CODIFY TO CLARIFY: THE NEED FOR FEDERAL LEGISLATION ON THE STATE SECRETS PRIVILEGE

ABSTRACT

This Note details the State Secrets Privilege, a federal common law evidentiary doctrine that allows the federal government to withhold national security material from evidence in civil lawsuits. While the privilege traces its roots to the early days of the United States, the doctrine has evolved significantly over time. Most recently, the State Secrets Privilege has seen expansive use in the post-9/11 world where the government frequently invokes the privilege to dismiss entire lawsuits. This led to two United States Supreme Court holdings in March 2022 which entrenched the power of the State Secrets Privilege in American jurisprudence.

Yet, throughout the past 70 years, criticisms of the State Secrets Privilege have grown louder as many suggest that a lack of oversight leaves the privilege ripe for abuse. While legislators have tried, and failed, to codify the State Secrets Privilege in the past, the time for Congress to enact federal legislation on the State Secret Privilege is now. This Note walks through the historical evolution of the State Secrets Privilege and explains how Congress can act to increase oversight and prevent abuses of the privilege while maintaining the necessary national security protections required to successfully defend the United States.

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I. INTRODUCTION

The United States has a trust problem. Merely 2 percent of Americans trust the federal government to always do what is right, and only 19 percent trust the

federal government to do what is right most of the time.[1] This trend of distrust marks near record lows since at least 1958.[2] Accordingly, the federal government must take action to restore the public's faith. While this requires a comprehensive approach, there are actions that can be taken on national security matters that will strengthen the defense of the nation while fostering an environment where public trust can flourish.

Many are quick to attack the secrecy of the federal government on national security.[3] This secrecy often lends credibility to fanatical conspiracy theorists who cannot be refuted because the information is classified.[4] Yet, despite claims that the government acts inappropriately on matters of national security, Americans do not dispute the significant role the government should play in this realm. In short, 90 percent of Americans believe the federal government should play a large role in combatting terrorism and 75 percent believe it should play a major role in protecting U.S. interests around the world.[5] However, only 10 percent of individuals cite national security and foreign policy as an area where the federal government excels.[6] This juxtaposition shows Americans understand the importance of national security, but few believe the government fulfills its duty in carrying out national security objectives. This can be addressed through reformation of the State Secrets Privilege (SSP).

1. *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role: 1. Public Trust in Government*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-2/ [https://perma.cc/E6BX-4R6S].

2. *Id.*

3. *Transparency & Oversight*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/protect-liberty-security/transparency-oversight#:~:text=National%20security%20might%20sometimes%20require,itself%20should%20never%20be%20secret [https://perma.cc/2LSA-BBQS] ("Federal officials and outside experts agree, however, that far too much [national security] information is classified and withheld from the public.").

4. *See* Kathryn Olmsted & Simon Willmetts, *State Secrecy Explains the Origins of the 'Deep State' Conspiracy Theory* (Feb. 6, 2024), https://www.scientificamerican.com/article/state-secrecy-explains-the-origins-of-the-deep-state-conspiracy-theory/ [https://perma.cc/6P2N-WLMU].

5. *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role: 3. Federal Government: Performance and Role*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/federal-government-performance-and-role/ [https://perma.cc/2GCE-R4BA].

6. *Id.*

II. EVOLUTION OF THE COMMON LAW STATE SECRETS PRIVILEGE

A. *Establishing Precedent*

The SSP is a common law federal evidentiary doctrine used by the federal government to prevent disclosure of national security information in civil suits.[7] While not formally recognized until the 1950s, the SSP's roots stem from the Founding Era in *United States v. Burr*.[8] Here, Aaron Burr attempted to subpoena duces tecum presidential letters belonging to President Thomas Jefferson.[9] In response, the President asserted he could withhold the documents because they contained state secrets that could endanger national safety.[10] Ultimately, the court ordered production of the letters and wrote that if there was material within that would endanger the public, a suppression determination could only be made upon return of the subpoena, but not prior.[11]

Since the SSP's origin in *Burr*, two different uses have developed. First, there is a broad SSP used when the lawsuit strikes at the heart of an issue where the subject matter is a state secret.[12] In these instances, rather than requiring the government to disclose the state secret, the entire lawsuit may be dismissed.[13] This was seen in *Totten v. United States* where a Union spy during the Civil War claimed he had not been properly compensated for his work.[14] The Supreme Court affirmed dismissal of the case by stating:

> Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with

7. United States v. Zubaydah, 595 U.S. 195, 204–05 (2022).
8. 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692D).
9. *Id.* at 32.
10. *Id.* at 37.
11. *Id.*
12. *See, e.g.*, Totten v. United States, 92 U.S. 105, 106 (1875).
13. *Id.* at 106–07.
14. *Id.* at 105–06.

> individuals and officers, might be exposed, to the serious detriment of the public.[15]

The Court also added "public policy forbids the maintenance of any suit . . . which would inevitably lead to the disclosure of matters which the law itself regards as confidential," thus holding that if state secrets are the very subject matter at issue, courts lack jurisdiction to hear the case.[16]

Additionally, the SSP has a narrow evidentiary purpose that does not require dismissal.[17] In *United States v. Reynolds*, the Supreme Court held specific pieces of evidence may be withheld from discovery if national security or military secrets are at stake.[18] This case established the long-standing procedures behind the SSP that are used today.[19] First, a formal SSP claim must be made by the head of a department who has control on the matter after their own personal consideration.[20] Then, courts must evaluate the claim of privilege without ever forcing disclosure of the evidence the privilege was designed to protect.[21] In essence, the Court analogized the SSP to a criminal defendant invoking their privilege against self-incrimination, but opined that "abandonment of judicial control would lead to intolerable abuses."[22] This led the Court to emphasize the SSP belongs solely to the government, and it cannot be waived by private parties.[23]

Further, the Court held that when military secrets are at stake, "even the most compelling necessity cannot overcome the claim of privilege."[24] Because military secrets were at stake in *Reynolds*, the Supreme Court was satisfied that a balance could be struck where the respondents could viably assert their case without the government disclosing the materials it claimed which included military secrets.[25] Thus, the suit continued without the privileged evidence.[26]

15. *Id.* at 106–07.
16. *Id.* at 107.
17. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 7–8 (1953).
18. *Id.* at 11.
19. *Id.* at 7–8; *see also* United States v. Zubaydah, 595 U.S. 195, 205 (2022) (plurality opinion) (citing *Reynolds*, 345 U.S. at 7–8) (following the formal requirements outlined in *Reynolds*).
20. *Reynolds*, 345 U.S. at 7–8.
21. *Id.* at 8.
22. *Id.*
23. *Id.* at 7.
24. *Id.* at 11.
25. *Id.* at 11–12.
26. *Id.* at 12.

While *Reynolds* is the first case where the Supreme Court directly addressed the SSP at length, the majority opinion has not come without scrutiny.[27] In the 70 years since, the Supreme Court has been criticized on grounds that *Reynolds* was far too deferential to the Executive Branch, spurred a lack of uniformity in judicial review, and was ripe for abuse without any in camera review.[28] This was exacerbated when the evidence at the heart of *Reynolds* was later declassified, and there were no state secrets; however, there was embarrassing information regarding the military's negligence.[29]

Nonetheless, the seminal cases of *Burr*, *Totten*, and *Reynolds* show the SSP was sporadically invoked over the course of 150 years, but its evolution laid the bedrock for the modern SSP, which is used much more frequently.[30] And as the doctrine evolved, a more detailed SSP has emerged. As seen in post-9/11 cases, there is a three-part analysis to evaluate the government's SSP claim. First, the court will ascertain whether the *Reynolds* procedural requirements of invoking the SSP are met.[31] Second, the court evaluates whether the information sought to be protected qualifies for the SSP.[32] Here, courts use the reasonable danger standard articulated in *Reynolds*, finding it may be possible to satisfy the court, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence [in question] will expose military matters which, in the interest of national security, should not be divulged."[33] Third, if the evidence does require SSP protection, the court must determine how, if possible, to proceed.[34] *Reynolds*' clear statement, that information is absolutely protected under the SSP regardless of the plaintiff's necessity, provides an unyielding standard that does not bend for

27. *See id.* at 6–12.

