation to extend some form of protection to state secrets during litigation even if no common law rule to that effect had ever been adopted. But would Congress be disabled from legislating with respect to the privilege?

Some forms of regulation would seem clearly to remain within the control of Congress, while other forms would raise significant constitutional questions. Congress would have authority at least to regulate the process through which assertions of the privilege are to be adjudicated, even assuming a robust constitutional foundation for the privilege. This would include the power to require judges to conduct *in camera, ex parte* review of the specific items of evidence in the course of determining whether the privilege attaches. But whether Congress can 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. It would be particularly hard to justify compelled disclosure, for example, where military or diplomatic secrets protected by the state secrets privilege happen also to fall within the scope of executive privilege. Though executive privilege ordinarily is qualified rather than absolute, the Supreme Court in *United States v. Nixon* raised the possibility that it might be absolute where the communication at issue concerns military and diplomatic secrets.[6]

None of this is to say that Congress cannot or should not pursue reform of the state secrets privilege. In light of the potential constitutional problems identified above, however, it is advisable to emphasize less-intrusive reform options whenever possible.

II. 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 the status quo, with an eye towards distinguishing that which is mere codification from that which constitutes a substantial change. It helps to conduct this comparison in a way that corresponds to the sequence of questions a judge must resolve when confronted with an invocation of the privilege. The fruits of this approach appear in the text below, and also in the table attached as an appendix to this testimony.

[6] 418 U.S. at 706. If we assume for the sake of argument that the state secrets privilege is a mere rule of evidence but that executive privilege is a distinct constitutional rule that is absolute in the context of military and diplomatic secrets, the relationship between the two becomes analogous to that between the rule against hearsay evidence and the 6th Amendment Confrontation Clause. The hearsay and confrontation rules are not coextensive, but do have a significant area of overlap in criminal prosecutions. Congress can and does (through the Rules Enabling Act process) legislate exceptions that ameliorate the impact of the hearsay rule. Congress cannot legislate corresponding exceptions to the Confrontation Clause, however, meaning that there are some circumstances in which evidence withstands a hearsay objection but nonetheless must be excluded because of Constitutional considerations.

1. Has the Privilege Been Invoked by the Proper Executive Official?

No significant change.

The SSPA will not significantly alter the status quo with respect to the formalities of invoking the privilege. Both approaches require personal invocation of the privilege by the head of the executive entity with responsibility for the information at issue, and permit only the United States to raise the issue.[7]

2. What Category of Information Is Protected by the Privilege?

No significant change.

There is no significant change as between the status quo and the SSPA when it comes to defining the category of information eligible for state secrets protection. The SSPA defines a "state secret" with reference to information relating to "national defense or foreign relations."[8] The status quo at least arguably encompasses a similar range of topics.[9]

3. What Risk Threshold Is Embedded in the Substantive Test for the Privilege?

No significant change.

There is no significant change as between the status quo and the SSPA when it comes to calibrating the risk threshold for application of the privilege. Under the SSPA, the test is whether public disclosure "would be **reasonably likely** to cause significant harm" to national defense of foreign relations.[10] The status quo appears to employ a similar risk threshold.[11]

4. Who Ultimately Decides Whether the Substantive Test Is Met with Respect to Allegedly-Protected Information?

No significant change.

There is no significant change as between the status quo and the SSPA with respect to the question of whether courts or the executive branch has the final say with

[7] Compare SSPA § 4054(a) & (b) with United States v. Reynolds, 345 U.S. 1, 7-8 (1953).
[8] SSPA § 4051.
[9] *See* Chesney, *supra* note 1, at 1315-32 (specifying nature of information at issue in published state secrets adjudications between 1954 and 2006).
[10] SSPA § 4051(emphasis added).
[11] *Reynolds* arguably is vague with respect to the question of how strong the likelihood of harm from disclosure must be, but courts appear to understand it to require a reasonable-risk standard. *See, e.g.*, El – Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007).

respect to whether the privilege attaches to a given piece of information. Under both, that responsibility lies with the courts.[12]

5. When Determining Whether the Privilege Attaches to a Particular Item of Evidence, May the Judge Review the Item Itself?

Some change.

