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NEWSLETTER

Update on State Secrets Litigation Under the Trump Administration

February 2020

Disputes between contractors and the government, or solely between private actors, arise in the context of classified and sensitive government programs that touch on every aspect of the national security space. Although there are mechanisms for conducting litigation (usually where the government is a party) in a classified setting, the government's authority to assert the state secrets privilege can constrain the nature and scope of such litigation, especially in cases where disputes emerge between private parties (such as prime-subcontractor disputes) involving the government's classified information or programs.

The state secrets privilege is an extraordinary doctrine that, at its core, balances an individual's right of access to the court system with the government's interest in protecting sensitive or classified information from disclosure. The government invokes the privilege sparingly. Since the Supreme Court of the United States formally recognized the privilege in *U.S. v. Reynolds*, 345 U.S. 1 (1953), the privilege has been invoked and adjudicated in less than 100 published civil cases. The government is the defendant in most cases, though some disputes are solely between private parties. The privilege has been increasingly invoked in the last several decades, in part because of the central role played by contractors in national security programs and in the war on terror, as well as the significant number of challenges to government surveillance or other counter-terrorism programs.

While the state secrets privilege is relatively uncommon in civil litigation, it has the capability to fundamentally alter the rights and remedies available to litigants. Indeed, even the potential for

Practice Areas

Government Contracts

invocation of the privilege may guide litigation and discovery strategy when suits touch on national security issues.

This article discusses important recent developments in state secrets litigation, including two U.S. Court of Appeals for the Ninth Circuit decisions outlining limits to the privilege's scope and application, and two decisions involving disputes with or between contractors. This article also discusses strategic considerations for state secrets privilege litigation.

Recent Ninth Circuit Decisions

In 2019, the Ninth Circuit decided two notable cases with implications for litigation involving the state secrets privilege. The first case, *Husayn v. Mitchell*, 938 F.3d 1123 (9th Cir. 2019), involved a discovery dispute arising out of a Polish criminal proceeding between a foreign national who was subject to enhanced interrogation techniques by the Central Intelligence Agency (CIA) and two independent contractor psychologists who proposed and developed the interrogation methods. After the government intervened in the case, invoked the state secrets privilege, and moved to quash the subpoena, the district court concluded that discovery could not proceed without risking disclosure of information subject to the state secrets privilege–namely, the roles and identities of Polish citizens involved with a CIA site in Poland.

On appeal, the Ninth Circuit reversed, finding that the district court's "hasty dismissal" overlooked the judiciary's "special burden" to assure that the appropriate balance is struck between protecting national security and ensuring access to the court system. The appellate court required the district court to consider the use of in camera review, protective orders, restrictions on testimony, code names and pseudonyms, and other measures to permit discovery to proceed. The Ninth Circuit, however, left open the possibility for dismissal should the district court find it impossible to disentangle privileged information from non-privileged. As particularly relevant here, the Ninth Circuit found that many of the facts relating to the CIA's detention and interrogation program have been "in the public eye for some years now" or are "basically public knowledge," citing media reports, allegations by non-governmental organizations, and statements by former Polish government officials. The court thus rejected the government's argument that the CIA withholding official confirmation of such facts is "key to preserving an 'important element of doubt about the veracity of the information.'" The court reasoned that the government would not have to take an official position in this litigation, and found that the independent contractors from whom discovery was sought were not "agents of the government," but rather "private parties [whose] disclosures are not equivalent to the United States confirming or denying anything." The Ninth Circuit's position on these issues appears to be at odds with prior decisions addressing similar circumstances in the U.S. Court of Appeals for the Fourth Circuit. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007) and *Wever v. AECOM Nat'l Sec. Programs, Inc.*, 2017 WL 5139263, at *5 (E.D. Va. June 15, 2017).

Second, in *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), the Ninth Circuit agreed with several district courts in the Ninth Circuit that the Foreign Intelligence Surveillance Act's (FISA) procedures for challenging unlawful

electronic surveillance takes priority over the state secrets privilege and the dismissal remedy that may follow from it. As the court explained, while the privilege may have a "constitutional core" or "constitutional overtones," at bottom, it is only an "evidentiary rule rooted in common law, not constitutional law." The Ninth Circuit's decision reflects one important consequence regarding whether the privilege is constitutional law, or, as one court put it, "constitutionally-inspired deference to the executive branch." *In re Nat'l Sec. Agency Telecommunications Records Litig.*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008).