28. *See* S. REP. NO. 110-442, at 2, 24, 39 (2008) (discussing various criticisms of the *Reynolds* framework); *see also* Louis Fisher, *The State Secrets Privilege: From Bush II to Obama*, 46 PRESIDENTIAL STUD. Q. 173, 178 (2016).

29. *See* Herring v. United States, 424 F.3d 384, 388 (3d Cir. 2005); *see also Reform of the State Secrets Privilege: Before the H. Subcomm. on Const., Civil Rts., and C.L. of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) (Testimony of Judith Loether, Daughter of Victim in *United States v. Reynolds*) [hereinafter State Secrets Reform Hearing].

30. *See* JENNIFER K. ELSEA & EDWARD C. LIU, CONG. RSCH. SERV., R47081, THE STATE SECRETS PRIVILEGE: NATIONAL SECURITY INFORMATION IN CIVIL LITIGATION 1, 18 (2022) ("The United States has invoked the state secrets privilege in a wide array of cases . . . ."); *Reynolds*, 595 U.S. 195; United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D); Totten v. United States, 92 U.S. 105 (1875).

31. El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

32. *Id.*

33. *Id.* at 305 (citing *Reynolds*, 345 U.S. at 10).

34. *Id.* at 304.

an in camera or private review by a judge.[35] This can present serious issues for the nongovernment party.

The doctrine underlying the SSP has come under increased scrutiny in recent years. While President George W. Bush's administration frequently invoked the SSP,[36] more recent attorneys general noted the detriment to public confidence when it is invoked without a clear need to protect national security.[37] This can be seen in then-Attorney General Eric Holder's 2009 memorandum to all executive department heads calling for greater accountability when invoking the SSP.[38] Notably, this memorandum called for narrow tailoring such that the SSP shall only be used when "assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations."[39] Further, Attorney General Holder established a State Secrets Review Committee comprised of senior Department of Justice (DOJ) officials tasked with evaluating potential SSP claims before making a recommendation on whether it can be invoked.[40] Although, the Attorney General would ultimately conduct a final review before granting approval.[41]

Following two 2022 Supreme Court cases on the SSP, Attorney General Merrick Garland issued a similar memorandum building off of Attorney General Holder's.[42] The standards imposed by Attorney General Garland required the department or agency head to submit their request for invocation of the SSP to the assistant attorney general responsible for their division.[43] This must be accompanied by a declaration of the department or agency head's personal

35. *Id.* at 306 (citing *Reynolds*, 345 U.S. at 10).

36. Fisher, *supra* note 28, at 173.

37. *Compare* Memorandum from Eric Holder, Att'y Gen. of the United States, to Heads of Executive Departments and Agencies (Sept. 23, 2009) [hereinafter Holder Memo], https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf [https://perma.cc/H68Z-RTCP], *with* Memorandum from Merrick Garland, Att'y Gen. of the United States, to Heads of Executive Departments and Agencies (Sept. 30, 2022) [hereinafter Garland Memo], https://www.justice.gov/d9/pages/attachments/2022/09/30/supplement_to_policies_and_procedures_governing_invocation_of_the_state_secrets_privilege.pdf [https://perma.cc/XXF5-WSXD].

38. Holder Memo, *supra* note 37, at 1.

39. *Id.*

40. *Id.* at 2–3.

41. *Id.*

42. *See* Garland Memo, *supra* note 37, at 1; United States v. Zubaydah, 595 U.S. 195 (2022) (plurality opinion); FBI v. Fazaga, 595 U.S. 344 (2022).

43. Garland Memo, *supra* note 37, at 1.

consideration of the matter.[44] If the declaration fails to sufficiently show the individual's personal knowledge, it must be supplemented by a detailed declaration from the personal knowledge of a subject-matter expert within that department or agency.[45] Then, if the Attorney General approves, the department or agency who invokes the SSP must provide updates at "appropriate intervals" to show the SSP is still necessary to prevent unauthorized disclosure of information that could reasonably be expected to cause significant harm to national security.[46]

B. *Codification Efforts*

This evolution highlights the crossroads at which the SSP sits. There is no doubt the SSP has a vital function in defending national security.[47] There are matters that clearly do not belong in the public sphere due to the danger they pose.[48] Nonetheless, with public trust in the government near record lows,[49] even executive officials see there is a greater need to ensure accountability in SSP usage.[50] Thus, it is no surprise the SSP has drawn the ire of Congress.[51]

After a rise in National Security Agency (NSA) and Central Intelligence Agency (CIA) litigation, which led to increased SSP invocation post-9/11, Senators Edward Kennedy, Arlen Spector, and Patrick Leahy introduced the bipartisan State Secrets Protection Act (SSPA) in 2008.[52] This legislation would

44. *Id.*

45. *Id.* at 1–2.

46. *Id.* at 2.

47. *See Zubaydah*, 595 U.S. at 199 ("That privilege allows the Government to bar the disclosure of information that, were it revealed, would harm national security.").

48. *See* Holder Memo, *supra* note 37, at 1 ("[A]ssertion of the privilege is necessary to protect information[,] unauthorized disclosure of which reasonably could be expected to cause significant harm to [natural security] . . . .").

49. *See Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role: 1. Public Trust in Government*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-2/ [https://perma.cc/E6BX-4R6S].

50. *See, e.g.*, Holder Memo, *supra* note 37; Garland Memo, *supra* note 37.

51. *See* Press Release, ACLU, Both Houses of Congress Urge State Secrets Reform (Feb. 11, 2009, 12:00 AM), https://www.aclu.org/press-releases/both-houses-congress-urge-state-secrets-reform [https://perma.cc/YQ3B-AWZH]; Press Release, Rep. Jerry Nadler, Reps. Nadler, Petri, and Conyers Reintroduce the Bipartisan State Secrets Protection Act (Oct. 23, 2013) [hereinafter Nadler Release], https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391132 [https://perma.cc/CL5R-9STK].

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

have codified a new three-step procedure on SSP matters.[53] First, courts would have been required to conduct ex parte hearings to determine which filings contain state secrets.[54] Second, courts could then order redacted, unclassified, or summary substitutes of the document containing the state secret.[55] Third, the court would make a decision by taking into consideration national security interests and justice.[56] However, this was all part of a comprehensive scheme that would have required hearings under the SSPA to be conducted in camera if it presents a risk of revealing state secrets; allowed judges to conduct hearings ex parte if national security could not be adequately protected by other means;[57] limited participation in these hearings to individuals with appropriate security clearances; prescribed procedures for determining whether evidence is protected as a state secret; prevented SSP use to dismiss cases; and required the court to give substantial weight to a government assertion on why public disclosure would be *reasonably likely* to cause significant harm.[58] The legislation's dual purpose was to absolutely protect all state secrets through secure judicial proceedings, while denying the executive branch the ability to use the SSP as a shield for activity not containing a state secret.[59] Ultimately, the bill passed the Senate Committee on the Judiciary; however, it was opposed by committee members for unsettling the "well-settled doctrine" of the SSP that already balanced the right of the people to know how their government works with the strong need for secrecy in defending national security.[60] Ultimately, the SSPA was never called to the floor for a vote.[61]

Perhaps part of the reason the SSPA failed in 2008 can be attributed to the Bush administration's stout opposition.[62] Unlike his successors, Attorney General Michael B. Mukasey informed Senator Leahy that President Bush would veto the

53. *See id.* § 4052(a).
54. *See id.* § 4052(a)(1).
55. *See id.* § 4052(a)(2).
56. *Id.* § 4052(a)(3).
57. *See id.* § 4052(b)(2).
58. *Id.* §§ 4052–4054.
59. *Id.*
60. S. Rep. No. 110-442, at 37 (2008).
61. *S. 2533 – States Secrets Protection Act*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/senate-bill/2533/all-actions?s=1&r=1&q=%7B%22search%22%3A%22state+secrets+protection+act%22%7D [https://perma.cc/AV8E-RQTZ] (showing the last action on S.2533 was its placement on the Senate Legislative Calendar on Aug. 1, 2008).
62. *See* Letter from Michael B. Mukasey, Att'y Gen. of the United States, to Sen. Patrick Leahy (Mar. 31, 2008) (on file with Author).

