



The State Secrets Privilege and Other Limits on Litigation Involving Classified Information

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Summary

The state secrets privilege is a judicially created evidentiary privilege that allows the government to resist court-ordered disclosure of information during litigation, if there is a reasonable danger that such disclosure would harm the national security of the United States. The Supreme Court first described the modern analytical framework of the state secrets privilege in the 1953 case of *United States v. Reynolds*. In its opinion, the Court laid out a two-step procedure to be used when evaluating a claim of privilege to protect state secrets. First, there must be 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. Second, a court must independently determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. If the privilege is appropriately invoked, it is absolute and the disclosure of the underlying information cannot be compelled by the court.

The Classified Information Procedures Act (CIPA) provides pretrial procedures that permit a trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court. The use of classified evidence may also implicate criminal defendants' rights to exculpatory information and witnesses' statements held by the prosecution, or their right to confront witnesses under the Sixth Amendment.

Congressional action may affect the operation or coverage of the state secrets privilege. In 2008, a federal district court held that the Foreign Intelligence Surveillance Act supplanted the state secrets privilege with respect to civil claims of unlawful electronic surveillance. In the 111th Congress, House and Senate versions of bills entitled "the State Secrets Protection Act," H.R. 984 and S. 417, have been introduced to codify the privilege. The bills would additionally limit the privilege to cases where significant harm to national security was presented, require judicial review of the actual information claimed to be privileged, and require the Attorney General to report to Congress within 30 days of any invocation of the state secrets privilege.

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The state secrets privilege, derived from common law, is an evidentiary privilege that allows the government to resist court-ordered disclosure of information during litigation if there is a reasonable danger that such disclosure would harm the national security of the United States.¹ In recent years, some have suggested that this privilege has been overused by the executive branch to prevent disclosure of its questionable conduct, particularly with respect to the “war on terror.”² Both the Bush and Obama administrations have asserted the state secrets privilege in suits brought by private litigants alleging unlawful electronic surveillance³ and extraordinary rendition.⁴

This report is intended to provide an overview of the protections afforded by the state secrets privilege. Although it is primarily a construct of the judiciary,⁵ Congress has previously enacted and continues to consider legislation that may affect its operation. In 1980, Congress enacted the Classified Information Procedures Act to provide uniform procedures to be used in federal criminal litigation involving classified information.⁶ In 2008, a federal district court held that portions of the Foreign Intelligence Surveillance Act (FISA) superseded the state secrets privilege, at least with respect to civil claims alleging unlawful electronic surveillance under FISA.⁷ In the 111th Congress, different versions of the State Secrets Protection Act have been introduced in both the House of Representatives⁸ and the Senate.⁹

After reviewing the case law that defines the current state secrets privilege, this report will discuss both enacted and proposed legislation that may affect the scope or function of the state secrets privilege.

¹ For a common law discussion of the privilege, see 8 Wigmore Evidence §§ 2367-2379 (J. McNaughton rev. 1961); for a more recent description, see EDWARD J. IMWINKELREID, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES*, ch. 8 (2002). It has also been argued that the privilege is derived “from the President’s authority over national security, and thus is imbued with ‘constitutional overtones.’” Amanda Frost, *The State Secrets Privilege And Separation Of Powers*, 75 *FORDHAM L. REV.* 1931, 1935 (Mar. 2007).

² Editorial, *Securing Lawsuits*, *WASH. POST*, May 11, 2009, at A16; Editorial, *Unraveling Injustice*, *N.Y. TIMES*, Feb. 5, 2009, at 30; Louis Fisher, *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*, Statement Before the Senate Judiciary Committee, Feb. 13, 2008, at 3, available at http://loc.gov/law/help/usconlaw/pdf/ssp_senatejudiciary.pdf; Editorial, *Revisit the State Secrets Privilege*, *PITTSBURGH POST-GAZETTE*, Oct. 15, 2007, at B7.

³ See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204-1205 (9th Cir. 2007); Carrie Johnson, *Handling of State Secrets at Issue; Like Predecessor, New Justice Dept. Claiming Privilege*, *WASH. POST*, at Mar. 25, 2009, at A1.

⁴ See, e.g., *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007) and Carrie Johnson, *Handling of State Secrets*, *supra* note 3 (“Six weeks ago, Attorney General Eric H. Holder Jr. disappointed civil libertarians by invoking the state-secrets claim in a case against a Boeing Co. subsidiary accused of transporting five terrorism suspects to countries where they were tortured”).

⁵ See *FED. R. EVID.* 501.

⁶ P.L. 96-456.

⁷ *In re NSA Telcoms. Records Litig.*, 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008).

⁸ H.R. 984.

⁹ S. 417.

United States v. Reynolds: The Seminal Case

The Supreme Court first articulated the modern analytical framework of the state secrets privilege in 1953, when it decided *United States v. Reynolds*.¹⁰ That case involved multiple wrongful death claims brought by the widows of three civilians who died aboard a military aircraft that crashed while testing secret electronic equipment. The plaintiffs had sought discovery of the official post-incident report and survivors' statements that were in the possession of the Air Force. The Air Force opposed disclosure of those documents as the aircraft and its occupants were engaged in a "highly secret mission of the Air Force" at the time of the crash.¹¹ The federal district court ordered the Air Force to produce the documents so that it could independently determine whether they contained privileged information. When the Air Force refused to provide the documents to the court, the district court ruled in favor of the plaintiffs on the issue of negligence; the court of appeals subsequently affirmed the district court's ruling.¹²

The Supreme Court reversed. In its opinion, the Court laid out a two-step procedure to be used when evaluating a claim of privilege to protect state secrets. First, "there must be 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."¹³ Second, "the court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."¹⁴

Asserting the Privilege

The first requirement identified by the Court, the assertion of the privilege, is a largely procedural hurdle to assure that the privilege is "not to be lightly invoked."¹⁵ Nevertheless this requirement is readily met through the written assertion of the privilege by the head of the department in control of the information in question. The lack of a formal assertion has been excused because strict adherence to the requirement would have had little or no benefit.¹⁶

¹⁰ *U.S. v. Reynolds*, 345 U.S. 1 (1953).

¹¹ *Id.* at 5. The Air Force did offer to make the surviving crew available for examination by the plaintiffs. *Id.*

¹² *Reynolds v. U.S.*, 192 F.2d 987 (3d Cir. 1951).

¹³ *Id.* at 8.