The SSPA departs from the status quo to a small extent with respect to whether the judge may review a document or record as to which the government has invoked the privilege. Under the SSPA, judges not only can but must review the actual item of evidence.[13] Under the status quo, they are expressly admonished by *Reynolds* to be reluctant to require *in camera* production unless the litigant has shown great need for the document.[14]

The SSPA's requirement of *in camera* disclosure reflects the lesson learned in connection with 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. The Supreme Court concluded such details could not be disclosed publicly, which is a plausible enough conclusion under the substantive test described above. But though it did not follow that the accident report necessarily did contain such details, the court assumed that it did and found the privilege applicable on that basis. Notoriously, it turned out much later that the report had not contained any details about the radar at all; the privilege ought not to have been invoked in the first place.[15]

The outcome in *Reynolds* illustrates rather dramatically the need for judges to ensure that a document or other record in fact contains the sensitive information said to be in it. It is important to appreciate, however, that this type of mistake does not reflect standard practice under the state secret privilege today. Where particular documents are in issue, in fact, courts today routinely do examine them personally en route to determining whether the privilege should attach.[16] The change that would be wrought by the SSPA on this issue, accordingly, is simply to remove any question as to whether this should be done.

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[12] Compare SSPA § 4054(e) (describing the judge's role in determining whether the privilege attaches) with *Reynolds*, 345 U.S. at 9-10 (conceding that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers", and thus rejecting the government's express argument in that case that the executive's invocation of the privilege should be conclusive).

[13] SSPA § 4054(d)(1) (requiring the United States to submit to the court not only an explanatory affidavit but also all evidence as to which the privilege has been asserted).

[14] *See* 345 U.S. at 10-12.

[15] *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166-68 (2006).

[16] *See, e.g.*, Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (2007) ("We reviewed the Sealed Document *in camera* . . . ").

6. When Determining Whether the Privilege Attaches to Abstract Information (Rather than an Item of Evidence), What Form of Justification Should the Government Provide to the Court?

Some change.

The need to invoke the state secrets privilege does not arise only in connection with specific, tangible items of evidence that can be produced for *in camera* judicial review. In the discovery context, a variety of mechanisms (including deposition questions and interrogatories) may implicate the privilege in the context of abstract information. The same is true at the pleading stage. Where a plaintiff alleges a fact in a complaint, the government's baseline obligation under Federal Rule of Civil Procedure 8(b) is to admit that fact, deny that fact, or state that it lacks sufficient information to do either. Admission establishes that fact as true for purposes of the litigation, of course, and thus the pleading stage can present the government with the same need to invoke the privilege but without a particular item of evidence to be reviewed.

The SSPA requires the government to submit a classified affidavit (as well as an unclassified version for public disclosure) to explain the privilege assertion in this scenario (actually, it requires such affidavits in all privilege-assertion contexts, but the requirement has more significance where there is not other information for the court to review).[17] This is only a technical departure from the status quo, however, as it appears to be the universal practice in recent years to supply such affidavits.

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.

7. When Determining Whether the Privilege Attaches, Should the Judge Permit Opposing Litigants to See the Classified Documents or Information At Issue?

Significant change.

The status quo permits the government to submit classified documents and affidavits on an *ex parte* basis in the course of asserting the privilege. These submissions are reviewed by the court alone, and are not at any point made available to opposing counsel. As a result, the process of determining whether the privilege attaches is in an important sense non-adversarial.

The SSPA departs from that model by granting the judge a range of options designed to permit greater adversariality during hearings concerning the privilege.

[17] SSPA § 4054(b).

a. Ex Parte Filings

The question of adversariality arises first with respect to the government's written submissions with respect to the privilege (*i.e.*, the filing of the classified information at issue, as well as explanatory affidavits). Under SSPA § 4052(a)(1), the judge will have discretion to determine whether such filings "shall be submitted ex parte."[18] The only restraint on the judge's authority to exercise this option is § 4052(a)(3)'s requirement that the judge "make decisions under this subsection taking into consideration the interests of justice and national security." No doubt most judges in most cases would exercise this authority wisely,[19] and as I will describe below there is much to be said for injecting greater adversariality into the privilege adjudication process. But creating an option for the judge to prohibit an initial *ex parte* filing probably goes too far.