SSPA if presented to him.[63] He suggested the SSPA would "needlessly and improperly interfere" with the constitutional role of the judicial and executive branches.[64] Attorney General Mukasey also questioned Congress' ability to alter the SSP, claiming it is rooted in the Constitution where it relates to the effective discharge of presidential powers.[65]

Despite the fact the SSPA of 2008 was defeated, it sparked debate as to what role Congress could play in enacting SSP reform. One school of thought shared Attorney General Mukasey's belief that the SSP fell within the powers of the Executive as Commander-in-Chief and as representative of the nation in foreign affairs to protect national security as defined in the Constitution.[66] If true, Congress' ability to reform the SSP would be severely limited.[67] In contrast, proponents of SSP reform assert it is merely a common law doctrine.[68] This suggests Congress has ample constitutional authority to enact legislative reform.[69] While there is likely overlap between the SSP's common law and constitutional foundation, it is more accepted that Congress, at least, has the power to codify the procedure behind the SSP.[70]

Undeterred by their previous failure and with optimism, President Obama would be less opposed to reform, Senators Leahy, Kennedy, Specter, Feingold, and

63. *Id.* at 1.

64. *Id.*

65. *Id.* at 2; *see also* United States v. Nixon, 418 U.S. 683, 711 (1974).

66. *See* State Secrets Reform Hearing, *supra* note 29, at 28–31 (statement of Hon. Patricia M. Wald).

67. *See* Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 442, 448 (2008) ("Others take the view that the privilege is not mere common law creation . . . with the consequence that Congress either cannot modify the privilege or at least is significantly constrained in doing so.").

68. *See id.* ("Those who favor reform tend to describe it as a mere evidentiary rule adopted by judges through the common law process . . . .").

69. *See id.* at 449 (citing State Secrets Reform Hearing, *supra* note 29, at 28–31).

70. *See id.* at 449–50.

Kennedy again introduced legislation mirroring the SSPA in 2009.[71] However, this legislation died upon being referred to committee.[72]

After two consecutive bipartisan coalitions failed to pass the SSPA in 2008 and 2009, political action on the issue was not renewed until 2013 when Representative Jerrod Nadler introduced a bill that would have only allowed for SSP use if the government could show public disclosure would be reasonably likely to cause significant harm to the national defense or diplomatic relations.[73] Representative Nadler stated his bill was a response to the "troubling trend" of SSP usage in the face of the public's growing distrust in government.[74] But, this bill died upon being referred to subcommittee and a subsequent 2016 reintroduction of the bill suffered the same fate.[75]

C. *Modern (Post-9/11) Uses and Interpretations of the Common Law State Secret Privilege*

The United States was forever changed on September 11, 2001.[76] As Americans asked how this could have happened, the government expanded intelligence and terrorism prevention capabilities to ensure future attacks would be

71. State Secrets Protection Act, S. 417, 111th Cong. (2009); *see also* Press Release, ACLU, Both Houses of Congress Urge State Secrets Reform (Feb. 11, 2009, 12:00 AM), https://www.aclu.org/press-releases/both-houses-congress-urge-state-secrets-reform [https://perma.cc/YQ3B-AWZH]; Press Release, Sen. Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009), https://www.legistorm.com/stormfeed/view_rss/346849/member/62/title/leahy-specter-feingold-kennedy-introduce-state-secrets-legislation.html [https://perma.cc/6NQZ-9ZGX].

72. *S. 2533 – States Secrets Protection Act*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/senate-bill/2533/all-actions?s=1&r=1&q=%7B%22search%22%3A%22state+secrets+protection+act%22%7D [https://perma.cc/AV8E-RQTZ].

73. State Secrets Protection Act, H.R. 3332, 113th Cong. § 2 (2013).

74. Nadler Release, *supra* note 51.

75. *H.R.3332 – To Provide Safe, Fair, and Responsible Procedures and Standards for Resolving Claims of State Secret Privilege*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/3332/all-actions [https://perma.cc/4LKF-349Z]; *H.R.4767 - To Provide Safe, Fair, and Responsible Procedures and Standards for Resolving Claims of State Secret Privilege*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/4767/all-actions [https://perma.cc/CTH8-ZA23].

76. *See* Elaine Kamarck, *9/11 and the Reinvention of the US Intelligence Community*, BROOKINGS INST. (Aug. 27, 2021), https://www.brookings.edu/articles/9-11-and-the-reinvention-of-the-u-s-intelligence-community/ [https://perma.cc/UMK5-FBEN].

thwarted.[77] And with this expansion, the past 24 years have featured increased SSP usage. Specifically, the government invoked the SSP at least 49 times from 2001–2021.[78] This is significant when compared to the period from 1961–1981 where the government only invoked the SSP 16 times.[79]

1. *Recent Assertions of the State Secrets Privilege*

In accordance with the vast array of functions of the United States government, the SSP has been asserted on many topics post-9/11. This includes electronic surveillance programs;[80] government contractors defaulting on contracts;[81] CIA employment practices;[82] a foreign national, suspected terrorist who was placed on a "kill list";[83] individuals seeking to learn whether they had been placed on a terrorist watch list;[84] individuals challenging extraordinary rendition;[85] and individuals challenging their prosecution based on their alleged role in the 9/11 terrorist attacks.[86]

All of these SSP assertions exist on a spectrum where, on one end, it is clear that national security secrets would be implicated if the government was required to disclose all material facts. But on the other end of the spectrum, the SSP usage may appear more superfluous. Nevertheless, in every situation named above, the government has successfully invoked the SSP to prevent disclosure of certain facts.[87] While broad assertions of the privilege should be questioned if they are truly baseless, it is critical to understand the nuanced situations where the

77. *Id.*

78. United States v. Zubaydah, 595 U.S. 195, 251 (2022) (Gorsuch, J., dissenting) ("The government invoked the state secrets privilege only 16 times between 1961 and 1980. Yet, it has done so at least 49 times between 2001 and 2021.").

79. *Id.*

80. *See, e.g.*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006); Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 906 (9th Cir. 2011).

81. *See, e.g.*, Gen. Dynamics Corp. v. United States, 563 U.S. 478, 480 (2011).

82. *See, e.g.*, Doe v. CIA, 576 F.3d 95, 97 (2d Cir. 2009); Sterling v. Tenet, 416 F.3d 338, 346 (4th Cir. 2005).

83. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

84. *See, e.g.*, Rahman v. Chertoff, No. 05 C 3761, 2008 WL 4534407, at *5 (N.D. Ill. Apr. 16, 2008).

85. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010); El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007).

86. Declaration of William P. Barr, Att'y Gen. of the United States, at 3, *In re* Terrorist Attacks of September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. Apr. 13, 2021) (No. 6412). The document indicates it is the second such declaration with respect to these categories of information.

87. *See supra* notes 80–86.

government properly asserts the SSP. Facially, many successful assertions may not seem to square with what is traditionally understood to be a "state secret."

For example, in *General Dynamics Corp. v. United States*, contractors sued when the Navy terminated their contract to develop stealth aircraft for defaulting on the contract.[88] On its face, it is a stretch to tie national security to contract default. However, it was the underlying subject matter of the contract—stealth technology—that required protection.[89] And here, despite the SSP protection, Navy officials still accidentally revealed military secrets in depositions.[90] The Supreme Court rightfully recognized the danger this poses: "Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government's covert programs."[91]

While the *Reynolds* warning that the SSP "is not to be lightly invoked" acts as a constraint, the fact that the Supreme Court recognizes state secrets can be indirectly disclosed provides the government with expansive power in arguing for application of the SSP.[92] At the very least, this power is consistent with the *Reynolds* interpretation requiring at least some deference to the government's SSP claim;[93] however, most recently, the government argued for the "utmost deference" to national security judgments.[94] In settling this deference issue, courts are stuck with a double-edged sword: protecting national security is absolutely critical to the nation's defense;[95] however, affording too much deference without proper oversight is troublesome.

To return to the original point, post-9/11 courts have frequently accepted SSP assertions in cases where, at least facially, there may not appear to be a state secret at issue as courts have twice found the SSP could be used in employment matters.[96] First, in *Sterling v. Tenet*, a CIA operations officer alleged the CIA engaged in

88. 563 U.S. 478, 480–81 (2011).

89. *Id.* at 481–82.

90. *Id*. at 482.

91. *Id.* at 487.

92. *Compare* United States v. Reynolds, 345 U.S. 1, 7 (1953), *with Gen. Dynamics Corp.*, 563 U.S. at 487.

