

AN ADMINISTRATIVE LAW APPROACH TO REFORMING THE STATE SECRETS PRIVILEGE

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Many scholars assert that the common law state secrets privilege is abused by government officials who use it to cover up misconduct or prevent embarrassment. For the second time in two sessions, Congress is considering a bill that would require substantive judicial review of the privilege: If the government invokes the privilege, a judge would be required to review each document and determine whether its revelation would harm national security. This Note argues that judicial review alone is unlikely to reform the state secrets privilege effectively because it does not address the underlying incentives that encourage abuse of the privilege by the executive branch. A risk-adverse judiciary is unlikely to challenge assertions of grave harm to national security except in the most blatant cases of abuse. This Note builds the case that administrative law-based reforms will deter government abuse more effectively than judicial review alone by creating disincentives that discourage invocation of the privilege. By making invocation of the privilege more administratively burdensome and by putting the professional credibility of officials who may not benefit from its use on the line, the reforms proposed here would more effectively discourage overreaching in the state secrets privilege context.

INTRODUCTION¹

Over fifty years ago, in *United States v. Reynolds*,² the Supreme Court recognized the government's right to invoke the state secrets

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¹ After this Note was accepted for publication, the Obama administration announced that it would implement new administrative mechanisms to reform the state secrets privilege. See generally Memorandum from Eric Holder, Attorney Gen., to Heads of Executive Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009), available at <http://www.usdoj.gov/opa/documents/state-secret-privileges.pdf>. This announcement was met with criticisms from congressional leaders and civil liberties advocates who argue that "real reform" of the privilege requires external oversight by the judiciary. Press Release, ACLU, Proposed State Secrets Guidelines Don't Relieve Need for Real Reform (Sept. 23, 2009), available at http://www.aclu.org/safefree/general/41124prs20090923.html?s_src=RSS ("Real reform of the state secrets privilege must affirm the power of the courts." (statement of ACLU staff attorney Ben Wizner)); see also Posting of Michael Scherer to Swampland, <http://swampland.blogs.time.com/2009/09/23/barack-obamas-new-state-secrets-policy-the-question-of-court-review> (Sept. 23, 2009, 15:50 EST) ("[Obama's]

privilege: a common law evidentiary procedure that permits the government to withhold evidence from discovery in civil cases if its revelation would threaten the nation's security. Decades later, the plaintiffs in that landmark case discovered that the document the government sought to protect contained no actual state secrets.³ The government likely withheld it only to prevent embarrassment. Off to a rocky start, the state secrets privilege has become only more problematic with age.

Although the exact numbers are difficult to ascertain, the government's use of the state secrets privilege has increased dramatically in the last twenty years.⁴ More problematic is the fact that the federal government has increasingly used the privilege not only as a discovery rule but also as a motion to dismiss lawsuits entirely, even when a plaintiff may have had access to enough evidence to prove her case without the protected information.⁵ Some argue that judges have abdicated their role of scrutinizing government assertions of state secrets, rendering the privilege ripe for abuse as an unchecked trump card for the executive branch to end unfavorable lawsuits.⁶

Many scholars have criticized the expansive scope of the state secrets privilege.⁷ As a result of these allegations of abuse, Congress

new policy is disappointing because it still amounts to an approach of 'just trust us.' Independent court review of the government's use of the state secrets privilege is essential." (statement of Sen. Russ Feingold)).

This Note builds the case that administrative law-based reforms, like those the Obama administration recently proposed and those proposed in Part III, *infra*, will be a more effective means of reforming the state secrets privilege than the judicial review sought by the Administration's critics. The argument presented in this Note does not, however, compel the conclusion that the administration's proposal is sufficiently comprehensive to deter all abuse of the state secrets privilege. Nor does it conclude that legislation mandating the administrative law mechanisms now in place (and expanding upon them) is unnecessary to prevent the next administration from rescinding them. This Note does, however, argue that advocates who seek to reform the privilege should build upon the recently implemented internal administrative law mechanisms as a way to balance incentives rather than rely solely on the judiciary to police the privilege.

² 345 U.S. 1 (1953).

³ See *infra* notes 28–29 and accompanying text.

⁴ See *infra* note 33 and accompanying text.

⁵ See *infra* Part I.B.1.

⁶ For examples of such lawsuits, see *infra* notes 34–37 and accompanying text.