¹⁴ *Id.* With respect to the facts at hand, the Court noted that the Secretary of the Air Force had filed a formal assertion of the privilege, and that there was a reasonable danger "that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Id.* at 10. Furthermore, it was "apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests." *Id.* Thus, the Court upheld the government's assertion of the state secrets privilege and barred discovery of the requested documents by the plaintiffs.

¹⁵ *Id.* at 7.

¹⁶ *But see Clift v. U.S.*, 597 F.2d 826, 828-9 (2d Cir. 1979) (preventing discovery of documents in a patent infringement suit brought by the inventor of a cryptographic device against the government where the Director of the NSA had submitted an affidavit stating that disclosing the contents of the documents would be a criminal violation, but had not formally asserted the state secrets privilege; the court reasoned that imposition of the formal requirement would have had little or no benefit in this circumstance).

Evaluating the Validity of the Privilege

In contrast, “the latter requirement is the only one which presents real difficulty.”¹⁷ For example, although the Supreme Court’s holding in *Reynolds* recognized that it is the role of the judiciary to evaluate the validity of claims of privilege, the Court declined to require courts to automatically require inspection of the underlying information. As the Court noted in *Reynolds*, “too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”¹⁸ In light of this dilemma, the Court chose to chart a middle course, employing a “formula of compromise” to balance the competing interests of oversight by the judiciary and national security interests.¹⁹ Under this scheme, the privilege should be found valid when the court is satisfied that there is a reasonable danger that disclosure “will expose military matters which, in the interest of national security, should not be divulged.”²⁰ Once the court is satisfied that the privilege is valid, it should not further “jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”²¹

Whether a court can be satisfied without examining the underlying information may be affected by the amount of deference afforded to the government’s representations regarding the information. In *Reynolds*, the Court noted that the necessity of the underlying information to the litigation will determine “how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.”²² In the case of *Reynolds*, the Court noted that the Air Force had offered to make the surviving crew members available for examination by the plaintiffs.²³ Because of this alternative avenue of information, the Court was satisfied that the privilege was valid based primarily upon representations made by the government regarding the contents of the documents.²⁴ Conversely, less deference to the government’s representations may be warranted where a private litigant has a strong need for the information.²⁵

The Effect of a Valid Privilege

If the privilege is appropriately invoked, it is absolute and the disclosure of the underlying information cannot be compelled by the court. Although a private litigant’s need for the information may be relevant to the amount of deference afforded to the government, “even the

¹⁷ *Reynolds*, 345 U.S. at 8.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.* at 11.

²³ *Id.* at 5.

²⁴ *Id.* at 11.

²⁵ See, e.g., *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (*in camera* examination of classified information was appropriate where it was central to litigation); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d at 1203-1204 (“We reviewed the Sealed Document *in camera* because of [plaintiff’s] admittedly substantial need for the document to establish its case”).

most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied” that the privilege is appropriate.²⁶

In some circumstances, the exclusion of the protected information can be fatal to the litigation. In *Halkin v. Helms*, the D.C. Circuit was confronted with a claim of privilege regarding the National Security Agency’s alleged interception of international communications to and from persons who had been targeted by the Central Intelligence Agency.²⁷ After deciding that the claim of privilege was valid, the D.C. Circuit affirmed the protection of *that* information from discovery.²⁸ Although some non-privileged evidence that the plaintiffs were targeted by the Central Intelligence Agency (CIA) existed, the court dismissed the suit after deciding that without the privileged information, the plaintiffs would not be able to establish a *prima facie* case of unlawful electronic surveillance.

A similar result may occur if the state secrets privilege requires the exclusion of evidence central to a litigant’s defense. In *Molerio v. Federal Bureau of Investigation*, a job seeker alleged that the Federal Bureau of Investigation (FBI) had disqualified him based upon his father’s political ties to socialist organizations in violation of the applicant and his father’s First Amendment rights.²⁹ In response, the FBI asserted that it had a lawful reason to disqualify the plaintiff, but claimed that its reason was protected by the state secrets privilege. After reviewing the FBI’s claim *in camera*, the D.C. Circuit agreed that the evidence of a nondiscriminatory reason was protected and that its exclusion would deprive the FBI of a valid defense. Therefore, the dismissal of that action was required once the privilege was determined to be valid.³⁰

Whether the assertion of the state secrets privilege is fatal to a particular suit, or merely excludes privileged evidence from further litigation, is a question that is highly dependent upon the specific facts of a case. Two recent cases from the Fourth and Ninth Circuits, dealing with the federal government’s rendition practices,³¹ can be viewed as exemplifying the varied conclusions courts have reached in ostensibly similar cases. In *El-Masri v. United States*, the plaintiff brought a civil suit against various government officials and private transportation companies alleging that he had been unlawfully rendered to a secret CIA detention site.³² Similarly, in *Mohamed v. Jeppesen Dataplan*, a subsidiary of the Boeing Company was sued for allegedly transporting the plaintiffs to countries that engaged in torture.³³ In both cases, the government asserted the state secrets privilege and argued that the suits should be dismissed because the issues involved in the lawsuits could not be litigated without risking disclosure of privileged information.³⁴ Both trial courts held that the privilege was properly invoked and dismissed both complaints at the

²⁶ *Id.*

²⁷ *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

²⁸ The other evidence of CIA targeting was never claimed to be privileged by the government. *Id.* at 997.

²⁹ *Molerio v. FBI*, 749 F. 2d at 824-825.

³⁰ *Id.* at 825.

³¹ These suits involve controversies in which the United States allegedly rendered suspected terrorists to states known to practice torture. See CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

³² *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007).

³³ *Mohamed v. Jeppesen Dataplan*, 2009 U.S. App. LEXIS 8978 (9th Cir. Apr. 28, 2009).

³⁴ *El-Masri v. U.S.*, 479 F.3d at 301. In *Jeppesen*, the federal government was not initially a defendant, but intervened in the case to assert the privilege and simultaneously moved to dismiss. *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128, 1132-1133 (N.D. Cal. 2008).

pleadings stage. However, upon appeal the respective circuits reached markedly different conclusions.

