[DRAFT – EXCERPTED FROM ROBERT CHESNEY, NATIONAL SECURITY, LITIGATION, AND THE STATE SECRETS PRIVILEGE, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR (MOORE & TURNER, EDS.) (FORTHCOMING 2009)]

III. The Question of Reform

Invocation of the privilege in cases such as *el-Masri* and the NSA suits have fueled growing awareness of the harsh impact of the privilege, and as a result interest in the prospects for reform of the privilege has grown considerably in recent years. Calls for legislative reform have multiplied, including much-publicized reports favoring reform issued by the Constitution Project[1] and the American Bar Association.[2] As of spring 2008, the reform movement has culminated in a bipartisan legislative package put forward by Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA), known as the State Secrets Protection Act ("SSPA").[3]

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 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."[4] 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

[1] The Constitution Project, Reforming the State Secrets Privilege (May 31, 2007).
[2] American Bar Association, Revised Report 116A, Report to the House of Delegates (Aug. 2007).
[3] *See* S. 2253.
[4] *See* SSPA § 4054(b).

personal consideration by that officer."[5] Both the SSPA and current practice, moreover, limit invocation of the privilege to the United States.[6]

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 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.[7] The status quo at least arguably encompasses a similar range of topics.[8]

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."[9] 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,"[10] 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.[11]

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."[12] 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.

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[5] 345 U.S. at 7-8.
[6] Compare SSPA § 4054(a) with *Reynolds*, 345 U.S. at 7.
[7] SSPA § 4051.
[8] *See* Chesney, *supra* note *, at 1315-32 (specifying nature of information at issue in published state secrets adjudications between 1954 and 2006).
[9] SSPA § 4051.
[10] 345 U.S. at 7.
[11] SSPA § 4051(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).
[12] *See* United States v. Reynolds, No. 21, Petitioner's Brief, at 47, available at 1952 WL 82378.

Among other things, the government reasoned that executive officials are far better situated than judges to assess the probable consequences of a disclosure.[13] On the other hand, unchecked authority to assert the privilege naturally would give rise to assertions of 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.[14]

This principle is no longer seriously contested today in formal terms.[15] But the relative authority of the judge and the executive branch continues to be a matter of controversy today because of the lingering question of how much deference the judge should give to the executive's claim, even if the claim is not strictly binding. 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.[16] Such deference was owed both "for constitutional reasons" and for "practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information."[17] 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."[18] 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 ultimate responsibility for determining whether the privilege should attach.[19] 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

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[13] *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").
[14] 345 U.S. at 9-10.
[15] *See, e.g, el-Masri*, 479 F.3d at 305 ("The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met.").
[16] 479 F.3d at 305 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
[17] *Id.*
[18] 507 F.3d at 1203.
[19] *See* SSPA § 4054(e) (describing the judge's role in determining whether the privilege attaches).

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*. When the government claims privilege in that context, it typically justifies its assertion with an explanatory affidavit from the official asserting the privilege.[20] 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 respect to this issue. Under the SSPA, judges not only can but *must* review the actual item of evidence.[21] Under the status quo, in contrast, they are expressly admonished by *Reynolds* to be reluctant to require such *in camera* production unless the litigant has shown great need for the document.[22]

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. 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 substantial details about the radar. Thus conventional wisdom holds that the privilege ought not to have been invoked on that basis in the first place, something that almost certainly would have been revealed by judicial inspection of the document.[23]

Reynolds thus has come to stand for an important, common-sense proposition: where the privilege is asserted in connection with a 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 appreciate, however, that this type of mistake does not reflect standard practice under the state secrets privilege today. Notwithstanding language in *Reynolds* cautioning judges not to conduct *in camera* inspections unnecessarily, courts today routinely do examine documents personally en

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[20] *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).

[21] *See* SSPA § 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).