⁷ See, e.g., Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 105–10 (2007) (arguing that privilege has been expanded beyond its original intent). See generally, D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499 (2007) (arguing for creative judicial fixes to state secrets privilege including conducting entire trials *in camera* and limiting privilege to evidentiary standard); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005) (arguing that state secrets privilege is abused).

is considering a bill called the State Secrets Protection Act (SSPA).⁸ The bill, which the academic community largely supports,⁹ calls for substantive judicial review of all documents for which the government claims the privilege.

This Note looks critically at the flawed aspects of the state secrets privilege and argues that proposals for substantive judicial review will not adequately address the core problem of the privilege—the existence of lopsided incentives that encourage government abuse. Congress’s proposed reform of the state secrets privilege is therefore unlikely to achieve its goals for two primary reasons: First, the reform assumes that abuse of the privilege is obvious enough that judges will be able to segregate easily information that does not need to be protected from information that is a genuine state secret. Second, the proposed reform assumes that if full judicial review is mandatory, it will deter abusive invocation of the privilege.

This Note argues that reform relying heavily on increased judicial review will be ineffective because abuse of the privilege is not always blatant or easily identifiable. In a large subset of cases, a risk-averse judiciary cannot reasonably be expected to distinguish genuine state secrets that would harm national security if released from information that the executive branch seeks to withhold for improper reasons. Because the judiciary may be ineffective at identifying improper invocation of the privilege, executive branch abuse of the privilege will continue in all but the most obvious cases. Other incentives are needed to discourage the executive branch from improperly invoking the privilege when significant harm to national security is not at stake. Administrative law mechanisms used in other areas of national security law but wholly lacking in the state secrets context will more appropriately deter abuse by addressing the incentives problems that judicial review alone cannot.

In Part I, this Note examines the history of the state secrets privilege and its current problems. Part II then explores the congressional proposal for reform and its shortcomings. It also looks briefly at an additional proposal for reform that would introduce monetary penalties for use of the privilege and argues that this incentive also would be unlikely to correct the lopsided incentives for invoking the privilege.

⁸ State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009); *see infra* note 84 (discussing SSPA bills in Senate and House of Representatives). Congress also considered this bill in a prior session. State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5607, 110th Cong. (2008).

⁹ *See infra* note 83 and accompanying text.

Part III proposes mechanisms, drawn in part from other areas of national security law, that would cabin the privilege more effectively by creating internal incentives for the executive branch to self-police and to reduce abuse of the privilege. Properly conceived and implemented, the purpose of self-policing is not, as some critics fear, to avoid external scrutiny.¹⁰ Instead, self-policing uses the tools of administrative law to create oversight mechanisms that make it more difficult and less desirable to invoke the privilege while capitalizing on the executive branch's relative expertise in national security. Part III also explores the potential of notice-and-comment procedures from administrative law to help garner public buy-in for the proper use of the privilege while still protecting genuine state secrets. Part III concludes by exploring additional procedures the judicial branch should consider when handling cases that implicate the state secrets privilege.

I

THE PROBLEM OF THE STATE SECRETS PRIVILEGE

A. *The Troubled Birth of the Privilege*

Scholars dispute the historical origin of the state secrets privilege.¹¹ The privilege crystallized, however, when the Supreme Court first acknowledged it in *United States v. Reynolds*,¹² a 1953 case dealing with the domestic crash of a military plane. This landmark case marks the first and last time the Court has dealt directly with the privilege, and the case fittingly foreshadows many of the problems that have surrounded the privilege ever since.

After a military plane carrying "secret electronic equipment"¹³ crashed, the widows of three civil observers who died in the crash filed suit in federal court, asserting that the government's negligence caused their husbands' deaths.¹⁴ During discovery, the plaintiffs requested copies of any accident reports that the Air Force produced

¹⁰ See *supra* note 1 (describing ACLU and Sen. Russ Feingold's opposition to Obama administration's proposal).

¹¹ For discussions of the historical foundations of the state secrets privilege, see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270–80 (2007), which traces the roots of the doctrine from *Marbury v. Madison*, and Weaver & Pallitto, *supra* note 7, at 97–100, which argues that the state secrets doctrine "derives from crown privilege as it developed in the law of England and Scotland."

¹² 345 U.S. 1 (1953).

¹³ *Id.* at 3.