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. 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.

b. Ex Parte Hearings

It is not clear how often *ex parte* hearings occur under the status quo, as distinct from the filing of *ex parte* submissions. That said, hearings do at least take place against the backdrop of such submissions, meaning that there is no opportunity for adversarial testing of them.

There is considerable wisdom in finding a way to inject some degree of adversariality into the currently *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. The best way to thread this needle, if it is to be threaded at all, is to permit the judge to appoint a guardian-ad-litem to represent the absent litigant's interests, drawing at random from a previously-generated list of attorneys who have high-level clearances and who have agreed to serve in this

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[18] SSPA § 4052(a)(1).

[19] 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* 18 U.S.C. App. 3, § 4. 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 argument, no court in a published opinion 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* 18 U.S.C. App. 3, § 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.

capacity.[20] Such a list might be compiled and maintained by the chief judge of each district, or by the Chief Justice of the United States.

The SSPA makes a laudable effort to inject a degree of adversariality into the privilege adjudication process, including a guardian-ad-litem mechanism in § 4052(c). I endorse the spirit of this approach, though not all of its details. My concern with the bill's guardian-ad-litem mechanism is a limited one: § 4052(c) presumably would permit the appointment of any person as guardian so long as the individual has the requisite security clearance. In my view, it is preferable to establish in advance a specific roster of potential guardians.[21]

But that objection is relatively minor. The bigger concern—and the more dramatic departure from the status quo—is that § 4052(c) also appears to authorize the judge to permit the litigant's own attorneys to have "access to motions or affidavits submitted under this chapter" and to participate in hearings in which otherwise *ex parte* materials may be discussed, so long as the attorneys have the requisite clearances. In short, even if the government's initial filings are permitted to be *ex parte*, § 4052(c) might be read to give the judge discretion to require disclosure of those filings to opposing counsel at some point *before* ruling on whether the privilege actually attaches. This probably strikes the wrong balance between the need to preserve the secrecy of information as to which the privilege has been invoked and the desire to obtain the benefits of adversariality, particularly insofar as a guardian-ad-litem mechanism will be available.[22] Insofar as privilege hearings do not involve discussions of the contents of materials filed on an *ex parte* basis, of course, they certainly should continue to involve full adversariality.

8. When Determining Whether the Privilege Attaches, Should the Judge Use *In Camera* Procedures?

No significant change.

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.[23] Under the status quo, judges typically employ a blend of ordinary and *in camera* procedures when adjudicating an assertion of the privilege.

The impact SSPA § 4052(b)(1) would have on this practice is unclear, but probably will not constitute a significant change. This section establishes a default presumption that hearings concerning the state secrets privilege will be conducted *in*

[20] *See* Chesney, *supra* note 1, at 1313.
[21] The section also should be amended to clarify that any such appointed counsel may not share with the represented party any information obtained from the government in such proceedings.
[22] Again, it is worth noting the contrast between the proposed procedure and the more protective approach associated with CIPA § 4 motions, in which *ex parte* review is the rule. *See supra* note 22.
[23] An *in camera* procedure is not necessarily *ex parte*, though the two concepts are conflated often.

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."

9. In the Course of Determining Whether Information Is Privileged, May the Judge Employ a Special Master?

No significant change.

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, while others draw on the same notions to contend that judges should in fact be extremely if not entirely deferential. And certainly it is true that a federal judge is not as well-situated as the Director of National Intelligence or the Secretary of State to assess such impacts.[24] 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.[25]

In an effort to reconcile these concerns, scholars have pointed out 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.[26] SSPA § 4052(f) would clarify that such authorities can be used in connection with state secrets litigation.

10. Can the Judge at Least Order the Creation of Substitutes for Privileged Information?

No significant change.

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." Drawing on the model set forth in CIPA § 6, 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.[27] 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.[28] The U.S. must comply with such an order if the issue arises in a

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[24] *See, e.g., al-Haramain*, 507 F.3d at 1203 ("we 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").
[25] 345 U.S. at 9-10.
[26] *See, e.g.,* Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, A.B.A. NAT'L SECURITY L. REP., Nov. 2006, at 1, 3-5, available at http://www.abanet.org/nat-security/nslr/2006/NSL_Report_2006_11.pdf.
[27] SSPA § 4054(f).
[28] *See id.*

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."[29]

It is not clear that any of these provisions depart from what a court might order even in the absence of the SSPA, though I am not aware of specific examples in which such compulsory authority actually was exercised. In any event, it certainly is 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.