In *El-Masri*, the Fourth Circuit agreed with the trial court and affirmed the dismissal of the case. According to the Fourth Circuit's opinion, any attempt to prove or disprove the allegations in the complaint would necessarily involve disclosing the internal organization and procedures of the CIA, as well as secret contracts with the transportation companies. Therefore, because "the very subject matter of [the] action is a state secret,"³⁵ the court was required to dismiss the suit upon the successful invocation of the privilege by the government.³⁶

In contrast, the Ninth Circuit held that the state secrets privilege only excluded privileged evidence from discovery or admission at trial, and did not require the dismissal of the complaint at the pleadings stage.³⁷ While the exclusion of privileged evidence from discovery might ultimately be fatal to the litigation, because it prevents the plaintiffs from establishing a *prima facie* case or denies the defendant a valid defense, the *Jeppesen* court held that dismissal of a suit on the pleadings because of the "very subject matter" of the privileged information is not warranted,³⁸ except in the special case of contracts for espionage discussed below.

Totten v. United States: The Special Case of Nonjusticiable Contracts for Espionage

Although courts may reach different results when considering the effect of an assertion of the state secrets privilege, there is one category of cases involving state secrets that courts have generally held to be nonjusticiable: specifically, cases brought against the federal government to enforce contracts for espionage.

This rule was first enunciated in *Totten v. United States*, in which the Supreme Court dismissed a breach of contract claim brought against the government by the estate of a former Civil War spy for the Union.³⁹ The Court dismissed the claim noting that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."⁴⁰

In *Tenet v. Doe*, the Supreme Court reaffirmed the central holding of *Totten*, which stated that controversies over espionage contracts are not justiciable.⁴¹ Prior to that decision, the relevance of

³⁵ *El-Masri*, 479 F.3d at 310 (quoting *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (upholding summary judgment for defendant Air Force in suit alleging unlawful handling of hazardous waste after government successfully asserted state secrets privilege in response to almost all of plaintiff's discovery requests)).

³⁶ *El-Masri*, 479 F.3d at 311 (citing *Sterling v. Tenet*, 416 F.3d 338, 341 (4th Cir. 2005) (Title VII claim brought by covert employee of the CIA cannot be litigated without disclosing privileged information)).

³⁷ *Mohamed*, 2009 U.S. App. LEXIS 8978, at 27-28. The court also held that the *Totten* rule, which requires the immediate dismissal of suits involving espionage contracts and is discussed in the next section, was not applicable here. See *infra* notes 39-44 and accompanying text.

³⁸ *Id.* at 18. Therefore, the appellate court reversed the trial court's dismissal and remanded the case for further proceedings. *Id.* at 38-40.

³⁹ *Totten v. U.S.*, 92 U.S. 105 (1876).

⁴⁰ *Id.* at 107.

⁴¹ *Tenet v. Doe*, 544 U.S. 1 (2005).

the *Totten* rule in light of the Court's intervening decision in *Reynolds* was unclear. For example, in the lower court proceedings leading up to the Supreme Court's opinion in *Tenet*, the Ninth Circuit had held that the immediate dismissal doctrine required in *Totten* was, in modern times, only appropriate once the state secrets privilege had been properly asserted and evaluated pursuant to *Reynolds* and its progeny.⁴²

Ultimately in *Tenet*, the Supreme Court held that the *Totten* rule had not been "reduced to an example of the state secrets privilege," and that "the state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."⁴³ Therefore disputes over contracts for espionage appear to remain a special category of cases which the courts have no jurisdiction over, even without any invocation of the state secrets privilege by the government.⁴⁴

The Classified Information Procedures Act and Secret Evidence in Criminal Litigation

Although the cases discussed thus far have dealt only with civil litigation, the government enjoys a similar privilege with respect to the use of classified information in criminal litigation. In practice, this privilege operates differently in the criminal context as the government is simultaneously responsible for prosecution and the protection of national security. Therefore, when classified information is part of the prosecution's case-in-chief, the government may resolve these competing interests before any judicial proceedings are necessary.

However, once criminal proceedings have been instigated, the Sixth Amendment provides a criminal defendant with the right to have a public trial, to be confronted with the witnesses against him, and to present relevant evidence in his defense.⁴⁵ In some prosecutions, particularly those conducted as part of the "global war on terror," the defendant's presentation of evidence in a public trial could also present risks to the national security of the United States. Additionally, in situations known colloquially as "graymail," the defendant may be seeking to introduce tangentially related classified information solely to force the prosecution to dismiss the charges against him.⁴⁶

This dilemma was one factor leading to Congress's enactment of the Classified Information Procedures Act (CIPA),⁴⁷ which "provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court."⁴⁸ These procedures, which are summarized in **Appendix A**, are intended to provide a means for the court to distinguish instances of graymail from cases in which classified information is actually material to the defense.

⁴² *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003) (rev'd by *Tenet v. Doe*, 544 U.S. at 1).

⁴³ *Tenet v. Doe*, 544 U.S. at 10-11.

⁴⁴ *Id.* at 11 ("requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs").

⁴⁵ U.S. CONST. amend. VI.

⁴⁶ See S.REPT. 96-823 at 1-4 (part of the legislative history of CIPA).

⁴⁷ P.L. 96-456, codified at 18 U.S.C. app. 3 § 1-16.

⁴⁸ S.REPT. 96-823, at 1.

Importantly, the text of CIPA contains no standards for a court to apply to evaluate whether a claim of privilege is valid. As the Second Circuit has noted, CIPA “presupposes a governmental privilege against disclosing classified information” in criminal matters.⁴⁹ Other courts have agreed that CIPA does not create any new privilege against the disclosure of classified information,⁵⁰ but merely establishes uniform procedures to determine the materiality of classified information to the defense in a criminal proceeding.⁵¹ Under CIPA, if the government objects to disclosure of classified information that is material to the defense, the court is required to accept that assertion without scrutiny, and impose nondisclosure orders upon the defendant.⁵² However, in such cases the court is also empowered to dismiss the indictment against the defendant, or impose other sanctions that are appropriate.⁵³ Therefore, once classified information has been determined through the procedures under CIPA to be material, it falls to the government to elect between permitting the disclosure of that information or the sanctions the court may impose.

Prosecutions implicating classified information can be factually varied, but an important distinction that may be made among them is from whom information is being kept. In cases where the defendant is already privy to some classified information, the government may be seeking to prevent disclosure to the general public. However, in the case of terrorism prosecutions, the more typical situation is likely to be the introduction of classified information as part of the prosecution’s case against the defendant. In these cases, protective orders preventing disclosure to the defendant, as well as to the public, may be sought by the government. Constitutional issues related to withholding classified information from a criminal defendant arise during two distinct phases of criminal litigation. First, issues may arise during the discovery phase when the defendant requests and is entitled to classified information in the possession of the prosecution. Secondly, issues may arise during the trial phase, when classified information is sought to be presented to the trier-of-fact as evidence of the defendant’s guilt. The issues implicated during both of these phases are discussed below.

