Navigating Discovery When the Government Claims Privilege

The military and state secrets privilege is a commanding evidentiary privilege that allows the government to withhold sensitive information within the context of litigation that is vital to the nation's security or diplomatic relations. Primarily due to the Sept. 11, 2001, al Qaeda terrorist attacks along the East Coast of the United States, a worldwide focus in terrorism, and continuing terrorist attacks, the military and state secrets privilege has been asserted more frequently by the U.S. Dept. of Justice. Proper assertion of this privilege is important for the protection it affords our nation.

However, advocates for a more open government contend that the assertion leads to an increased opportunity for the Executive Branch to avoid accountability or grab power from the Judicial Branch. Recently, President Barack Obama has made it more difficult for government agencies to invoke the state secrets privilege. In truth, the government does not always move to dismiss civil cases when they assert the military and state secrets privilege, which leads to the important question of how practitioners and courts can proceed with discovery when there is an assertion.

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Rooted in the earliest days of the Republic, see *Totten v. United States*, 92 U.S. 105 (1875), the Supreme Court first recognized the state and military secrets privilege in *United States v. Reynolds*, 345 U.S. 1, 10 (1953), which is still a leading decision on the privilege. "[T]he privilege to protect state secrets must head the list" of the government's privileges. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C.Cir. 1978). The privilege also protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. *Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998). "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8. When "sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters," the case should be dismissed. *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *El-Masri v. United States*, 479 F.3d 296, 306-11 (4th Cir. 2007). Similarly, dismissal is also necessary when either the plaintiff cannot make out a prima facie case absent the excluded state secrets, or if the privilege deprives the defendant of information that would otherwise provide a valid defense to the claim. Once the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege is absolute. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

With the increased use of the privilege, more and more thorny discovery issues have erupted in our courts. One such issue is what role protective orders will play to navigate discovery once the state secrets privilege has been properly asserted, but the case is not ripe for dismissal. The Nevada Federal Court case of *eTreppid Technologies v. Montgomery, et al*, consolidated with *Montgomery v. eTreppid Technologies, LLC, et al*, D. Nev. 3:06-cv-00056, addressed this issue.

In *Montgomery,* the military and state secrets privilege was asserted by the government on Sept. 25, 2006, through a public declaration of John Negroponte, then Director of National Intelligence, and a sealed classified declaration presumably of an unknown department head. In these intellectual property cases between former eTreppid business partners, Dennis Montgomery and Warren Trepp, the government was brought in as a party. While at eTreppid, Montgomery worked for the Department of Defense and signed an agreement to not reveal classified information, which, during litigation, he claimed he needed to reveal to defend himself and advance his claims. A recent investigative piece about Dennis Montgomery in *Playboy,* January 2010, entitled, "*The Man Who Conned the Pentagon*," by Aram Roston, indicates that Montgomery's technology may have been a farce, which cost taxpayers tens of millions.

In asserting the state secrets privilege, Negroponte stated, "I have determined that the unauthorized disclosure of certain information…*reasonably could be expected to cause serious and in some cases exceptionally grave damage to the national security of the United States, and thus must be protected from disclosure and excluded from this case.* Therefore, I formally invoke and assert the state secrets privilege." He stated that certain categories of information should be subject to the privilege, including: "the existence or non-existence of any actual or proposed relationship, agreement, connection…or meeting of any kind between any entity in the United States Intelligence Community…and any actual or proposed interest in, application, or use by any entity in the United States Intelligence Agency…of any technology, software, or source code…associated with this lawsuit…the precise nature of the harm that would ensue from the disclosure…is set forth in detail in the in camera, ex parte declaration."

Thereafter, the government moved for a protective order to prohibit discovery of evidence that fell within the privilege. Despite the parameters of what Negroponte seemingly wanted protected in his public declaration, the government's protective order did not track the exact language used by him. The government's proposed protective order expanded and allowed more discovery than what Negroponte sought to safeguard.

Montgomery objected. He wanted a full assertion of the privilege and the cases dismissed. Montgomery argued that the government was trying to call the shots during discovery and government attorneys had exceeded their authority because they were not "department heads" who had "personally considered" the situation, and therefore they could not define the scope of the privilege. See *Edmonds v. United States*, 323 F. Supp. 2d 65, 73 (D.D.C. 2004). He argued that discovery should be constrained by the "explanation" in the department head's declaration, not by the government's version of the department head's explanation, and once the department head had asserted the privilege, the court should define how the case proceeded, if at all, not the government.

Case law supported his position. "Once the state secrets privilege has been properly invoked the district court must consider whether and how the case may proceed in light of the privilege." *Fitzgerald*, 776 F.2d at 1243. "[I]t is the judge who is in control of the trial not the executive." *Kasza*, 133 F.3d at 1159; *Sterling v. Constantin*, 287 U.S. 378, 401 (1932). The court's important role was also recognized in *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Cal. 2006), when the government sought to preclude all discovery and dismiss the cases in the name of national security. The issue was whether AT&T had entered into a secret relationship with the government to secretly track or "dragnet" communications into and out of the United States of persons linked to al Qaeda. The court said, "[w]hile the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court takes seriously its constitutional duty to adjudicate the disputes that come before it." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

The government, on the other hand, claimed that it should determine the scope of the privilege.

The rub in *Montgomery,* and almost every case where the government asserts the state secrets privilege with classified declarations, is that non-government parties are not privy to the sealed classified declaration(s) filed in support of the government's assertion of the privilege. The court, however, is privy and has access to both the public and sealed department head declarations, which is one reason why judges need ample in camera oversight to determine what evidence can be released in discovery, even though "[t]he process of in camera review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system." *See Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (2007).

In rejecting Montgomery's position, the court signed the protective order proposed by the government, and struck the right balance. (*Montgomery v. eTreppid,* D. Nev., 3:06-cv:0056, docket #252-253). Discovery proceeded and the court masterfully preserved and protected state secrets. As the ultimate guardian, the court maintained control over discovery, thereby limiting any intended or unintended displacement of the judiciary by the executive branch, while protecting the interests of the litigants and the government. The case eventually settled when Montgomery and his partner and financier, Edra Blixseth, a former billionaire who has since filed for bankruptcy, signed and gave a $26.5 million dollar judgment to eTreppid.

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In *Montgomery* the government did not try to close down the case, as it has been incorrectly accused of doing in other cases, including *El-Masri.* The opposite occurred.

A comparison of the government's position in *Montgomery* to permit discovery, with *AT&T* to achieve dismissal, and subsequent publicized cases, suggests that both the Bush and Obama administrations attempt to carefully assert this powerful privilege and protect our country, while fairly balancing the rights of plaintiffs to have their day in court, seemingly to the chagrin of the American Civil Liberties Union. As the military and state secrets privilege is more frequently asserted, pragmatic approaches to safeguard military and state secrets, and cautiously navigate through the maze of competing discovery interests, will be important to constitutional principles we all value.