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

94. United States v. Zubaydah, 595 U.S. 195, 223 (2022) (Thomas, J., concurring) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).

95. *See id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 592 (2004)).

96. *See, e.g.*, Doe v. CIA, 576 F.3d 95, 108 (2d Cir. 2009); Sterling v. Tenet, 416 F.3d 338, 346 (4th Cir. 2005).

unlawful racial discrimination against him because he was denied opportunities, subjected to disparate treatment, and was retaliated against for reporting the discrimination.[97] In response, the CIA invoked the SSP and requested dismissal because litigation would threaten exposure of classified material.[98] Accordingly, the District Court for the Eastern District of Virginia conducted an ex parte, in camera review of the Government's declaration and concluded Sterling would need to "disclose the nature and location of his employment and the employment of those similarly situated" to prevail.[99] Because this information was classified, dismissal was the proper remedy as the evidence necessary for Sterling to state a prima facie claim was protected.[100] On appeal, the Fourth Circuit quoted *Reynolds* holding that, "[t]oo 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."[101] Thus, the court was once again in conflict over how much deference to afford the government. However, the court noted the SSP serves the important purpose of preventing graymail, so maintaining a strong SSP prevents the government from being placed into a position where it must settle or jeopardize national security by proceeding to trial.[102]

Upon review of Sterling's claim, the Fourth Circuit affirmed the district court holding.[103] The court agreed the factual issues in this case would lead to "'disclosure of intelligence-gathering methods or capabilities' . . . [which are] squarely within the definition of state secrets."[104] Additionally, the court reasoned that Sterling's position as a covert operative with the CIA inherently involved state secrets because the very nature of his duties may have involved working with foreign sources of intelligence.[105] The court then implied the CIA specifically may be afforded a larger amount of deference than other agencies because Congress

97. 416 F.3d at 341.

98. *Id.* at 342.

99. *Id.*

100. *Id.*

101. *Id.* at 343 (quoting United States v. Reynolds, 345 U.S. 1, 8 (1953)).

102. *Id.* at 344. The Supreme Court defined "graymail" as a practice where "individual lawsuits [are] brought to induce [a government agency] to settle a case . . . out of fear that [litigation] would reveal classified information that may undermine covert operations." Tenet v. Doe, 544 U.S. 1, 11 (2005). The Supreme Court noted this is particularly important in civil cases where the government is a defendant, because it is unable to control the direction of the litigation, and this could impose national security risks based on the plaintiff's decisions. *Id.*

103. *Sterling*, 416 F.3d at 349.

104. *Id.* at 346 (quoting Molerio v. FBI, 749 F.2d 815, 820–21 (1984)).

105. *Id.*

intended the CIA to have broad powers in protecting the secrecy of U.S. intelligence and without such powers, the CIA would be hamstrung.[106] Without the ability to guarantee the security of information provided by foreign intelligence sources, the Fourth Circuit warned, there can be dangers to personal safety and the CIA's intelligence gathering mission.[107] Further, the Fourth Circuit rejected Sterling's claim because his employment discrimination suit would have required him to show he was treated worse than other similarly situated non-African American agents.[108] This would have required a comparative analysis of Sterling's duties, which remain classified, to his colleagues which would require disclosure of the duties of other CIA operatives—which are also classified.[109] Lastly, even assuming Sterling could establish a prima facie case, the Government would be entitled to a complete defense.[110] But, the CIA would be unable to do so as defending their actions would require them to reveal "criteria inherent in sensitive CIA decisionmaking," and the methods for gathering necessary evidence would require individuals to risk their cover to appear in court where information provided could jeopardize others.[111]

As the Fourth Circuit described it, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."[112] Ultimately, the court dismissed the case because neither party could prove or defend their position without the privileged evidence.[113] Additionally, any special procedure would come with considerable risk of inadvertent disclosure or leaks, which is precisely what *Reynolds* sought to avoid.[114] While the court recognized the unfairness of dismissal, the Fourth Circuit emphasized, like other courts, that access to the judicial process must bend in the face of national security risks.[115]

In contrast, there has been a limited number of instances where the federal government's post-9/11 assertion of the SSP is rejected. In *Mohamed v. Holder*, a U.S. citizen claimed the government violated his constitutional rights by placing him on the "No Fly List" which prevented him from traveling from Kuwait to the

106. *Id.* (quoting CIA v. Sims, 471 U.S. 159, 170 (1985)).
107. *Id.*
108. *Id.*
109. *Id.* at 346–47.
110. *Id.* at 347.
111. *Id.*
112. *Id.* (quoting CIA v. Sims, 471 U.S. 159, 178 (1985)).
113. *Id.* at 348 (quoting Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991)).
114. *Id.*; United States v. Reynolds, 345 U.S. 1, 11 (1953).
115. *Sterling*, 416 F.3d at 348 (citing *Reynolds*, 345 U.S. at 11).

United States.[116] He later amended his complaint to allege he was tortured by FBI agents while in Kuwait.[117] In response, Attorney General Eric Holder moved to dismiss under the SSP on grounds that the litigation required the disclosure of the following: information which would confirm or deny whether an individual was the subject of an intelligence investigation; rationales and results from intelligence investigations that would reveal information obtained by the intelligence community in determining whether individuals were linked to terrorism; and information that would reveal sources and methods used by the FBI in investigating potential terrorists.[118] Consistent with *Reynolds*, Attorney General Holder stated this information could reasonably be expected to cause significant harm to national security.[119]

Nevertheless, the Eastern District of Virginia was unpersuaded. Despite the Government's protest, the court required the Government to comply with their request for in camera review of the documents they claimed were privileged.[120] After review, the Eastern District of Virginia denied the motion to dismiss; specifically, the court was particularly skeptical of this request and stated, "the state secrets privilege is a judicially created rule of evidence, not a doctrine of sovereign immunity or non-justiciability, whose applicability and consequences, where applicable, are best considered within a specific context during the actual adjudication of any claims to which it may apply."[121] Further, the court held none of the documents were so related to the plaintiff's claim that the Government would be unable to defend against it without using those documents.[122] However, the court left the door open for a narrow SSP use as it withheld final decision on whether the SSP applied to any individual document until it could be evaluated in the specific context of its usage.[123]

116. 995 F. Supp. 2d 520, 522 (E.D. Va. 2014).

117. *Id.*

118. Declaration of Eric H. Holder, Jr., Att'y Gen. of the United States at 3, Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. Jan. 22, 2014) (No. 1:11-CV-00050), ECF No. 104-1 [hereinafter Holder Declaration]. The State incorporated Attorney General Holder's Declaration as an exhibit in its motion to dismiss.

119. Holder Declaration, *supra* note 118.

120. Order on Motion to Compel at 2, Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. Oct. 30, 2014), ECF No. 144; *see also* Steven Aftergood, Court Denies Motion to Dismiss State Secrets Case, FED. OF AM. SCIENTISTS (Oct. 31, 2014), https://fas.org/blogs/secrecy/2014/10/ssp-denial/FAS [https://perma.cc/AU5Y-D4ZV].

121. Order on Motion to Compel at 2, Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. Oct. 30, 2014), ECF No. 144.

122. *Id.*

123. *Id.* at 2–3.

Underlying these examples, two principles remain steadfast. First, courts typically embrace a strong SSP, thus allowing the privilege to be invoked frequently with success.[124] And second, while litigation on employment practices or contract default seem harmless to national security on its face, these issues are incredibly nuanced. While declassification of the material behind *Reynolds* may have shown an abuse of government power, it is a mischaracterization to say the SSP is routinely an abusive government practice.[125]

Further, there lies serious questions about whether it is best to require disclosure of information that potentially has a nominal effect on national security or whether it is best to provide the government significant deference. Under the former, the risk of disclosing state secrets adversely affecting United States interests increases. Yet, under the latter, the risk of eroding public trust in the government increases. This debate underscores the need for legislation clarifying the SSP—legislation that defers to government on national security matters while providing oversight to guard against potential abuse. Nevertheless, in the absence of clear guardrails, the Supreme Court decisions in *United States v. Zubaydah* and *FBI v. Fazaga* certainly favored a strong SSP.[126]

2. *2022 SSP Supreme Court Rulings*—Zubaydah *and* Fazaga

Perhaps in light of the government's increased invocation of the SSP, the Supreme Court decided two cases featuring the privilege in March 2022 where the holdings further solidified the power of the SSP.[127]

In *Zubaydah*, the Supreme Court was presented with a suspected terrorist who sought to subpoena former CIA contractors through an ex parte 28 U.S.C. § 1782 motion.[128] Specifically, Zubaydah sought information regarding enhanced interrogation techniques used against him by the CIA, allegedly in Poland, to be used by the Polish government in potential criminal litigation against individuals who may have been involved.[129] The subpoena featured 13 document requests; 12

124. *See, e.g.*, Sterling v. Tenent, 416 F.3d 338, 347–48 (4th Cir. 2005).