Withholding Classified Information During Discovery

The mechanics of discovery in federal criminal litigation are governed primarily by the Federal Rules of Criminal Procedure (FED. R. CRIM. P.). These rules provide the means by which defendants may request information and evidence in the possession of the prosecution, in many cases prior to trial. There are two important classes of information that the prosecution must provide, if requested by the defendant: specifically *Brady* material and *Jencks* material.

Brady material, named after the seminal Supreme Court case *Brady v. Maryland*,⁵⁴ refers to information in the prosecution’s possession which is exculpatory, or tends to prove the innocence

⁴⁹ *U.S. v. Aref*, 533 F.3d 72, 78-79 (2nd Cir. 2008) (holding that the state secrets privilege may be asserted in criminal prosecutions, subject to the procedures in CIPA, if the information is not relevant and helpful to the defense).

⁵⁰ *U.S. v. Meija*, 448 F.3d 436, 455 (D.C. Cir. 2006). *See also U.S. v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989).

⁵¹ The legislative history of CIPA states that “it is well-settled that the common law state secrets privilege is not applicable in the criminal arena.” H.REPT. 96-831 pt. 1, at n.12. *But, see U.S. v. Aref*, 533 F.3d 72 at 79 (observing that this statement in the legislative history “sweeps too broadly”).

⁵² 18 U.S.C. app. 3, § 6(e)(1).

⁵³ 18 U.S.C. app. 3, § 6(e)(2).

⁵⁴ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires prosecution to turn over exculpatory evidence in its possession).

of the defendant. For example, statements by witnesses that contradict or are inconsistent with the prosecution's theory of the case must be provided to the defense, even if the prosecution does not intend to call those witnesses. Prosecutors are considered to have possession of information that is in the control of agencies that are "closely aligned with the prosecution,"⁵⁵ but, whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed.⁵⁶

Jencks material refers to written statements made by a prosecution witness who has testified or may testify. For example, this would include a report made by a witness called to testify against the defendant. In the Supreme Court's opinion in *Jencks v. United States*,⁵⁷ the Court noted the high impeachment value a witness's prior statements can have, both to show inconsistency or incompleteness of the in-court testimony. Subsequently, this requirement was codified by the Jencks Act.⁵⁸

The operation of *Jencks* and *Brady* may differ significantly in the context of classified information. Under § 4 of CIPA, which deals with disclosure of discoverable classified information, the prosecution may request to submit either a redacted version or a substitute of the classified information in order to prevent harm to national security.⁵⁹ While the court may reject the redacted version or substitute as an insufficient proxy for the original, this decision is made *ex parte* without the defendant's input. Classified information that is also *Jencks* or *Brady* material is still subject to CIPA and may be provided in a redacted or substituted form.⁶⁰

In some cases, the issue may not be the disclosure of a document or statement, but whether to grant the defendant pre-trial access to government witnesses. In *United States v. Moussaoui*, one issue was the ability of the defendant to depose "enemy combatant" witnesses who were, at the time the deposition was ordered, considered intelligence assets by the United States.⁶¹ Under the FED. R. CRIM. P., a defendant may request a deposition in order to preserve testimony at trial.⁶² In *Moussaoui*, the court had determined that a deposition of the witnesses by the defendant was warranted because the witnesses had information that could have been exculpatory or could have

⁵⁵ *United States v. Brooks*, 966 F.2d 1500, 1503 (1992).

⁵⁶ *But, see United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006) (in a prosecution involving the unauthorized disclosure of classified information, the CIA was closely aligned with special prosecutor for purposes of *Brady* based on the free flow of other documents between the CIA and the prosecutor).

⁵⁷ *Jencks v. U.S.*, 353 U.S. 657 (1957) (holding that, in a criminal prosecution, the government may not withhold documents relied upon by government witnesses, even where disclosure of those documents might damage national security interests).

⁵⁸ Codified at 18 U.S.C. § 3500. The Jencks Act provides definitions for so-called "Jencks material" and requires disclosure of such material to the defense, but only after the witness has testified.

⁵⁹ 18 U.S.C. app. 3, § 4.

⁶⁰ *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (holding that *in camera* examination and redaction of purported *Brady* material by trial court was proper).

⁶¹ *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). *Moussaoui* was prosecuted for his involvement in the conspiracy to commit the terrorist attacks of September 11, 2001. While the U.S. Court of Appeals for the Fourth Circuit held that CIPA did not apply to question of whether *Moussaoui* and his standby counsel would be allowed to depose to enemy combatant witnesses, *United States v. Moussaoui*, 333 F.3d 509, 514-15 (4th Cir. 2003), both the district court and the Fourth Circuit looked to CIPA for guidance when considering the question, see *Moussaoui, supra*, 382 F.3d at 471 n. 20 and accompanying text. Further litigation of these issues was rendered moot when *Zacarias Moussaoui* subsequently entered a guilty plea.

⁶² FED. R. CRIM. P. 15(a). The court should permit the deposition if there are exceptional circumstances and it is in the interest of justice.

disqualified the defendant for the death penalty.⁶³ However, the government refused to produce the deponents citing national security concerns.⁶⁴

In light of this refusal, the Fourth Circuit, noting the conflict between the government's duty to comply with the court's discovery orders and the need to protect national security, considered whether the defendant could be provided with an adequate substitute for the depositions. The court also noted that substitutes would necessarily be different from depositions, and that these differences should not automatically render the substitutes inadequate.⁶⁵ Instead, the appropriate standard was whether the substitutes put the defendant in substantially the same position he would have been absent the government's national security concerns.⁶⁶ Here, the Fourth Circuit seemed to indicate that government-produced summaries of the witnesses' statements, with some procedural modifications, could be adequate substitutes for depositions.⁶⁷

The Confrontation Clause and the Use of Secret Evidence At Trial

The use of secret evidence at trial also implicates constitutional concerns. As described above, there may be instances where disclosure of classified information to the defendant would be damaging to the national security. In these instances, the prosecution may seek to present evidence at trial in a manner that does not result in disclosure to the defendant. One proposed scenario might be the physical exclusion of the defendant from those portions of the trial, while allowing the defendant's counsel to remain present.⁶⁸ However, such proceedings could be viewed as unconstitutionally infringing upon the defendant's Sixth Amendment right to confrontation.⁶⁹

Historically, defendants have had the right to be present during the presentation of evidence against them, and to participate in their defense.⁷⁰ But other courts have approved of procedures which do not go so far as to require the defendant's physical presence. In *United States v. Abu Ali*, the Fourth Circuit permitted video conferences to allow the defendant to observe, and be observed by, witnesses who were being deposed in Riyadh, Saudi Arabia.⁷¹ The Fourth Circuit stated that these procedures satisfied the Confrontation Clause if "the denial of 'face-to-face confrontation' [was] 'necessary to further an important public policy,'" and sufficient procedural

⁶³ *Moussaoui*, 382 F.3d at 458, 473-475.