11. Can a Suit Be Dismissed Based on the State Secrets Privilege?

Significant change.

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. 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 have frequently been granted.[30] 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.

Invocation of the privilege under current doctrine can result in dismissal of a suit in at least four ways, some of which the SSPA will change and some of which it won't. A full appreciation of the SSPA's impact requires a brief overview of these distinctions.

a. When Denial of Discovery Precipitates Summary Judgment

The first scenario involves summary judgment in the aftermath of a ruling precluding discovery on state secrets grounds. 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. In that setting, the Rule 56 ruling conceptually is subsequent to the state secrets ruling, rather than being based directly on it. The discovery ruling ultimately is no less fatal to the plaintiff's case, however, and if the motions happen to be adjudicated simultaneously it might indeed 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 § 4053(b) (stating that that "the state secrets privilege shall not

[29] *See id.* § 4054(g). No sanction is provided by the SSPA for scenarios in which the U.S. is merely an intervenor.
[30] *See* Chesney, *supra* note 1, at 1306-07, 1315-33.

constitute grounds for dismissal of a case or claim" other than pursuant to the § 4055 mechanism described below).

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

A second scenario that can be fatal to a claim under current doctrine arises when the government would be obliged to reveal protected information in order to defend 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.

The SSPA codifies this result, to some extent, in § 4055. Under that section, 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," and that there is no viable option for creating a non-privileged substitute that would provide a "substantially equivalent opportunity to litigate" the issue.[31]

More significantly, however, § 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. 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). If that is the correct interpretation, it would seem to follow that § 4055 contemplates a mini-trial on the merits of the defense.

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, as described above. 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. This could have constitutional ramifications. 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 be wise to structure the judge's review of the defense as a legal-sufficiency inquiry (in which the government's version of events is presumed to be true, akin to Rule 12(b)(6) litigation) rather than as a mini-trial.

[31] SSPA § 4055(1) & (3). For what it is worth, § 4055(2) also requires a finding that dismissal of the claim or counterclaim "would not harm national security."

c. When the Government Invokes the Privilege to Avoid an Admission at the Pleading Stage and Then Moves For Dismissal

Perhaps the most obscure scenario in which invocation of the privilege might prove fatal under current doctrine arises out of a defendant's obligation to admit or deny the allegations in a plaintiff's complaint. Assume that a plaintiff alleges a fact concerning protected information, such as the existence and details of a covert action program. Under Federal Rule of Civil Procedure 8(b), a defendant ordinarily must admit alleged facts in its answer if the defendant knows them to be true. Such an admission conclusively establishes the existence of that fact for purposes of the litigation, eliminating the need for the plaintiff subsequently to seek production of evidence that might prove the fact. What happens if, instead of admitting the fact, the defendant objects that it should not have to respond on privilege grounds, and the court agrees?

One possibility is that the plaintiff's allegation will be deemed denied, and the case simply will proceed to discovery. In that case, invocation of the privilege functions merely to spare the government any obligation to admit or deny protected information, putting off until later in the case the question of whether the suit may go forward. But another possibility is that the court will treat the plaintiff's allegation as void. Depending on the circumstances, this might expose the complaint to dismissal under Rule 12(b)(6) for failure to state a claim.

SSPA § 4053(c) would resolve this uncertainty by permitting the United States to "plead the state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial of that allegation . . . would itself divulge a state secret to another party or the public," or to do the same where admissions or denials by another party would have such an effect.[32] The language of § 4053(c) should be amended to clarify that the allegation should then be deemed denied.[33] With that qualification, though, the § 4053(c) mechanism is a very useful step forward in rationalizing the impact of the privilege at the pleading stage.

d. Are Some Claims Simply Not Actionable?

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."[34] The idea here is not that the government needs to avoid admitting or denying a particular allegation, nor 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.

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[32] SSPA § 4053(c).
[33] The text currently provides that "[n]o adverse inference shall be drawn form a pleading of state secrets in an answer to an item in a complaint." *Id.*
[34] *See el-Masri*, 479 F. 3d at 306.