125. *But see* S. REP. NO. 110-442, at 3 (2008) ("[A] strong public perception has emerged that sees the privilege as a tool for Executive abuse.").

126. *See* United States v. Zubaydah, 595 U.S. 195, 199 (2022) (plurality opinion); FBI v. Fazaga, 595 U.S. 344, 358–59 (2022).

127. *See Zubaydah*, 595 U.S. at 199; *Fazaga*, 595 U.S. at 358–59.

128. *Zubaydah*, 595 U.S. at 198. Under 28 U.S.C. § 1782, a district court may order testimony or documents for use in proceedings in foreign tribunals. However, a person cannot be compelled to give testimony, statements, or produce documents in violation of a privilege. *See* 28 U.S.C. § 1782(a).

129. *Zubaydah*, 595 U.S. at 200–02.

referred specifically to Poland and 10 requested documents on an alleged CIA detention facility there.[130] In response, the Government invoked the SSP arguing that requiring a response would confirm or deny whether Poland had cooperated with the CIA, and any such confirmation would significantly harm national security interests.[131] The crux of the issue came down to whether the Government was required to confirm the CIA performed enhanced interrogation techniques in Poland.[132] This was already widely speculated, but publicly-available documents suggested this to be true.[133] Despite this, the United States never formally recognized the existence of a CIA black site in Poland.[134] Accordingly, a fractured Supreme Court upheld the Government's use of the SSP and dismissed Zubaydah's case in a plurality opinion.[135]

Specifically, the Court noted that any response to the subpoenas would tend to confirm or deny the existence of a CIA site in Poland.[136] The Court was particularly persuaded by the CIA director's declaration emphasizing the need to protect relationships with foreign intelligence services.[137] Here, the CIA argued these relationships are "based on mutual trust that the classified existence and nature of the relationship will not be disclosed" because such disclosure would breach trust and, in turn, jeopardize these relationships.[138] The Court summarized its position by stating, "to confirm publicly the existence of a CIA site in Country A, can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future."[139]

The Court continued by noting that confirmation by the Government is inherently different than speculation by foreign courts or the press as it leaves no

130. *Id.* at 202.

131. *Id.* at 199 (citing Reynolds v. United States, 345 U.S. 1, 6–7 (1953)).

132. *See id.* at 198–99.

133. *Id.* at 200, 240 (first citing plurality opinion, then Gorsuch, J., dissenting). A Senate Select Committee on Intelligence report reveals the following: discussions on the CIA's use of enhanced interrogation, the European Court of Human Rights finding beyond reasonable doubt that Zubaydah's treatment occurred in Poland, and former Polish President Aleksander Kwasniewski's statements that the CIA had established a site within Poland. *See generally* S. REP. NO. 113-288, at 17–48 (2014).

134. *Zubaydah*, 595 U.S. at 200 (plurality opinion).

135. *Id.* at 214.

136. *Id.* at 206.

137. *See id.* at 207–08.

138. *Id.*

139. *Id.* at 208.

room for doubt.[140] Thus, the CIA's refusal to confirm or deny its cooperation with foreign intelligence services plays a vital role in maintaining the trust of allies.[141] The plurality opinion then likened their position to select Freedom of Information Act (FOIA) exemptions that permit an agency to withhold government records that a member of the public requests, records the agency would normally be required to disclose, unless the information sought has become public and officially acknowledged.[142] Under these premises, since the government had never officially acknowledged a CIA site in Poland, the Court reasoned confirmation of such a site's existence "could reasonably be expected to significantly harm national security interests," thus successfully meeting the test articulated in *Reynolds*.[143]

Further, the Court found dismissal was proper as Zubaydah's need for the information was not great.[144] Specifically, because Zubaydah's attorneys argued they did not seek confirmation of the detention site location in Poland as much as they sought information about what happened there, any need to confirm or deny the existence of a CIA site in Poland was of little importance.[145] Accordingly, the Court held the SSP applied, and Zubaydah could not require the Government to confirm or deny the existence of CIA sites in Poland.[146]

The Court's dismissal in *Zubaydah* did not come without several differing opinions. In Justice Clarence Thomas's concurrence in part and in the judgment, he focused extensively on the "showing of necessity" by Zubaydah.[147] Using the term "dubious," as articulated in *Reynolds*, Justice Thomas believed Zubaydah's mere "dubious" need for the discovery he sought required dismissal.[148] Under this opinion, the Government's reasons for invoking the SSP are irrelevant.[149]

While providing a lengthy background on Zubaydah's terrorist activities, Justice Thomas, joined by Justice Samuel Alito, were concerned the discovery request came under section 1782, as this meant Zubaydah filed this on behalf of Poland, rather than for his own use, thus greatly reducing Zubaydah's specific need

140. *Id.*

141. *Id.* at 208–09.

142. *Id.* at 210 (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)).

143. *Id.* at 211 (citing United States v. Reynolds, 345 U.S. 1, 10 (1953)).

144. *Id.* at 212.

145. *Id.*

146. *Id.*

147. *Id.* at 216 (Thomas, J., concurring).

148. *Id.* at 217. Specifically, *Reynolds* states, "A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail." *Reynolds*, 345 U.S. at 11.

149. *Zubaydah*, 595 U.S. at 217.

for the information.[150] Moreover, Justice Thomas departed from the plurality in how he would have applied *Reynolds*.[151]

Justice Thomas stated *Reynolds* articulated a two-step approach where the Court must first evaluate the requesting party's need for the privileged material, and if the party make a strong showing, dismissal is not required and the court then evaluates if there is "reasonable danger" that "military secrets are at stake."[152] In his view, the plurality flipped this when it first considered the Government's reason for invoking the SSP before considering whether Zubaydah had a sufficient need.[153] To Justice Thomas, this put national security at risk, as a "reasons-first approach" would lead to in camera review more often where this disclosure to a judge would undermine the "utmost deference" owed to the Executive Branch on national security.[154] Accordingly, undermining the "utmost deference" to the President would then lead to judicial second-guessing and "defeat[] the unity, secrecy, and dispatch that the Founders believed to be so important" on national security matters.[155]

In conclusion, while noting the Government offered a reasonable explanation to support its claim, Justice Thomas would have dismissed before reaching that point.[156] Specifically, he asserted Zubaydah failed to prove a nontrivial need because his requested discovery would only offer Poland meaningful relief; Zubaydah failed to pursue alternatives that would have allowed him to make a case without the privileged evidence; and lastly, Zubaydah's attorneys admitted they could adduce the essential facts of the case without the material touching on military secrets.[157] Thus, Zubaydah demonstrated a mere "dubious showing of necessity," and for that, Justice Thomas supported dismissal.[158]

In another concurrence in part, Justice Brett Kavanaugh, joined by Justice Amy Coney Barrett, wrote to clarify the limited role in camera proceedings should

150. *Id.* at 217–19.

151. *Id.* at 216–17.

152. *Id.* at 219–20 (citing *Reynolds*, 345 U.S. at 10–11).

153. *Id.* at 216–17.

154. *Id.* at 222–23; *see also Reynolds*, 345 U.S. at 10 (discussing in camera review); Dep't of Navy v. Egan, 484 U.S. 518, 529–30 (1988) ("As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.") (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

155. *Zubaydah*, 595 U.S. at 223 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 592 (2004) (Thomas, J., concurring)).

156. *Id.* at 230–32.