⁶⁴ *Id.* at 459.

⁶⁵ *Id.* at 477.

⁶⁶ *Id.*

⁶⁷ *Id.* at 479-483. The precise form of the deposition substitutes is unclear as significant portions of the Fourth Circuit's opinion dealing with the substitute were redacted.

⁶⁸ See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168 (D.D.C. 2004) (describing potential procedures under military commissions established by Presidential order).

⁶⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006) (Stevens, J., plurality opinion) (stating that "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him").

⁷⁰ See, e.g., *id.*; *Crawford*, 541 U.S. at 49, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine") (internal citations omitted).

⁷¹ *United States v. Abu Ali*, 528 F.3d 210, 239-240 (4th Cir. 2008)(quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). In this case the defendant, while located in the Federal courthouse in Alexandria, Va., was able to communicate with his counsel in Riyadh via telephone during breaks in the deposition or upon the request of defense counsel.

protections were in place to assure the reliability of the testimony.⁷² Here, the Fourth Circuit cited the protection of national security as satisfying the “important public policy” requirement. The cited procedural safeguards were the ability of the defendant and witness to mutually observe the other, the fact that testimony was given under oath in the Saudi criminal justice system, and the ability of defense counsel to cross examine the witnesses.⁷³

Arguments alleging that protective orders violate the Confrontation Clause because they do not allow the participation of the defendant may also be undercut in the classified information context because, in some cases, the excluded defendant is not believed to have knowledge of the information being presented.⁷⁴ Therefore, his ability to provide his counsel with rebuttal information for cross examination purposes may be reduced. CIPA does not have any provisions which authorize the exclusion of defendants from any portion of trial based upon national security considerations. But, CIPA § 3 may authorize courts to issue protective orders preventing disclosure of classified information to the defendant by defense counsel.⁷⁵

Legislative Modification of the State Secrets Privilege

While CIPA may not appear to impose any limitations on the scope of the government’s privilege against disclosing classified information, other pieces of legislation may affect the operation or coverage of the privilege. In 2008, a federal district court held that FISA supplanted the state secrets privilege with respect to civil claims of unlawful electronic surveillance. Two versions of the State Secrets Protection Act have also been introduced in the 111th Congress to codify and change aspects of the privilege in civil litigation. Each of these is discussed below.⁷⁶

The Foreign Intelligence Surveillance Act

FISA provides a statutory framework for government agencies to seek an order from the specialized Foreign Intelligence Surveillance Court (FISC) that authorizes the collection of foreign intelligence information via electronic surveillance⁷⁷ or physical searches.⁷⁸ FISA also provides procedures governing the use of pen registers and trap and trace devices,⁷⁹ and access to certain business records for foreign intelligence collection.⁸⁰

⁷² *Id.* at 241-242 (citing *Maryland v. Craig*, 497 U.S. 836 (1990), in which one-way video testimony procedures were used in a prosecution for alleged child abuse).

⁷³ *Id.* See, also, *United States v. Bell*, 464 F.2d 667 (2nd Cir. 1972) (holding that exclusion of the public and the defendant from proceedings in which testimony regarding a “hijacker profile” was presented was consistent with the Confrontation Clause).

⁷⁴ Arguably, if the defendant is already aware of the information, the need to prevent disclosure to him is lessened.

⁷⁵ See Brian Z. Tamanaha, *A Critical Review of The Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 290, n.64, n.65 (1986).

⁷⁶ Proposals like those in the Whistleblower Protection Enhancement Act, H.R. 1507 in the 111th Congress, that address the state secrets privilege in a more limited context are beyond the scope of this report.

⁷⁷ 50 U.S.C. §§ 1801-1808.

⁷⁸ 50 U.S.C. §§ 1822-1826.

⁷⁹ 50 U.S.C. §§ 1841-1846. Pen registers capture the numbers dialed on a telephone line; trap and trace devices identify (continued...)

FISA also provides a civil remedy for an “aggrieved person ... who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used” in violation of federal law.⁸¹ When evaluating the legality of a FISA order, the statute states that the court

shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.⁸²

The interaction between FISA and the state secrets privilege has been a central issue in some litigation regarding the Terrorist Surveillance Program instituted by the Bush Administration shortly after the terrorist attacks of September 11, 2001. In *In re National Security Agency Telecommunications Records Litigation*, plaintiffs sued federal officials for allegedly conducting unlawful electronic surveillance of the plaintiffs.⁸³ The plaintiffs sought discovery of records of the alleged electronic surveillance, portions of which had already been inadvertently disclosed to the plaintiffs by the government.⁸⁴ The government attempted to prevent disclosure of these records by asserting the state secrets privilege and the Ninth Circuit, reviewing an interlocutory appeal, held that the records were initially protected by the state secrets privilege.⁸⁵ However the Ninth Circuit remanded the case to the district court to address whether FISA superseded the state secrets privilege.⁸⁶

On remand, the Federal District Court for the Northern District of California held that the FISA procedures, which the court read as requiring judicial examination of the actual underlying information, superseded the judicially created state secrets privilege as it is described in *Reynolds*,⁸⁷ but only if the plaintiffs could demonstrate that they had standing as “aggrieved persons” under FISA.⁸⁸ In January of 2009, the court found that the plaintiffs had successfully met this burden using information that was not protected by the state secrets privilege.⁸⁹

(...continued)

the originating number of a call on a particular phone line. *See* 18 U.S.C. § 3127(3)-(4).

⁸⁰ 50 U.S.C. §§ 1861-1862.

⁸¹ 50 U.S.C. § 1810.

⁸² 50 U.S.C. § 1806(f).

⁸³ *In re NSA Telecomms Records Litig.*, 564 F. Supp. 2d 1109, 1112 (N.D. Cal. 2008).