It is important to appreciate just what this line of argument accomplishes. Under this approach, a suit may be dismissed even if the plaintiff can assemble 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, then, this is the most controversial dismissal scenario in current doctrine, one that the SSPA appears designed to override. Section 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.

It is easy to see why this approach is tempting. Plaintiffs who can assemble sufficient evidence on their own (i.e., those who do not require sensitive discovery) may proceed to trial so long as the government is not disabled from pursuing legitimate defenses. This sounds reasonable at first blush, assuming that the privilege is enforced properly during the discovery process and the government remains as free as other litigants to pursue summary judgment.

But there are costs to this approach, and potential constitutional obstacles as well. With respect to costs, consider a suit alleging the existence and details of a classified program such as the *el-Masri* rendition lawsuit. Under the SSPA, the suit may well have proceeded at least against the United States. The government might then face an extremely difficult choice. The government could proceed to trial and put the plaintiff to his proof, conducting a strictly-defensive effort to impeach the credibility of the plaintiff's witnesses and otherwise to cast doubt on the plaintiff's case. To present its own case-in-chief, however, the government presumably would be obliged to opt to reveal information that might otherwise be protected by the privilege.

Would putting the government to that choice be a worthy price to pay in order to permit litigation to proceed in that circumstance? Presumably the answer would vary from case to case depending on the circumstances. Section 4053(b) provides no opportunity for an individualized assessment, however. Instead, it predetermines that the better option in all such settings is to proceed with the litigation. A more nuanced approach is desirable, particularly insofar as the SSPA approach may generate constitutional objections. And a middle course is available. For example, judges could retain the ability to dismiss suits in this setting, subject to a heightened showing of potential harm to national security or diplomacy. Where that showing is made and a case is dismissed as a result, the Justice Department could be required to provide notice and relevant filings to the Judiciary and Intelligence Oversight Committees, which could then begin consideration of whether a private bill providing relief to the plaintiff would be in order.

* * *

Thank you very much for your courtesy in soliciting my views and your patience in considering them. Please do not hesitate to let me know if I may be of further assistance.

Appendix A - Summary of Analysis

The SSPA in large part is a codification of existing doctrine, which is a useful thing in and of itself. Where it does depart from the status quo, the SSPA for the most part constitutes an improvement. There are, however, a handful of points that would benefit from clarification or a more cautious approach. As explained in the text above:

- § 4054(b) should be amended to clarify that a judge may choose to order an unclassified affidavit to be filed under seal;

- § 4052(a)(1) should be amended to clarify that the government as an initial matter may always submit to the court on an *ex parte* basis any items of evidence as to which it is invoking the privilege (as well as explanatory affidavits);

- § 4052(c)(1) should be limited to a guardian-ad-litem system based on a pre-selected roster of eligible attorneys selected either by the Chief Judge of each district or the Chief Justice of the United States;

- § 4053(b) should be amended to make clear that courts remain free to grant Rule 56 motions even if a plaintiff's lack of necessary evidence results from application of the state secrets privilege;

- § 4053(c) should be amended to clarify that pleading the state secrets privilege in lieu of admitting or denying an allegation shall cause the allegation in issue to be deemed denied;

- § 4055 should be amended such that a judge considering dismissal based on a "valid defense" shall conduct proceedings *in camera* and also subject to the modified guardian-ad-litem mechanism described above, and perhaps also pursuant to a legal-sufficiency model akin to Rule 12(b)(6) adjudication; and

- § 4055 also should be amended to address the possibility of an overriding need in some cases to permit dismissal even in the absence of a meritorious defense (subject perhaps to a heightened showing of harm), with Congress receiving notice for purposes of considering a bill for private relief.