¹⁴ For an extensive background to the case, see generally LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006).

regarding the crash.¹⁵ The government refused to provide its report, asserting several different arguments for its refusal.¹⁶

The Supreme Court found that “the Secretary of the Air Force . . . attempted . . . to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence.”¹⁷ Finding that “[j]udicial experience with the privilege . . . has been limited,”¹⁸ the Court clarified exactly how it could be invoked: “There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”¹⁹

The Court went on to give rather unhelpful advice to judges who would be adjudicating such claims, ruling that “[a] court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”²⁰ The Court in fact admitted that “[t]he latter requirement . . . presents real difficulty”²¹ and then attempted to create a “formula of compromise” between absolute deference to the government and full judicial review, noting that a “court may [not] automatically require a complete disclosure” of the contested evidence.²² Instead, “[i]t may be possible to satisfy the court, from all the circumstances of the case,” that the privilege should apply, without ever “insisting upon an examination of the evidence, even by the judge alone, in chambers.”²³

The Court also found that use of the privilege should turn on the necessity of the documents to the case. When necessity is strong, the privilege “should not be lightly accepted,” but when “necessity is dubious” or there is an available alternative, the privilege will trump.²⁴

The Court concluded in *Reynolds* that the government’s claim of privilege was appropriate without judicial review of the actual con-

¹⁵ *Id.* at 31.

¹⁶ The government originally asserted that the report was outside the scope of discovery. *Id.* It also argued to withhold documents under 5 U.S.C. § 22, the Housekeeping Statute, and made several claims that the reports were “hearsay.” *Id.* At the appellate level, the government asserted constitutional claims and claims of privilege, but, as the Court noted, the “state secret privilege was not singled out.” *Id.* at 60.

¹⁷ *Reynolds*, 345 U.S. at 6–7.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 7–8 (footnotes omitted).

²⁰ *Id.* at 8 (footnotes omitted).

²¹ *Id.*

²² *Id.* at 9–10.

²³ *Id.* at 10.

²⁴ *Id.* at 11.

tested document.²⁵ Noting that “this is a time of vigorous preparation for national defense” and recognizing the importance of technology for “the effective use of air power,” the Court found that “there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.”²⁶ The Court also found that the government’s offer to provide the witnesses it interviewed in its report (i.e., the survivors of the crash) sufficed as an adequate alternative to production of the requested documents.²⁷

Decades after the Court decided the case, the daughter of one of the crash victims discovered the accident report in question on the internet.²⁸ The information that the Air Force had fought to withhold from disclosure was not a military secret at all; indeed, the document contained no reference to secret equipment whatsoever. Rather, the report detailed a “number of mistakes [that had been] made with the plane and by the crew.”²⁹

Despite this new information, a federal district court refused to reconsider the earlier ruling.³⁰ The Third Circuit affirmed, and the Supreme Court denied certiorari.³¹ The revelation confirmed what many had feared: The state secrets privilege was ripe for abuse and left little recourse for those it adversely affected.

B. Criticisms of the State Secrets Privilege

Although it is difficult to determine exactly how often the government has invoked the state secrets privilege,³² there is a general consensus that the use of the privilege has “grown significantly” since the Carter administration.³³ In addition to the increasing frequency of

²⁵ *Id.* at 9–10.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11.

²⁸ FISHER, *supra* note 14, at 167.

²⁹ *Id.* at 168; *see also* Herring v. United States, No. 03-CV-5500-LLD, 2004 WL 2040272, at *8 (E.D. Pa. Sept. 10, 2004) (“The accident investigation report concludes that engine failure caused the crash . . . ; the report also indicates that had the plane complied with the technical orders . . . the accident might have been avoided. It does not . . . refer to any newly developed electronic devices or secret electronic equipment.” (internal citation omitted)).

³⁰ Herring, 2004 WL 2040272, at *11 (granting motion to dismiss).

³¹ Herring v. United States, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006).

³² *See* Lyons, *supra* note 7, at 110 (describing inability of electronic searches to retrieve all cases invoking privilege and discussing possibility of government use of privilege without formal invocation); *see also* Chesney, *supra* note 11, at 1301–02 (same).