⁸⁴ *Id.* at 1111.

⁸⁵ *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d at 1204-1205.

⁸⁶ *Id.* at 1206.

⁸⁷ *See, In re NSA Telecomms Records Litig.*, 564 F. Supp. 2d at 1119.

⁸⁸ *Id.* at 1137. *See also* 50 U.S.C. § 1801(k) (defining “aggrieved persons” under FISA).

⁸⁹ *In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1086 (N.D. Cal. 2009).

The State Secrets Protection Act

H.R. 984 and S. 417, both entitled the State Secrets Protection Act, were introduced in the 111th Congress to codify the procedures and standards to be used in civil cases to evaluate a claim of the state secrets privilege by the government. Neither bill would address the operation of the state secrets privilege or CIPA in the context of criminal litigation. This section provides a general overview of the major changes proposed in each bill; a description of the individual provisions of each bill may be found in **Appendix B** and **Appendix C**, respectively.

Both bills would authorize the use of security measures provided under CIPA and provide all parties with a right of interlocutory appeal on any issue relating to the state secrets privilege. H.R. 984 would also impose a duty upon the Attorney General to report on cases in which the government had asserted the state secrets privilege to the congressional Intelligence Committees and the chairs and ranking members of the House and Senate Judiciary Committees. S. 417 would impose a similar duty, but would require reporting to the full membership of both committees and would also permit members of the respective committees to request access to the privileged information.

It would not be overstatement to say that both bills would impose more stringent judicial oversight of assertions of the state secrets privilege. Both bills would codify the common law requirement that the head of an agency formally assert the privilege after actual consideration by that officer, but would additionally require that official to provide an affidavit explaining the factual basis of the claim. The government would also be required to provide a public and unclassified version of this affidavit.

Both bills would also require a showing of “significant harm” before the privilege may apply.⁹⁰ In contrast, courts applying *Reynolds* have generally not required that the harm to national security be “significant” in magnitude.⁹¹ Therefore, it is possible that both bills would require a higher threshold of harm to be demonstrated before the protection of the privilege could apply. It is also possible that some classified information would not be protected under either bill.⁹²

In a significant departure from the common law doctrine, both bills would require courts to examine the actual information for which the privilege is asserted to evaluate whether the claim

⁹⁰ H.R. 984 limits the privilege to situations in which “public disclosure of the information ... would be reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States.” Similarly, S. 417 defines a state secret as “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.”

⁹¹ See *Reynolds*, 345 U.S. at 8 (requiring a risk of “injurious disclosure”); *Ellsberg v. Mitchell*, 709 F.2d 51, 59 (D.C. Cir. 1983) (upholding the privilege where “disclosure of the material would damage national security”); *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (upholding state secrets where disclosure of the secret “would impair national security”); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (upholding privilege where disclosure “would undermine the government’s intelligence capabilities and compromise national security”); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (upholding privilege because “release of such information would reasonably endanger national security interests”).

⁹² Pursuant to executive order, classified information falls into three levels: top secret, secret, and confidential. Confidential information, the lowest level, includes information that “could be expected to cause damage to the national security” if disclosed. Information may be classified as secret if there is a danger of “serious damage to the national security” of the United States. Information is top secret if exceptionally grave danger could occur. Exec. Order No. 12958, § 1.2(a) (as amended by Exec. Order No. 13292 (2003)).

of privilege is valid. This is in contrast to the procedures described under *Reynolds*, which do not automatically require courts to examine the underlying information in every case.

Both bills would also authorize the court to order the government to provide alternative non-privileged substitutes for information that is found to be protected by the privilege in order to provide a private litigant with substantially the same opportunity to litigate the underlying issue of law or fact. A refusal by the government to provide a substitute could result in court imposed sanctions against the government.

Both bills appear intended to provide an alternative to the common law privileges described in both *Reynolds* and *Totten*. Although it has been argued that “any effort by Congress to regulate an exercise of the Executive’s authority to protect national security through the state secrets privilege would plainly raise serious constitutional concerns,”⁹³ at least one federal district court has recognized Congress’s authority to enact legislation superseding the state secrets privilege.⁹⁴

S. 417, if enacted, would apply to all pending and future cases. H.R. 984 would similarly apply prospectively and would also have limited retroactive effect. Specifically, it would authorize federal courts to entertain timely motions to vacate final judgments that were based on the common law state secrets privilege and were entered after January 1, 2002, and involved claims against the federal government, or a government official in his official capacity.

This retroactivity provision may raise constitutional concerns. In *Plaut v. Spendthrift Farm*, the Supreme Court invalidated a legislative enactment that required federal courts to reopen final decisions as a violation of the separation of powers principle.⁹⁵ It might be argued that the retroactivity provision in H.R. 984 also reopens final judgments in violation of the separation of powers principle. While a full analysis of this issue is beyond the scope of this report, it should be noted that the retroactivity provision of H.R. 984 may be distinguishable from the facts in *Plaut* for at least two reasons. First, unlike the statute in *Plaut*, H.R. 984 would not appear to compel courts to reopen such cases.⁹⁶ Secondly, the Court found it important that *Plaut* reopened claims against private parties, while the retroactivity provisions in H.R. 984 would only be applicable to claims brought against the federal government.⁹⁷

⁹³ Memorandum of Points and Authorities in Support of Defendants’ Second Motion to Dismiss, *Al-Haramain Islamic Foundation v. Bush*, No. M:06-CV-1791 at 14 (Mar. 14, 2008) (arguing that the in camera procedures of FISA should not be read to supersede the state secrets privilege). See also *Reynolds*, 345 U.S. at n.9 (suggesting that the state secrets privilege is “an inherent executive power which is protected in the constitutional system of separation of power”).

⁹⁴ *In re NSA Telecomms Records Litig.*, 564 F. Supp. 2d at 1119-20 (holding that FISA contains a clear expression of Congress’s intent to abrogate the state secrets privilege).

⁹⁵ *Plaut v. Spendthrift Farm*, 514 U.S. 211, 240 (1995) (invalidating statute that reopened final judgments in private civil actions under § 10(b) of the Securities Exchange Act of 1934).

⁹⁶ H.R. 984, § 11 (“A court also *may* relieve a party ... from a final judgment, order, or proceeding”) (emphasis added).

⁹⁷ See *Id.* at 230-1 (quoting *U.S. v. Sioux Nation*, 448 U.S. 371, 407) (“Congress’ mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim *against the United States* does not violate the doctrine of separation of powers”) (emphasis added).