157. *Id.*

158. *Id.* at 232 (citation omitted).

play in SSP litigation.[159] Specifically, Justice Kavanaugh clarified, even if the requesting party has a strong need, courts should not automatically demand in camera examination if the government can satisfy there is a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[160] Moreover, Justice Kavanaugh emphasized the strong need for deference to the Executive in national security matters.[161]

In a fourth opinion, Justice Elena Kagan wrote to concur in part and dissent in part.[162] She stated the Government met its burden in showing that "confirming the location of Zubaydah's detention would pose a 'reasonable danger' of harm" as it would remove all doubt on the accuracy of prior reporting and undermine other intelligence activities.[163] However, Justice Kagan would have distinguished the location of the detention site from the treatment Zubaydah received at that location, which would not require dismissal because Zubaydah's treatment is not a state secret.[164] Justice Kagan conceded that, as written, Zubaydah's discovery requests would have forced the CIA to confirm or deny whether Poland hosted a CIA site, but she suggested that modifying the requests would address this issue and allow the case to proceed.[165] This would have fairly balanced the Government's interest with Zubaydah's interest in uncovering the abuse he suffered.[166]

In a final opinion, Justice Neil Gorsuch, joined by Justice Sonia Sotomayor, began a scathing dissent by writing, "we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point. . . . Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret."[167]

The dissent presented the issue here as determining what happened inside Zubaydah's cell during his time at a CIA site, which is not a state secret because it

159. *Id.* (Kavanaugh, J., concurring).
160. *Id.* at 233 (citing United States v. Reynolds, 345 U.S. 1, 10 (1953)).
161. *Id.*
162. *Id.* at 234 (Kagan, J., concurring).
163. *Id.* (citing *Reynolds*, 345 U.S. at 10).
164. *Id.* at 236.
165. *Id.* at 237.
166. *Id.*
167. *Id.* at 237–38 (Gorsuch, J., dissenting) (citing Watts v. Indiana, 338 U.S. 49, 52 (1949)).

was previously disclosed in a 2014 Senate Report.[168] Justice Gorsuch noted the public record is littered with references to Zubaydah's treatment at a CIA black site in Poland, and that even the CIA contractors in question have spoken, and even testified, extensively without government objection on their CIA-related activities.[169] Further, even though Zubaydah's discovery request included references to Poland, the dissent noted Zubaydah gave the Court power to modify or limit discovery if confirming the location of a CIA site was an issue.[170] Combining all of this information led the dissent to conclude this case should not have been dismissed.[171]

While conceding the Executive Branch has substantial authority over foreign affairs, Justice Gorsuch added there is "interdependence" between branches of government where they share concurrent power.[172] Specifically, Justice Gorsuch wrote that this is the case here with section 1782 since Congress authorized the judicial branch to order discovery for foreign proceedings and because no one argues it intrudes on the power of the Executive.[173] And while the Government urged for the "utmost deference" to executive judgment, the dissent would have rejected that by using *Burr*, where the court refused to give President Jefferson a similar power, and *Reynolds*, where the Court stated, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[174] In further warning of the consequences of providing too much deference, the dissent invoked *Korematsu v. United States* as a stark reminder.[175] But further yet, deference becomes even more problematic when it is estimated that between 50 to 90 percent of classified materials do not need to be considered classified as it allows for the covering of potential mistakes.[176] Accordingly, the dissent wrote, "[t]his Court hardly needs to add fuel to that fire by abdicating any pretense of an independent judicial inquiry into the propriety of a claim of privilege and extending instead 'utmost deference' to the Executive's mere assertion of one."[177]

168. *Id.* at 243–44; S. REP. NO. 113-288, at 17–48 (2014).

169. *Id.* at 240, 245–46 (citations omitted).

170. *Id.* at 242–43 (citation omitted).

171. *Id.* at 246.

172. *Id.* (citation omitted).

173. *Id.* at 247.

174. *Id.* at 248, 250 (first citing United States v. Burr, 25 F. Cas. 30, 31 (C.C.D. Va. 1807) (No. 14,692D); then quoting United States v. Reynolds, 345 U.S. 1, 9–10 (1953)).

175. *Id.* at 250–51 (citing Korematsu v. United States, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting)) ("In *Korematsu v United States*, the President persuaded this Court to permit the forced internment of Japanese-American citizens during World War II.").

176. *Id.* at 252.

177. *Id.* at 252–53.

Instead, the dissent argued for greater judicial evaluation of SSP claims through an emphasis being placed on the "reasonable danger" evaluation from *Reynolds*, encouraging courts to conduct in camera review and exploring other options to make the evidence in question available.[178] While Justice Gorsuch noted some situations may still require dismissal, it is warranted only in the rarest of occasions where it is "impossible to adjudicate a claim without [the] privileged evidence."[179] Here, the dissent simply believed the danger the Court protected against is too speculative to justify use of the SSP or impose the significant penalty of dismissal.[180] In conclusion, Justice Gorsuch ended with a rigid stance:

> Really, it seems that the government wants this suit dismissed because it hopes to impede the Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds. . . . This Court's duty is to the rule of law and the search for truth. We should not let shame obscure our vision.[181]

Despite a fractured Court and strong dissent, *Zubaydah* expanded the discretion and authority of the government in invoking the SSP.[182] Moreover, when *Zubaydah* is paired with a unanimous Supreme Court in *Fazaga*, it appears the Supreme Court is intent on going to great lengths to assist the federal government in protecting classified material.

In *Fazaga*, the Court was tasked with defining the relationship between the SSP and a Foreign Intelligence Surveillance Act of 1978 (FISA) provision that allowed courts to consider the legality of electronic surveillance conducted under the Act.[183] After three individuals alleged the FBI illegally surveilled them, the government invoked the SSP to dismiss because "the disclosure of counter-intelligence information that was vital to an evaluation of those claims would threaten national-security interests."[184] Additionally, the Government asserted "[t]his claim applied to the following categories of information: information that could 'confirm or deny whether'" individuals were subjects of counterterrorism investigations, reveal the status of investigations, or reveal the methods of conducting the investigations.[185] However, FISA's purpose is to provide special procedures for the collection of foreign intelligence due to the unique national

178. *Id.* at 254–55.

179. *Id.* at 256.

180. *See id.* at 259–62.

181. *Id.* at 266.

182. *See supra* notes 127–46 and accompanying text.

183. FBI v. Fazaga, 595 U.S. 344, 347 (2022); Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1806.

184. *Fazaga*, 595 U.S. at 348.

185. *Id.* at 352 (citation omitted).

security issues it covers.[186] After obtaining an order from a FISA court to engage in this surveillance, 50 U.S.C. § 1806 permits the government to use the information gathered in judicial proceedings.[187] Specifically, section 1806(f) permits courts to make admissibility determinations following an in camera or ex parte hearing if the "Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States."[188] This provision brought section 1806(f) into direct conflict with the SSP.[189]

Instead of resolving the meaning of section 1806(f), the Court noted the text of FISA weighs heavily against any argument that it displaces in the SSP: "The absence of any statutory reference to the [SSP] is strong evidence that the availability of the privilege was not altered in any way[,]. . . . [and] the privilege should not be held to have been abrogated or limited unless Congress has at least used clear statutory language."[190] Further, the Supreme Court emphasized there is little overlap in cases where both section 1806(f) is triggered and the SSP could be viably asserted.[191] However, even if cases arise under section 1806(f), the Court held there is no true clash with the SSP as courts are required to conduct different inquiries.[192] Under FISA, the question is whether the information has been lawfully obtained, but under the SSP, the question is whether disclosure would harm national security.[193] Additionally, the Court noted that, while the two rules follow different procedures, the SSP may preclude the in camera and ex parte review typically allowed under section 1806(f).[194] In essence, this means congressional enactment of FISA, namely section 1806(f), does not curtail or displace the SSP in anyway.[195]

III. THE NEED FOR CLARIFICATION

Seventeen years ago, Senator Leahy gave this quote, which *Zubaydah* brings full circle:

> As use of the privilege has expanded and criticism has grown, public confidence has suffered. Mistrust of the privilege breeds cynicism and

186. *Id.* at 348.
187. *Id.* at 349.
188. *Id.* at 349–50 (quoting 50 U.S.C. § 1806(f)).
189. *See id.* at 348.
190. *Id.* at 355 (citations omitted).
191. *See id.* at 355–56.
192. *Id.*
193. *Id.* at 356.
194. *Id.*
195. *Id.* at 358–59.