³³ Weaver & Pallitto, *supra* note 7, at 101 (“In the twenty-three years between the decision in *Reynolds* and the election of Jimmy Carter . . . there were four reported cases in which the government invoked the privilege. Between 1977 and 2001, there were a total

the privilege's invocation, the types of cases in which the government employs the privilege have broadened beyond the Supreme Court's original intent. Although *Reynolds* involved a mere negligence claim, the government has since used the privilege to quash cases that involve claims of racial discrimination,³⁴ retaliation against whistleblowers,³⁵ misconduct by the CIA,³⁶ and government-sanctioned torture.³⁷

While it is possible to rationalize the growth in number³⁸ and types³⁹ of cases for which the government invokes the privilege, three larger concerns arise with regard to the privilege as it exists today. First, the privilege has evolved from a rule of evidence into a motion to dismiss, thereby serving as an absolute bar to litigation rather than as a surmountable obstacle. Second, the judiciary has proven to be an inadequate check on the government's use of the privilege, giving too much deference to the executive branch's invocation of the privilege and doing little to prevent abuse. Third, the executive branch's recent use of "mosaic theory"⁴⁰ has expanded the privilege to cover even seemingly innocuous evidence.

1. *The Shift from a Rule of Evidence to a Motion To Dismiss*

In *Reynolds*, the Supreme Court recognized state secrets as "a privilege which is well established in the *law of evidence*."⁴¹ As envisioned in *Reynolds*, the government would use the state secrets privi-

of fifty-one reported cases in which courts ruled on invocation of the privilege."); *see also* Chesney, *supra* note 11, at 1302 n.290 (breaking down reported cases and showing increase since 1970). *But see id.* at 1301–02 (arguing that use of privilege cannot be accurately quantified given multiple factors).

³⁴ *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (dismissing discrimination claim by CIA agent against CIA because claim required disclosure of classified information regarding location, names, and duties of CIA employees).

³⁵ Brief for Appellees at 3, *Darby v. U.S. Dep't of Def.*, 74 F. App'x 813 (9th Cir. 2003) (No. 02-16125) (claiming retaliation for reporting safety problems related to Area 51); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 67 (D.D.C. 2004) (dismissing claim of retaliation for whistleblowing about security breaches at FBI).

³⁶ *Black v. United States*, 62 F.3d 1115, 1118–19 (8th Cir. 1995) (dismissing claim of harassment and psychological attacks by CIA and other agencies because facts central to allegation were privileged).

³⁷ *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *see infra* text accompanying notes 45–49.

³⁸ *See* Chesney, *supra* note 11, at 1301–02 (attributing increase in assertion of privilege to amount of litigation implicating classified information).

³⁹ One could argue that the types of cases for which the privilege could be invoked were more limited in the 1950s because several sources of authority for suits against the federal government—including civil rights statutes, whistleblower statutes, and the *Bivens* doctrine—did not exist at that time.

⁴⁰ Mosaic theory is described in Part I.B.3, *infra*.

⁴¹ *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (emphasis added).

lege in the following manner: During discovery, a government official would invoke the state secrets privilege in response to an interrogatory. After determining that the government had invoked the privilege properly, a court would weigh (1) the necessity of the documents to the litigation, (2) the availability of alternatives, and (3) the circumstances of the case that indicated the nature of the secrets involved in order to determine whether granting the privilege was appropriate.⁴² At the end of discovery, if the plaintiff could not make her case because she lacked access to evidence withheld under the state secrets privilege, the government would be able to move for summary judgment and have the suit dismissed as a matter of law.

Instead, in practice, the executive branch “has invoked the privilege even before answering the complaint, and before receiving any requests for discovery,”⁴³ effectively using the privilege as a basis for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).⁴⁴ As a result, the government can bar cases that may implicate state secrets even if the plaintiff can acquire enough nonprivileged evidence to prove her case without the privileged documents.

A recent example of this use of the state secrets privilege is *El-Masri v. Tenet*.⁴⁵ Khaled El-Masri, a German citizen of Lebanese descent, claimed that Macedonian authorities abducted him, rendered him to Afghanistan, and tortured him as part of the CIA’s extraordinary rendition program.⁴⁶ El-Masri’s attorneys asserted that much of the information at stake in the case was already publicly available, including a report on the matter by the Council of Europe, statements by the Secretary of State acknowledging the rendition program, and numerous news reports about El-Masri’s rendition in particular.⁴⁷ Additionally, El-Masri may have been able to establish many of the central facts of the case with evidence he possessed, including evidence of his location based on hair follicle analysis and evidence of his hunger strike.⁴⁸

⁴² *Id.* at 8, 11.