Appendix A. Section-by-Section Summary of the Classified Information Procedures Act, 18 U.S.C. App. 3

Sec. 1. Provides definitions for both “classified information” and “national security” to be used in this act. Classified information means any information determined by the government pursuant to executive order, statute, or regulation to require protection for reasons of national security, and all data concerning (1) the design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. National security means the national defense and foreign relations of the United States.

Sec. 2. Permits any party to request a pretrial conference to establish a schedule for discovery requests; the provision of notice if the defendant intends to disclose classified information; a hearing to determine the relevance, admissibility, and materiality of classified information; or any other matter which relates to classified information. No admission made by the defendant or his counsel at this pretrial conference may be used against the defendant unless it is made in writing and signed by the defendant and his counsel.

Sec. 3. Authorizes the court to issue protective orders prohibiting the further disclosure of any classified information disclosed to the defendant during the course of any federal criminal litigation.

Sec. 4. Authorizes the court to permit the government to redact classified information from discovery provided to the defendant. Alternatively the court may permit the government to summarize the classified information, or to admit relevant facts in lieu of providing discovery. The court may permit such procedures if the government submits a written statement explaining why the defendant is not entitled to the redacted information. The statement may be viewed by the court *ex parte* and *in camera*. If the government’s request is granted, the written statement shall be preserved in the record, under seal, for appellate review.

Sec. 5. Imposes a continuing obligation on criminal defendants to notify, in writing and in a timely fashion, both the U.S. attorney and the court of their intent to disclose or cause the disclosure of classified information, along with a brief description of that information. The defendant may not disclose classified information during litigation until notice has been provided, a hearing under this act has been held, and any interlocutory appeal has been heard.

Sec. 6. The government may request a hearing to determine the use, relevance, or admissibility of any classified information to be used at trial. This hearing may be conducted *in camera* if the Attorney General certifies that a public proceeding might result in disclosure of classified information. Before the hearing, the government may be required to give the defendant notice of what classified information is at issue and its relevancy to the charges against the defendant. If the court authorizes the disclosure of classified information, the government may request that a substitute for the information be used instead. After a hearing on the substitute, the court shall permit the substitute if it would give the defendant substantially the same ability to make his defense. This hearing may be held *in camera* at the request of the Attorney General, who may also submit an *ex parte* affidavit explaining the government’s position. Disclosure of classified information may be prohibited if the Attorney General files an affidavit with the court objecting to disclosure. If the Attorney General files such an objection, the court may dismiss the

indictment, find against the government on any pertinent issue, strike testimony, or take any other action as may be appropriate in the interests of justice.

Sec. 7. The government may take an interlocutory appeal from any order authorizing the disclosure of classified information, imposing sanctions for nondisclosure by the government, or refusing a protective order sought by the government. Appeals shall be expedited.

Sec. 8. Any material containing classified information may be admitted without changing the classification status of the information. The court may limit which parts of any material are admitted in order to prevent unnecessary disclosure of classified information, unless such limitations would be unfair. The government may object during any examination of a witness if classified information that has not yet been found admissible is likely to be elicited. The court will take whatever action is necessary to determine whether the response is admissible.

Sec. 9. Directs the Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, to establish procedures to protect classified information in the custody of federal courts.

Sec. 9A. Directs Department of Justice officials to provide briefings to senior officials of any other agency with respect to cases involving classified information that originated in that agency.

Sec. 10. In prosecutions where the government must prove that some material relates to the national security of the United States, such as prosecutions for espionage, the prosecution is required to notify the defendant of the portions of the material it will rely upon.

Sec. 11. Permits §§ 1-10 of this act to be amended pursuant to 28 U.S.C. § 2076. That provision described procedures to amend the Federal Rules of Evidence, but has since been repealed. Similar procedures for amending the Federal Rules of Evidence may now be found at 28 U.S.C. § 2072. It is not clear what effect the repeal of 28 U.S.C. § 2076 has had on this provision of CIPA.

Sec. 12. Directs the Attorney General to issue guidelines specifying the factors that should be used by the Department of Justice in determining whether to prosecute cases in which there is a risk of disclosing classified information. When a decision not to prosecute is made pursuant to these guidelines, an official of the Department of Justice shall prepare written findings regarding the intelligence information that would be endangered, the purpose for which it might be disclosed, the likelihood that it would be disclosed, and the potential consequences of such disclosure on the national security of the United States.

Sec. 13. Requires the Attorney General to report to Congress, on a semiannual basis, about all cases which were not prosecuted pursuant to the guidelines issued by the Attorney General under this act. The report shall be given to both the House and Senate Intelligence Committees and to the chair and ranking member of the respective Judiciary Committees. The Attorney General is also directed to report on the operation and effectiveness of the act and on any suggested amendments as necessary.

Sec. 14. Authorizes the Attorney General to delegate authority under this act to the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General.

Sec. 15. Provides that this act became effective immediately upon enactment.

Sec. 16. Provides the short title for this act, the “Classified Information Procedures Act.”

Appendix B. Section-by-Section Summary of H.R. 984

Sec. 1. This act would be referred to as the State Secret Protection Act of 2009.

Sec. 2. The government would have a statutorily recognized privilege against providing information in civil litigation if public disclosure of that information would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.

Sec. 3. Courts would be directed to take steps to protect sensitive information. Courts would be authorized to use security mechanisms to protect against inadvertent disclosure, including those procedures developed under CIPA. All hearings and proceedings could be conducted *in camera*, as necessary, and participation of counsel would not be restricted unless the court determined it was necessary. Such restrictions can not be more restrictive than necessary and the court would provide a written explanation of its decision to all parties. During the court's evaluation of the privilege, the court could order the government to provide a substitute of the underlying information, if feasible, in order to provide counsel with a substantially equivalent opportunity to challenge the claim.

Sec. 4. The head of the agency with control over the evidence would be required to formally assert the state secrets privilege. Additionally, the government would be required to provide classified and unclassified affidavits explaining the factual basis of the claim.

Sec. 5. Additional preliminary procedures could be used in cases involving the state secrets privilege. These procedures would permit the court to issue protective orders upon government request, to appoint a special master or expert witness, to order the government to provide a manageable index of the underlying information, to hold prehearing conferences to address administrative matters, and to order counsel to obtain security clearances.