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

[23] *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166-68 (2006). *But see* Statement of Carl Nichols before the Senate Committee on the Judiciary, "Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability," Feb. 13, 2008 (arguing that 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, 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*, Herring v. United States, 424 F.3d 384 (3rd Cir. 2005).

route to determining whether the privilege should attach.[24] 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.

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 also may 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.[25]

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 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).[26] The allegation(s) in question presumably then would be deemed denied,[27] 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

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

[25] SSPA § 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.

[26] SSPA § 4053(c).

[27] 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." *Id.* This language should be amended to more clearly state that a privilege plea should be treated as a denial for pleading purposes.

affidavits on an *ex parte* basis in the course of asserting the privilege. These submissions are reviewed by the court alone; they are not made available to opposing counsel. 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.

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 in a significant way by limiting the ability of the government to justify its invocation of the privilege through *ex parte* submissions. First, § 4052(a)(1) 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."[28] No doubt most judges in most cases would exercise this authority wisely.[29] 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:

> 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.

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[28] SSPA § 4052(a)(1). 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.

[29] 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.

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. 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 nonetheless might 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.

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 has 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.[30] The U.K. has a comparable system, originally designed for immigration removals as well.[31] 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.[32]

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 so as 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.[33] This solution concededly is not ideal from the litigants' perspective, of course, but even from that viewpoint it does constitute a substantial improvement over the status quo.[34]

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[30] *See* Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, available at http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3_2/C-3_2.PDF.

[31] Special Immigration Appeals Act, 1997, c. 68, § 6 (Eng.).

[32] *See* Bill C-3, § 85.

[33] *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.

[34] 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 Classified Information Procedures Act ("CIPA"), in which *ex parte* review is the rule. *See supra* note 50.

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.[35] 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 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."

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, 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 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.[36] 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.[37]

The tension between these values appears intractable at first blush, but there are mechanisms for ameliorating the problem. Some scholars have pointed 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.[38] Section 4052(f) of the SSPA 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.

G. Consequences Once the Privilege Attaches: Substitutions

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[35] An *in camera* procedure is not necessarily *ex parte*, though the two concepts are conflated often.
[36] *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").
[37] 345 U.S. at 9-10.
[38] *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/natsecurity/nslr/2006/NSL_Report_2006_11.pdf.

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.[39] 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.[40] 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."[41]

It is not clear that any of these provisions depart from what a court might order even in the absence of the SSPA. But 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.

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 in this essay, 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.[42] 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. 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

Application of the privilege can prove fatal to a suit in more than one way under current doctrine. 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.

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

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 is no less fatal to the plaintiff's case for that, however, and if the motions 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 be 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," and that there is no viable option for creating a non-privileged substitute that would provide a "substantially equivalent opportunity to litigate" the issue.[43] 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. 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 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

[43] 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."

well as financial consequences). And for much the same 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.

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."[44] 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 adjudicated. Under this approach, therefore, 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 the result in this scenario 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 instead citing the privilege in its responsive pleading. 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. Taken together, these provisions have the effect of requiring cases in what might be called the "very subject matter" 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. Specifically, § 4054(a) states that the government not only may use the privilege to resist discovery, but also "for preventing the introduction of evidence at trial."[45] Much turns on the interpretation of this language.

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[44] *See el-Masri*, 479 F. 3d at 306.
[45] SSPA § 4054(a).

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 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. 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. Section 4054(a) accordingly should be amended to say as much.[46]

The important point for now is that the "sword" aspect of § 4054(a) at least arguably will produce an end result comparable to that which obtains under the current doctrine's "very subject matter" line of cases. 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 be to ensure much more careful tailoring of it to the facts and evidence in particular cases. This in turn should reduce the risk of erroneous applications (and thus injustice). Though this benefit will come at the costs of increased litigation expense and complexity, that is a cost that most likely is worth bearing. At the very least, the experiment is worth undertaking.

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

[46] 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 intending 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.

caveats noted above it marks an important step forward in the ongoing evolution of the state secrets privilege.