> suspicion about the national security activities of the U.S. Government, and it causes Americans to lose respect for the notion of legitimate state secrets. Perversely, overuse of the privilege may undermine national security by making those with access to sensitive information more likely to release it. As one former CIA officer stated recently: "There will finally be an instance where you've cried 'state secrets' so many times that [no one will] believe it anymore, and potentially something that is a state secret will get out."[196]

While the plurality upheld a strong SSP, the dissent was far more cautious about the deference given to the Executive's claim of SSP.[197] Accordingly, *Zubaydah* highlights the inherent struggle underlying the SSP.[198]

While the Supreme Court rightfully worried about unchecked deference to the Executive,[199] others have echoed these sentiments. Specifically, scholars have shared concerns over the lack of accountability in addition to lamenting the circular argument an SSP assertion requires.[200] As the SSP currently stands, the government bears the burden of demonstrating the need for secrecy, but because it may not be able to meet the burden without disclosing the secrets at issue, it does not have to disclose secrets which could potentially harm national security.[201] Others have criticized *Zubaydah* because it allows for disingenuous uses of the SSP where the government can create an agenda without transparency.[202] In essence, this allows the government to control narratives on sensitive issues which undermines the rule of law.[203]

In contrast, *Zubaydah* has been defended on grounds the SSP is essential in honoring the separation of powers because it provides a measure of assurance that

196. S. REP. NO. 110-442, at 6 (2008); United States v. Zubaydah, 595 U.S. 195, 212, 259 (2022) (plurality opinion and Gorsuch, J., dissenting).

197. *Zubaydah*, 595 U.S. at 212, 259 (plurality opinion and Gorsuch, J., dissenting).

198. *See id.* at 259 (Gorsuch, J., dissenting).

199. *See supra* notes 168–81.

200. *See, e.g.*, Claire Finkelstein, *How the State Secrets Doctrine Undermines Democracy*, BLOOMBERG L. (Mar. 28, 2022, 3:00 AM), https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy [https://perma.cc/39GU-6VNP]; Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1931–34 (2007); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 108–32 (2005).

201. *See* Finkelstein, *supra* note 200.

202. *See, e.g.*, Mark Fallon, *State Secrets and the Blinding of Justice*, UNIV. OF PA. CTR. FOR ETHICS & THE RULE OF L. (May 31, 2022), https://www.penncerl.org/the-rule-of-law-post/state-secrets-and-the-blinding-of-justice/ [https://perma.cc/PL4L-AFLA].

203. *See* Finkelstein, *supra* note 200.

national security decisions will remain with the appropriate institution.[204] Thus, *Zubaydah* appropriately balances the inherent tension between government branches and the competing state interests created by the Constitution.[205]

And lastly, others argue *Zubaydah* itself is evidence that legislative reform on the SSP is needed.[206] Specifically, the criticism that follows is that allowing the government to escape acknowledgment of a CIA site in Poland—despite many others acknowledging Zubaydah's torture took place there—shows the power of the SSP has gone too far and Congress should correct this.[207] While legislative reforms have failed in the past, the question is whether the time is finally right to codify the SSP? If so, how should Congress balance executive deference and strong national security protections, while ensuring necessary oversight?

IV. CRAFTING A LEGISLATIVE SOLUTION

A. *Evaluating Existing Ideas*

Legislative reform of the SSP is not a novel concept, but the fractured Supreme Court opinion in *Zubaydah* serves as a signal that now is the time to act. But what should reform look like? Congress could use the Classified Information Procedures Act (CIPA) as a guide.[208] CIPA is the SSP equivalent in criminal cases, and it places the burden on prosecutors to take precautions to prevent unauthorized disclosure of classified information.[209] It features twin aims of preventing disclosure of classified information while balancing the rights of criminal defendants and advising the government of the national security costs of the prosecutions.[210] In sum, section 2 of CIPA allows either party to request a pretrial conference "to consider matters relating to classified information that may arise in

204. *See, e.g.*, George Croner, *A Reply in Defense of the State Secrets Privilege*, UNIV. OF PA. CTR. FOR ETHICS & THE RULE OF L. (May 31, 2022), https://www.penncerl.org/the-rule-of-law-post/a-reply-in-defense-of-the-state-secrets-privilege/ [https://perma.cc/ZL9K-YKBN].

205. *See id.*

206. *See, e.g.*, Michael C. Dorf, *The Scope and Nature of the State Secrets Privilege*, VERDICT (Mar. 15, 2022), https://verdict.justia.com/2022/03/15/the-scope-and-nature-of-the-state-secrets-privilege [https://perma.cc/D72E-HGY4].

207. *See id.*

208. Classified Information Procedures Act, 18 U.S.C. app. 3.

209. *Synopsis of Classified Information Procedures Act (CIPA)*, DEP'T OF JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa [https://perma.cc/NGZ9-ZQGK]. *Compare* Classified Information Procedures Act § 6, *with* El-Masri v. United States, 479 F.3d 296, 304–05 (4th Cir. 2007).

210. *See Synopsis of Classified Information Procedures Act (CIPA)*, *supra* note 209.

connection with the prosecution."[211] If the government then requests a protective order, section 3 requires a court to issue one prohibiting disclosure of classified information by the United States to the defendant.[212] This step may require a defense attorney or defendant to receive security clearance to access the protected information.[213] If the government makes a sufficient showing in ex parte or in camera hearings, section 4 allows the government to delete classified items from discovery requests or provide unclassified substitutions if disclosure is required.[214] Section 5 then requires defendants to provide timely notice if they plan to use the classified information at trial and section 6 requires courts to hold a pretrial evidentiary hearing "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."[215] If the court holds the material is admissible, the government can offer unclassified substitutes, like what is described in section 4, so long as the defense is in "substantially" the same position to argue its case with these summaries instead.[216]

While CIPA has also faced criticisms, it is rooted in many of the same concepts as the SSP.[217] Accordingly, there is a tenuous balancing act between providing information necessary to fairly adjudicate a case and relying on the government to also protect national security. However, the same considerations that distinguish criminal and civil cases generally emphasize why this balancing act under CIPA is different. As CIPA is purely a criminal procedure statute, there will always be a greater need for defendants to have access to any evidence that could resolve their guilt. Government withholding of information from a criminal defendant could, in turn, violate the Fifth Amendment's Due Process Clause and run afoul of the Constitution.[218] But none of that is seen in the civil realm when the government is the defendant. That is not to suggest that those who have been wronged should not be entitled to recover, but there is a less pressing need when

211. Harry Graver, *The Classified Information Procedures Act: What It Means and How It's Applied*, LAWFARE (Nov. 20, 2017, 9:00 AM), https://www.lawfaremedia.org/article/classified-information-procedures-act-what-it-means-and-how-its-applied [https://perma.cc/TMG4-NA77] (quoting Classified Information Procedures Act § 2).

212. *Id.* (quoting Classified Information Procedures Act § 3).

213. *Id.*

214. *Id.* (discussing Classified Information Procedures Act § 4).

215. *Id.* (quoting Classified Information Procedures Act § 6).

216. *Id.* (quoting Classified Information Procedures Act § 4).

217. *Id.* (noting lack of defendant access to information, defendant challenges to the pretrial notice of intended use, and accusations of the government withholding too much information).

218. *See generally* U.S. CONST. amend. V.

life, liberty, and imprisonment are not at stake.[219] Thus, the balancing in a civil case should naturally be more protective of state secrets than in a criminal case because the government's need to prevent disclosure and protect national security remains strong, while the private party's need is lower.

Aside from CIPA, others have argued for different SSP legislative reforms. Following the SSPA introduction during the 110th Congress, one author suggested that while judicial review of potentially privileged documents is a good start, it does not do enough to address incentives that encourage the Executive Branch to abuse the SSP.[220] Instead, this author suggests administrative law reform is needed.[221] Nonetheless, unless individuals with security clearances are reviewing the documents, there remains a heightened risk the information will end up in the wrong hands or someone may have an incentive to disclose the information.