⁴³ Lyons, *supra* note 7, at 118.

⁴⁴ The government does this by simply filing a motion to dismiss claiming that the state secrets privilege applies and that therefore the case cannot be adjudicated. Professor Chesney disagrees with Lyons that this is a recent expansion of the privilege and points out that the state secrets privilege had been used successfully as the basis for motions to dismiss prior to its recent use by the Bush administration in cases following 9/11. Chesney, *supra* note 11, at 1307 & n.320.

⁴⁵ 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d*, 479 F.3d 296 (4th Cir. 2007).

⁴⁶ *Id.* at 532–34.

⁴⁷ Opening Brief for Plaintiff-Appellant at 29–37, *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667).

⁴⁸ See Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States*, Doc. No. 10957, at 26–27 (2006), available at

Both the district court and the Fourth Circuit, however, found that the privilege applied at this early stage of litigation and dismissed the case with prejudice, foreclosing El-Masri's claims of serious violations of his constitutional rights.⁴⁹ This type of motion is not uncommon.⁵⁰

2. *The Ineffectiveness of Judicial Oversight in the State Secrets Privilege*

Many also criticize the state secrets privilege for the extreme deference it receives from a judiciary unwilling to challenge the executive branch's decisions to invoke the privilege. *Reynolds's* muddled instructions regarding the proper level of judicial review of the privilege do not provide clear guidance on how much judicial scrutiny is appropriate.⁵¹

Despite the *Reynolds* Court's declaration that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,"⁵² *in camera* judicial review of the documents at issue happens in fewer than one-third of the cases where the government invokes the privilege.⁵³

<http://assembly.coe.int/Documents/WorkingDocs/Doc06/EDOC10957.pdf> (noting hair follicle testing and other evidence corroborating rendition testimony).

⁴⁹ *El-Masri*, 437 F. Supp. 2d at 541, *aff'd*, 479 F.3d 296.

⁵⁰ *Cf. In re United States*, 872 F.2d 472, 478–80 (D.C. Cir. 1989) (denying government's mandamus motion for appellate review of denial of motion to dismiss due to invocation of state secrets privilege). This use of the privilege by the government arguably conflates the state secrets privilege with the broader *Totten* privilege. *See Totten v. United States*, 92 U.S. 105 (1875); Lyons, *supra* note 7, at 120–23 (arguing that broadening of state secrets privilege inappropriately expands privilege into *Totten*). The Supreme Court recently acknowledged that the *Totten* privilege and the state secrets privilege are different, explaining that "the *Totten* bar [is not] an example of the state secrets privilege." *Tenet v. Doe*, 544 U.S. 1, 10 (2005). *Totten* is an "absolute protection" that prevents any plaintiff from forcing the CIA to acknowledge a covert espionage relationship, *id.* at 11; however, the Court noted, when the CIA has acknowledged that a relationship exists, *Totten* does not apply. *Id.* at 10 & n.5. Notwithstanding this clarification, cases like El-Masri's (which was adjudicated after the Supreme Court's clarification of the difference between the *Totten* and state secrets privileges) have been dismissed at the pleadings stage, effectively treating the state secrets privilege as a *Totten*-like absolute bar.

⁵¹ *See supra* notes 20–23 and accompanying text (summarizing *Reynolds's* discussion of judicial review of privilege). Indeed, the Supreme Court in *Reynolds* seems to have misapplied its own procedure for determining whether the privilege applied to the case at hand. *See Telman, supra* note 7, at 503–04 (noting application of such procedure led to Court's incorrect determination that report contained secret information).

⁵² *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953).

⁵³ Weaver & Pallitto, *supra* note 7, at 101. Caution should be used, however, when quantifying the use of privilege. *See supra* note 33 and accompanying text (citing statistics on government invocation of privilege but noting difficulties in accurately quantifying its use).

One explanation is that judges are merely following *Reynolds*'s command that courts should consider "all the circumstances of the case" and that lower "court[s] should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence."⁵⁴ These instructions encourage deference without clarifying what circumstances warrant judicial intervention.