Recent Disputes Involving Government Contractor Defendants

Two recent or ongoing cases illustrate the range of possible circumstances in which the state secrets privilege can arise in disputes with government contractors. First, in *Al-Shimari v. CACI Premier Technology, Inc.*, No. 8-827 (E.D. Va. 2019), Iraqi citizens alleging they were detained and abused while held in Abu Ghraib filed suit against a contractor that provided interpreter and interrogation personnel to the government. The contractor filed multiple motions to compel discovery from the government, but on three separate occasions, the U.S. Department of Defense (DOD) invoked the state secrets privilege to bar certain discovery. The court found the invocations valid and denied the motions to compel. The contractor then moved to dismiss the case, arguing that the unavailability of evidence meant that it could not meaningfully defend itself against the detainees' allegations, and, in a somewhat unusual procedural posture, the government took no position on whether the excluded information necessitated dismissal. The U.S. District Court found that the case could proceed to trial with the use of appropriate protective measures. The contractor then filed an interlocutory appeal challenging the district court's ruling on this and other grounds, and following the Fourth Circuit's dismissal for lack of jurisdiction, the contractor filed a petition for certiorari in November 2019 seeking the Supreme Court's review. Although the cert petition primarily focused on the District Court's derivative sovereign immunity ruling, it asserted that state secrets "pervading this litigation will severely hamper the development of CACI's defense and its examination of the individuals who actually participated in Plaintiffs' interrogations," noting that their identities were all classified and state secrets.

Second, in *Wever v. AECOM Nat'l Sec. Programs, Inc.*, 2017 WL 5139263 (E.D. Va. June 15, 2017), a putative subcontractor sued a would-be prime contractor for breach of contract and fraudulent inducement, alleging that it was unfairly excluded under the terms of a teaming agreement from performing services on a classified government contract to perform aviation services. In that case, the government intervened and moved to dismiss the suit, and the court agreed with the government's position, finding that the litigation could not proceed because all three of the circumstances warranting dismissal were appropriate.
Tips for Contractors Thinking Strategically About the State Secrets Privilege

- Although the state secrets privilege is relatively rarely invoked, contractors must remain mindful of the risk that disputes arising out of classified contracts or programs will be found nonjusticiable. Conversely, contractors should not assume that the state secrets privilege will be invoked and a case dismissed simply because the invocation of the privilege may make certain evidence unavailable. Indeed, the Ninth Circuit in *Husayn* charted a discovery path weaving through privileged information, in part relying on the fact that statements made by contractor personnel would not amount to official government

acknowledgments, as well as the fact that certain privileged information was already the subject of public reporting and debate.

- The state secrets privilege is sometimes used strategically. Plaintiffs may attempt to engage in "graymail" whereby the threat of disclosure of classified or privileged information is used as settlement leverage. Conversely, potential defendants may consider the potential for nonjusticiability as a license to use sharp elbows in dealings with others. Ultimately, both plaintiffs and defendants operating in classified environments assume a certain degree of risk that disputes arising out of such programs will be nonjusticiable in the court system because of the state secrets privilege. Parties may mitigate these risks through contract terms and pricing accounting for the risk of nonjusticiability, as well as by dealing with known entities and repeat players in the classified space, who may desire to maintain a positive reputation within industry. Additionally, parties that engage in fraud or sharp dealing with other private parties may risk agency investigation or face suspension of security clearances.
- It is critical to engage with U.S. Department of Justice (DOJ) and the relevant agencies as soon as practicable if there is a possibility that a dispute may implicate privileged information. It may take months for the government to complete its thorough review process. In the interim, it may be advisable to seek a stay, but given that there is no guarantee one will be granted, additional litigation expense will be incurred and litigation positions may worsen while DOJ decides what position it will take.
- Cleared counsel, whether in-house or outside, may be best positioned to assist in determining the risk of nonjusticiability or likelihood of dismissal under the state secrets privilege. While potentially privileged information may be dispersed throughout a record, little of it may be necessary for potential claims or defenses, and much of it may be segregable from the non-privileged evidence. Cleared counsel can conduct an investigation and provide guidance as to the legal relevance and necessity of the potentially privileged information.