Others, such as the American Bar Association of the City of New York, argue that legislation on the SSP should be enacted to require "the government to provide a full and complete explanation of its privilege claim and to make available for *in camera* review the evidence the government claims is subject to the privilege"; require the court to assess if it is "reasonably likely" there will be significant detriment to the national defense or substantial injury if the evidence is disclosed; and require the government to produce non-privileged substitutes in place of the privileged evidence if possible, defer judgment on motions to dismiss or for summary judgment until complete discovery has occurred, and allow for expedited interlocutory appeals.[222]

And again, others have sought to learn from other countries' procedures on the use of classified information in judicial proceedings.[223] Unsurprisingly, the English privilege provided a strong basis for the SSP articulated in *Reynolds*.[224] In many cases, the American SSP mirrors the English "crown privilege" as they are both absolute, not always requiring in camera review,[225] and the government is

219. *See generally id.*

220. Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1701–04 (2008).

221. *Id.* at 1717–20.

222. ROBERT E. STEIN, AM. BAR ASSOC., REP. 116A, REPORT TO THE HOUSE OF DELEGATES 1, 1–2 (2007) (on file with Author).

223. *See, e.g.*, Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOKLYN L. REV. 201, 202 (2009).

224. *Id.* at 226–27.

225. *Id.* at 227, 229.

afforded great deference because "[t]hose who are responsible for the national security must be the sole judges of what the national security requires."[226]

In contrast, Scotland takes a more limited approach as they conduct a balancing test of the need to maintain national security with the need for democratic accountability.[227] Further, the judiciary has a much greater role in resolving whether the government has met the burden to prevent disclosure.[228] However, the Scottish judiciary has noted that documents on national security, political documents, and issues involving public interest may require greater deference to the government.[229]

Lastly, Israel undergoes an entirely different evaluation. Instead, Israel takes a two-step inquiry where the court first asks whether the case is justiciable.[230] In making this determination, the Israeli Supreme Court has articulated four standards: if the case concerns an impingement of human rights, it is always justiciable; if the case involves a central issue of political or military policy and not a legal dispute, it is not justiciable; if an issue has already been decided by an international tribunal or court where Israel is a signatory, it is justiciable; and fourth, judicial review is most appropriate where the court considers a particular application of a government policy, not the policy broadly itself.[231] As most cases are justiciable,[232] courts then weigh national security against human rights concerns on a case-by-case basis, evaluating reasonability and proportionality.[233]

B. *A Proposal—Creation of the Independent Counsel on State Secrets*

While comparative analyses are helpful to understand how others handle similar state secrets situations, they do not precisely address the best solution for the American SSP. In short, SSP critics argue for greater oversight and less deference.[234] While these concepts go hand-in-hand, actions on national security are largely afforded to the President within the Constitution as the Commander-in-Chief and through the Vesting Clause.[235] But certainly, as articulated in Justice

226. *Id.* at 229 (quoting Duncan v. Cammel, Laird & Co. [1942] AC 624, 642 (HL) (appeal taken from Scot.).

227. *Id.* at 231.

228. *Id.*

229. *Id.* at 238.

230. *Id.* at 244.

231. *Id.* at 246.

232. *Id.* at 244–46.

233. *Id.* at 247.

234. *See* Chesney, *supra* note 67, at 453.

235. *See* U.S. CONST. art II.

Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Congress has some power to regulate the President's actions in this realm.[236]

First, any legislation must expressly use language stating it displaces the common law privilege of the SSP. Failure to do so was fatal to the respondent's position in *Fazaga*.[237] Further, express language within may be required to actually create the desired reform as the holding in *Isbrandtsen Co. v. Johnson* reads, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar [legal] principles, except when a statutory purpose to the contrary is evident."[238]

From there, the best solution is to craft legislation that allows the Attorney General to suggest an independent counsel to the President. This individual would act as a watchdog and decide whether the government could assert the SSP. As envisioned, this role would be structured similar to what was seen in the Ethics in Government Act of 1978.[239] While this individual would not have any prosecutorial functions, the independent counsel would go through a series of procedural steps before officially taking office and being tasked with resolving whether the government could actually invoke the SSP in their pending litigation.

To begin, the Attorney General would recommend candidates to the President to serve as independent counsel on state secrets. Ideally, the candidates would be judges with experience in national security litigation, former or current Department of Defense or DOJ attorneys, or other highly qualified individuals with extensive experience within the Intelligence Community. After receiving the Attorney General's suggestions, the President would nominate one candidate to serve as the independent counsel on state secrets with the advice and consent of the Senate. If appointed, this individual would serve a five-year term, subject to discipline or removal only by the Attorney General where there would be a good cause requirement on the Attorney General's ability to fire this individual.[240] Further, consistent with *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the President would be unable to order the Attorney General to simply remove the independent counsel on state secrets for neglect or disdain for their performance.[241]

236. *See* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
237. FBI v. Fazaga, 595 U.S. 344, 358 (2022).
238. 343 U.S. 779, 783 (1952).
239. *See* 5 U.S.C. §§ 401–404.
240. *See* Morrison v. Olson, 487 U.S. 654, 696 (1988).
241. 561 U.S. 477, 484 (2010).

Once the independent counsel on state secrets has been appointed to their term, all SSP claims would need to funnel through them for review. Specifically, this addresses the need for in camera or ex parte review by a judge who may not otherwise have the requisite security clearance to review certain documents. Further, it adds a strong layer of oversight, while maintaining strong protections for national security. Moreover, as the independent counsel on state secrets is not a typical government official, their judgment can be trusted, and deference can be afforded to it. In sum, the independent counsel, who is shielded from removal, is more likely to make an honest assessment of the prospective SSP use.

Beyond this, there would be specific SSP standards to guide the Independent Counsel on State Secrets' evaluation. While critics note *Reynolds* was founded on faulty grounds, it provides a framework that has endured nearly 70 years.[242] And while a fractured Supreme Court took significantly different positions in *Zubaydah*, no opinion called into question the "reasonable danger" of harm to national security standard articulated in *Reynolds*, so that should continue to be used.[243] Moreover, the independent counsel would be instructed that a state secret is defined as, "[a] governmental matter that would be a threat to the national defense or diplomatic interests of the United States if revealed; information possessed by the government and of a military or diplomatic nature, the disclosure of which would be contrary to the public interest."[244] This instruction given to the independent counsel shall also extend to specify a state secret is not something that is merely embarrassing or morally questionable, so long as it does not pose a threat to the national defense if revealed.

Accordingly, the independent counsel shall be given a two-step analysis to conduct. First, after weighing all the evidence provided by the government, is there a reasonable possibility a state secret would be disclosed in the course of litigation? If no, then any use of the SSP is prohibited. If yes, then the analysis would proceed to step two where the independent counsel shall be given discretion to remedy the issue with modification, redaction, or summarization of the material.

If at this point there is no possible remedy, then the independent counsel shall allow the government to invoke the SSP where it would be absolute, and the

242. S. REP. NO. 110-442, at 38 n.6 (2008); *see also* United States v. Reynolds, 345 U.S. 1, 10 (1953).

243. *See Reynolds*, 345 U.S. at 11; United States v. Zubaydah, 595 U.S. 195, 265–66 (2022) (Gorsuch, J., dissenting).

244. *State Secret*, BLACK'S LAW DICTIONARY (11th ed. 2019).

government would not be required to submit the evidence to the court.[245] Here, the independent counsel is then tasked with explaining to the court why the SSP was properly invoked without revealing the underlying state secrets. However, courts would then retain the authority to decide whether the case shall be dismissed or if it can proceed without the privileged material.

In essence, the creation of the independent counsel on state secrets would do nothing to affect the procedural decision of the Judiciary in deciding whether to dismiss. However, the independent counsel provides a third party to vet any invocation of the SSP. This would provide necessary additional oversight. It would restore trust, prevent abuse, and ensure the government is not simply invoking the SSP to avoid disclosing unfavorable information. But most importantly, it would protect national security—an area where the risk of information in the wrong hands poses grave danger.

Attorneys General Eric Holder and Merrick Garland attempted to impose checks on the SSP, but these actions lacked oversight and independence to ensure SSP invocation was proper.[246] Codification of the SSP clarifies its role in American jurisprudence, and the creation of the independent counsel on state secrets balances the government's need to defend the nation's security with the public's need for trust and accountability. Codify to clarify.

*Conner Greene**

245. The balancing of the plaintiff's need for the information shall remain an issue for the court. It would not be within the independent counsel's authority to determine how badly the opposing party needs the information. The task of the independent counsel on state secrets is simply to evaluate whether the government is invoking the SSP in an appropriate situation.

246. Holder Memo, *supra* note 37, at 1; Garland Memo, *supra* note 37, at 1–2.

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