Another explanation is that this type of deference is not uncommon within the judiciary, which often defers to the executive branch on tough questions involving national security. Courts have found that it "is not within the[ir] role . . . to second-guess executive judgments" regarding national security.⁵⁵ When courts abdicate review, which some argue is the proper approach, they create an area of executive pseudo-immunity, leaving individuals whose rights have been infringed unable to challenge the executive branch's actions.⁵⁶

3. *The Expansive Reach of Mosaic Theory*

Mosaic theory, under which a court may deem exposure of even public information a threat to national security, also has expanded the reach of the state secrets privilege.⁵⁷ Mosaic theory allows even innocuous pieces of unclassified information to fall under the state secrets privilege under the idea that a hostile foreign intelligence officer tasked with piecing together a larger picture of the national security weaknesses of the United States would be able to use those small pieces to create a larger "mosaic" of information, giving her a fuller picture than she would otherwise have.⁵⁸

Assertions of the state secrets privilege based on mosaic theory make evaluating whether any piece of evidence is truly a state secret difficult to adjudicate. While one piece of evidence may seem "otherwise trivial or innocuous[,] . . . it *might* prove dangerous if combined with other information by a knowledgeable actor (especially a hostile

⁵⁴ *Reynolds*, 345 U.S. at 10.

⁵⁵ *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003); see also *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("[I]t is often difficult for a court to review the classification of national security information.").

⁵⁶ See *Halkin v. Helms*, 598 F.2d 1, 14 (D.C. Cir. 1978) (Bazelon, J., dissenting from denial of rehearing en banc) (finding that utmost deference to executive branch on national security issues "conflicts with other decisions of this court as well as Congress's clear mandate for review of national security claims . . . and slights the role of the court in protecting . . . civil liberties").

⁵⁷ See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628 (2005) (documenting development and post-9/11 transformation of mosaic theory and arguing for greater judicial scrutiny of mosaic theory claims).

⁵⁸ *Id.* at 630.

intelligence agency).”⁵⁹ A court cannot possibly understand the danger this one piece of information poses, the argument goes, because it does not have the expertise to understand the context in which it arises and the threat that would arise if someone else had pieced together the context and only needed this one last piece of information. Faced with this type of claim, courts generally rule in favor of the government.⁶⁰

C. *The State Secrets Problem Will Continue To Fester if Unaddressed*

Abuse of the state secrets privilege is likely to continue—and worsen—for two primary reasons: First, there are no disincentives to discourage the executive branch from invoking the privilege; and second, the increased use of classification and pseudo-classification will inevitably lead to an increased number of cases in which litigation implicates government “secrets.”

1. *The Absence of Oversight To Prevent Abuse*

When the Supreme Court solidified the state secrets privilege in *Reynolds*, it placed only one obligation on the executive branch: that “the head of the department” invoke the privilege after giving “actual personal consideration” to whether the privilege is necessary.⁶¹

Congress and the executive branch, however, have developed far more extensive procedures in the last fifty years for protecting individuals’ rights when national security measures affect civil rights. For example, after rampant abuse by the Nixon administration, Congress extensively regulated the use of wiretapping for national security issues.⁶² Additionally, by executive order, each national security agency is now required to develop rules for protecting Americans’ civil rights, and the Attorney General is required to approve these measures.⁶³ Executive orders also created other internal executive

⁵⁹ Christina E. Wells, *CIA v. Sims: Mosaic Theory & Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006).

⁶⁰ See Pozen, *supra* note 57, at 652–55 (describing three types of judicial deference to mosaic claims); see also, e.g., *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (holding that Air Force “properly employed the mosaic theory of classification” after *in camera* review of classified declarations); *Halkin v. Helms*, 598 F.2d 1, 8–9 (D.C. Cir. 1978) (upholding claim of privilege by National Security Agency and noting that “[i]t requires little reflection to understand that the business of foreign intelligence . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. . . . [P]ieces of seemingly innocuous information can be analyzed and fitted into place to reveal . . . how the unseen whole must operate”).

⁶¹ *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

⁶² STEPHEN DYCUS ET AL., *COUNTERTERRORISM LAW* 119–20 (2007).