Appendix B – The SSPA Compared to the Status Quo

Issue	SSPA Approach	Change from Status Quo?	Comment
1. Formalities of invoking the privilege	Requires invocation by relevant department head	No significant change	No comment
2. Subjects protected by the privilege	National security and foreign relations	No significant change	No comment
3. Risk threshold	"reasonably likely to cause significant harm"	No significant change	No comment
4. Final decision-maker	The judge	No significant change	No comment
5. Judicial access to the protected information	Where particular items of evidence are in issue the judge must examine them.	Some change – such examinations are standard practice today, though *Reynolds* does attempt to discourage this.	A useful change in order to avoid a repeat of the *Reynolds* scenario (in which the document at issue did not actually contain sensitive information).
6. Affidavit requirements where abstract information rather than evidence is in issue	Where abstract information is in issue rather than a particular item, the government must submit both classified and unclassified affidavits.	This is typically done, though technically not required under current doctrine.	There is no harm in codifying this requirement. Section 4054(b) should be amended, however, to ensure the judge has the option of having the unclassified version filed under seal.
7. a. *Ex parte* filing of documents as an initial matter	The judge has authority to bar ex parte filings, or to order the provision of unclassified versions, etc.	This is a change to an extent. Under current doctrine, the government's submissions always are *ex parte*, though typically accompanied by unclassified affidavits as well.	Section 4052(a)(1) should be amended to clarify that the government always may make its initial filing on an *ex parte* basis.
7.b. *Ex parte* hearings	The judge has authority to allow access to *ex parte* filings either to the litigant's attorneys (subject to security clearance requirements) or to guardians-ad-litem, and should not hold any *ex parte* hearing unless the judge finds that those conditions provide insufficient security.	This is a significant change from the status quo, which provides no exceptions regarding access to the *ex parte* filings.	Section 4052(c)(1) should be amended to encompass only the guardian-ad-litem option, and to require selection of the guardian from a pre-selected list to be maintained by the Chief Judge of the district or by the Chief Justice of the United States.
8. *In camera* procedures	The judge must hold hearings on the privilege *in camera*, unless only legal issues posing no disclosure risks are in issue.	No significant change	No comment
9. Special masters	The judge may retain a special master to assist in assessing a privilege claim.	No significant change (though this option has not yet been used to the best of my knowledge).	No comment
10. Creation of	The judge may require	It is not certain that comparable currently exists,	No comment

substitutes	production of substitutes, ala CIPA.	but most likely it does.	
11.a. State secrets rulings precipitating a summary judgment ruling	The SSPA does not specifically address the question of whether summary judgment motions can still be made by the government in the aftermath of using the privilege to deny a party access to evidence that might have been needed to establish a triable issue of fact on a necessary element of a claim.	Presumably the SSPA does not intend to limit such rulings, and thus leaves that aspect of the status quo in place.	Section 4053(b) should be amended to make clear that it does not impact the summary judgment process.
11.b. Dismissing on state secrets grounds where a defense requires use of such information	A suit may be dismissed on privilege grounds only where the government has a "valid defense" that would be significantly impaired without privileged information, a determination that apparently would involve *in camera* adjudication of related factual disputes	This is a significant departure from the status quo, as it partially overrides the current rule that the government may obtain dismissal at the pleading stage where the "very subject matter" of a suit is itself a state secret.	Section 4055 should be amended such that the judge will not conduct a mini-trial in determining whether a defense is valid, but rather should employ a Rule 12(b)(6)-style approach that presumes the truth of the government's version of underlying events and limits the judge's role to testing the legal sufficiency of the defense. In any event, proceedings should be *in camera*, and should employ either *ex parte* methods or the modified guardian-ad-litem mechanism described above.
11.c. Invoking state secrets to avoid a pleading obligation	Where a pleading requires admission or denial of protected information, the government may instead plead the state secrets privilege.	The option to plead state secrets in response to an allegation concerning protected information may be a change to the status quo, though a litigant presumably could have achieved a similar result under current doctrine by lodging an objection in its answer.	Section 4053(c) should be amended to clarify that pleading the state secrets privilege should be deemed a denial.
11.d. Dismissing on state secrets grounds where no valid defense is in issue	Where the government does not have a "valid defense" that it would raise but for the privilege, the suit cannot be dismissed simply because its very subject matter concerns state secrets.	This is a significant departure from the status quo. Currently, courts take the view that suits must be dismissed on privilege grounds where their very subject matter is a state secret, regardless of whether the government actually has a defense to assert.	There may be individual instances where the costs to national security or diplomacy of permitting the litigation to continue outweigh the benefits. Section 4055 should be amended to permit the judge to make an individualized assessment of this, perhaps pursuant to a heightened burden on the government. Congress then should receive notice of the dismissal, prompting consideration of a private bill granting relief to the plaintiff.