Sec. 6. Courts would be required to actually examine the underlying information about which the privilege was asserted in addition to any other information necessary to evaluate whether the claim of privilege was valid. Where the amount of information is so great that it cannot be reviewed in a timely fashion, the court may base its determination on a sampling of the information. The court would be directed to weigh testimony from government experts in the same manner as it does other expert testimony.

Sec. 7. Where the information is found to be protected by the privilege, the court would be authorized to order the government to provide a non-privileged substitute, if feasible. Refusals to provide a substitute could result in sanctions against the government in civil actions brought against the government. A valid privilege would not result in dismissal or summary judgment until all parties have had an opportunity to complete non-privileged discovery. Where privileged information, that cannot be replaced with a non-privileged substitute, is central to a question of fact or law, the court would be authorized to take appropriate action including striking testimony, finding in favor of a party, or dismissing the claim.

Sec. 8. Interlocutory appeals could be taken by any party, and would be heard in an expedited fashion. Trials shall be adjourned during the pendency of an interlocutory appeal and the appellate court may dispense with written briefs or a written opinion.

Sec. 9. The Attorney General would be required to report, within 30 days, on any case in which the government invokes the state secrets privilege. This report would be given to the congressional Intelligence Committees and the chair and ranking member of the Judiciary Committees. The Attorney General would also be required to report on the operation and effectiveness of this act, and suggest amendments. This report would be issued annually for three years, and then only as necessary.

Sec. 10. The privilege in this act would be identified as the only privilege that may be asserted in civil cases based on state secrets. The procedures of the act would apply to any invocation of the state secrets privilege.

Sec. 11. This act would apply to claims pending on or after the date of enactment. It would also purport to authorize courts to vacate final judgments that were based on the state secrets privilege, if a motion for relief from a final judgment is filed within one year of the date of enactment, the final judgment was entered after January 1, 2002, and the claim was made against the government or arose out of conduct by persons acting in the capacity of a government officer, employee, or agent.

Appendix C. Section-by-Section Summary of S. 417

Sec. 1. This act would be referred to as the State Secrets Protection Act of 2009.

Sec. 2. Title 28 of the U.S. Code would be amended to provide a new Chapter 181 with the following new sections:

- *Sec. 4051.* Evidence, as used in this chapter, would include anything admissible under the Federal Rules of Evidence or discoverable under the Federal Rules of Civil Procedure. A state secret would be defined as any information, the public disclosure of which, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.
- *Sec. 4052.* Federal courts would be authorized to determine which documents should be submitted *ex parte* and whether substitutions or redactions should be provided, after weighing the interests of justice and national security. Hearings would be conducted *in camera* unless they relate solely to a question of law. Hearings could be held *ex parte* if protective orders and security clearances are insufficient to protect the interests of justice and national security. Courts could limit attendance in hearings to individuals with security clearances and could appropriate a *guardian ad litem* with a security clearance to represent any party. The court could stay proceedings while security clearances are being obtained. The court could review *in camera* and *ex parte* the government's reasons for denying or delaying the issuance of a security clearance. Orders and opinions could be issued under seal. The court could also appoint a special master with the necessary security clearance to assist the court.
- *Sec. 4053.* The government would be permitted to intervene in any civil action to protect against disclosure of information that may be subject to the state secrets privilege. A civil action could not be dismissed based solely upon a claim of state secrets until after all hearings required by this act have taken place. The government may assert the privilege in response to any allegation in a complaint or counterclaim, regardless of whether the action is against the government or a private party. The government would be required to formally assert the privilege through the submission of an affidavit by the head of the agency with responsibility for, and control over, the information. The affidavit would explain the factual basis for the claim of privilege. This duty would not be delegable by the head of an agency
- *Sec. 4054.* The government could assert the privilege at any time during a civil action to prevent the disclosure of information contained in court filings or evidence. A formal assertion of the privilege would be required, made by an affidavit issued by the appropriate agency head. The government would be required to make an unclassified version of the affidavit public. A court would be required to conduct a hearing to examine the underlying information and any affidavits submitted in support of the privilege in order to determine the validity of the claim of privilege. The government would be required to provide the court with all information to which the privilege is claimed to apply before the hearing. The court could base its conclusion on a sampling of the information where the volume of information is too large to be reviewed in a timely fashion. The government would be required to provide the court with an index of all the

information it claims is subject to the privilege. A piece of information would be privileged if it contains a state secret or cannot be effectively segregated from other evidence that contains a state secret. Privileged evidence would not be admitted or disclosed. Non-privileged evidence would be subject to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The court would be required to give substantial weight to assertions by the government as to why a public disclosure would be harmful to national security. Testimony by government experts would be treated the same as testimony by other experts. The court could order the government to provide a non-privileged substitute in lieu of evidence found to be privileged, if it would give a party a substantially equivalent opportunity to litigate the issue. In suits against the government or an officer or agent of the government, the court would be required to find against the government on any issue where the government was ordered, but refused, to provide a non-privileged substitute.

- *Sec. 4055.* A federal court could dismiss an action as a result of the state secrets privilege, only if a non-privileged substitute is not possible, dismissal of the claim or counterclaim would not harm national security, and continuing the litigation without the privileged information would substantially impair a valid defense to the action.
- *Sec. 4056.* Interlocutory appeals could be taken by any party, and would be heard in an expedited fashion. Trials shall be adjourned during the pendency of an interlocutory appeal and the appellate court may dispense with written briefs or a written opinion.
- *Sec. 4057.* The security procedures created under CIPA would be used to protect against unauthorized disclosure of evidence determined to be privileged. The Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, may amend the rules to implement this chapter. Any amendments would be submitted to the Intelligence and Judiciary Committees of the House of Representatives and the Senate. Such amendments would become effective 90 days after submission to Congress, unless Congress provides otherwise.
- *Sec. 4058.* The Attorney General would be required to report, within 30 days, on any case in which the government invokes the state secrets privilege. This report would be given to the Intelligence and Judiciary Committees. The Attorney General would be required to produce evidence for which the privilege was asserted upon request by a member of the Intelligence or Judiciary Committees. The Attorney General would also be required to report on the operation and effectiveness of this act, and suggest amendments. These report would be issued annually for three years, and then only as necessary.
- *Sec. 4059.* No other limit on the state secrets privilege under any other provision of law would be superseded by this act. No court would be prohibited from dismissing a claim or counterclaim on grounds unrelated to the state secrets privilege.

Sec. 3. Any provision of this act that is found to be invalid would be severable from the other provisions of this act.

Sec. 4. This act would apply to cases pending on or after the date of enactment.

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