⁶³ Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2006).

branch checks, including inspectors general and civil rights inspectors.⁶⁴

The state secrets privilege has largely been shielded from such oversight. In fact, the privilege is not subject to any formal internal oversight. The government keeps no record of the number of times it invokes the privilege,⁶⁵ perhaps indicating a reluctance to implement even the most general review mechanisms. Additionally, because the head of any one department can unilaterally invoke the privilege, it is possible that an agency head, like the Air Force Secretary, could invoke it without the Attorney General's knowledge. More importantly, this means that the government may invoke the privilege without the Attorney General having had the opportunity to fulfill its vital role of weighing the department's secrecy needs with the protection of civil rights and constitutional principles.⁶⁶

There is also little external oversight. Unlike other national security tools such as warrants for electronic surveillance under the Foreign Intelligence Surveillance Act (FISA)⁶⁷ and National Security Letters (NSLs),⁶⁸ both of which require the executive branch to report to Congress every time the tool is used, there are no notification requirements for invoking the state secrets privilege.⁶⁹

Furthermore, there have been few consequences for the executive branch even for its obvious abuses of the privilege. In *Reynolds*, for example, the Supreme Court refused to reconsider the case even though the government's bluff was discovered fifty years later.⁷⁰ In a more recent case involving an analogous Freedom of Information Act (FOIA)⁷¹ request, the court discovered as the case progressed that a

⁶⁴ See, e.g., *id.* (establishing obligations for inspectors general and agency heads to report possible violations of criminal laws).

⁶⁵ See Weaver & Pallitto, *supra* note 7, at 111 (finding no documentation for use of privilege after contacting "some three dozen agencies").

⁶⁶ See *infra* Part III.A.1 (arguing that in analogous contexts supervision by Attorney General creates proper incentives to self-police).

⁶⁷ Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1807, 1862 (2006). FISA is discussed more extensively in Part III, *infra*.

⁶⁸ National Security Letters are a powerful national security tool through which the FBI can demand that private individuals and companies turn over information related to national security investigations. These letters do not require a grand jury investigation (as in the case of a subpoena) or judicial oversight (as in the case of a warrant), and thus do not provide for any external oversight. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 115, 120 Stat. 192, 212 (2006) (creating ex post judicial review but not ex ante judicial review of national security letters).

⁶⁹ See *supra* text accompanying note 61 (describing requirements for invoking privilege).

⁷⁰ See *supra* notes 30–31 and accompanying text.

⁷¹ Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006). FOIA allows private parties to request copies of most unclassified government documents, with a few excep-

CIA agent was lying to the court about the Agency's ability to confirm or deny a record.⁷² Although the court refused to accept the agent's testimony, the agent escaped charges of perjury and contempt of court.⁷³ Instead, the court accepted similar testimony submitted by the government from a different official and ultimately still ruled in favor of the government, holding that the Agency could withhold the documents at issue.⁷⁴

Used in this manner, the privilege has become a very effective litigation tactic for the government.⁷⁵ Without any internal or external scrutiny and without any consequences for abuse, executive branch officials have no incentive to reduce or self-police the use of the privilege.⁷⁶

2. *The Increased Use of Secrecy in Government*

Compounding the lack of oversight of the state secrets privilege is the fact that secrecy within government is growing. In 2007, the most recent year for which statistics are available, 23,102,257 documents were marked classified⁷⁷—nearly quadruple the number of documents classified ten years earlier.⁷⁸ While an increase in intelligence gathering may account for some of this growth, it cannot explain away the trend entirely. In a hearing on overclassification before the U.S. House of Representatives, Deputy Under Secretary of Defense Carol Haave admitted that approximately fifty percent of classifications are unnecessary.⁷⁹ In addition, as the number of classified documents

tions. It operates much like discovery in civil cases, but no litigation is necessary, so normal discovery rules do not apply. Instead, the Act contains exceptions that allow the government to withhold documents that may harm national security if they are revealed. *Id.* § 552(b)(1). The decision to withhold documents is subject to judicial review. *Id.* § 552(a)(4)(B).

⁷² *Nat'l Sec. Archive v. CIA*, Civil Action No. 99-1160, at 1-3 (D.D.C. July 31, 2000); see also Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 164-65 (2006) (describing *Nat'l Sec. Archive*).

⁷³ Fuchs, *supra* note 72, at 165.

⁷⁴ *Id.*

⁷⁵ See Lyons, *supra* note 7, at 110-11 ("There are instances where the privilege has initially been defeated; but frequently, the government gets a second bite at the apple and the privilege is upheld.").

⁷⁶ See Fuchs, *supra* note 72, at 147-55 (detailing government incentives to use privilege, including foreclosing inquiries into misconduct and controlling public opinion).

⁷⁷ INFO. SEC. OVERSIGHT OFFICE (ISOO), REPORT TO THE PRESIDENT 7 (2008), available at <http://www.archives.gov/isoo/reports/2007-annual-report.pdf>.

⁷⁸ INFO. SEC. OVERSIGHT OFFICE (ISOO), REPORT TO THE PRESIDENT 1 (1998), available at <http://www.archives.gov/isoo/reports/1997-annual-report.pdf>.

⁷⁹ *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 108th Cong. 81-82 (2004), available at

increases, there appears to be a decrease in the number of documents that are declassified each year.⁸⁰

Furthermore, new “pseudo-classifications” compound the sheer number of net classified documents. Government officials now routinely mark documents as “Sensitive but Unclassified” and “For Official Use Only.”⁸¹ It is unclear whether the information in these documents, which are not classified pursuant to executive order, legislation, or regulation, would qualify as a state secret.

This proliferation of secrecy, which neither Congress nor the executive branch has been able to stem successfully, will certainly create more situations in which documents needed for litigation may be subject to the state secrets privilege.

II

THE LIMITS OF REFORMING THE PRIVILEGE THROUGH JUDICIAL OVERSIGHT

The principal plan that has emerged from Congress and that has been proposed by scholars to address problems with the state secrets privilege is to increase judicial scrutiny.⁸² In this Part, the Note describes how judicial review would work and why it will not fully address the core problems identified in Part I.

A. *The Proposal for Increased Judicial Scrutiny*

Many scholars have advocated for increased judicial scrutiny of documents that the government claims the state secrets privilege pro-

<http://www.fas.org/sgp/congress/2004/082404transcript.pdf> (statement of Carol A. Haave, Deputy Under Secretary of Defense, Counterintelligence Secretary, United States Department of Defense).

⁸⁰ RICK BLUM, OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD: QUANTITATIVE INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 6 tbl.3 (2004), available at http://www.openthegovernment.org/otg/secrecy_reportcard.pdf.

⁸¹ *An Introduction to the Freedom of Information Act: Hearing Before the Subcomm. on Government Management, Finance, and Accountability of the H. Comm. on Government Reform*, 109th Cong. 2 (2005), available at <http://oversight.house.gov/documents/20050511151955-06597.pdf> (statement of Rep. Henry A. Waxman).

⁸² See sources cited *infra* notes 83–84. Professors Amanda Frost and Robert Chesney have proposed another solution in which judges would certify a question to Congress regarding whether the privilege should apply. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1958–62 (2007); Chesney, *supra* note 11, at 1312. Because Congress has never considered these proposals, and because they present extraordinary logistical and constitutional questions, Frost, *supra*, at 1959, I do not address them here. The Obama Administration recently proposed reforming the state secrets privilege through internal oversight. See *supra* note 1. I address these reforms in note 137, *infra*.

teets.⁸³ Congress has considered bills that would incorporate some of these recommendations.⁸⁴ For the purposes of this Note, I use the proposal introduced in the Senate in 2009 as a model of judicial scrutiny requirements because it reflects the input of many scholars and is the most comprehensive version of what a judicial review scheme would require.

Under this Senate bill, the government could not use the state secrets privilege as grounds for a motion to dismiss.⁸⁵ Instead, rejecting the *Reynolds* Court's recommendation that courts fully defer to the government when appropriate, the proposal would require courts to review each "specific item of evidence" for which the government has invoked the privilege (or a sampling of the documents if they are too numerous to examine individually) "to determine whether the claim of the United States is valid."⁸⁶ For the privilege to be granted, the proposal requires that the evidence "contain[] a state secret [and that there be] no possible means of effectively segregating it from other evidence that contains a state secret."⁸⁷ A state secret is defined as "any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States."⁸⁸

The court is given tools to aid in this determination, including *in camera* review,⁸⁹ the ability to delay proceedings until the plaintiff's attorney is able to obtain security clearances,⁹⁰ permissible *ex parte* hearings,⁹¹ and the ability to assign a special master to aid in the determination of the privilege's application.⁹²

⁸³ See, e.g., AM. BAR ASS'N, REVISED REPORT 116A (2007), available at <http://fas.org/sgp/jud/statesec/aba081307.pdf> (endorsing set of standards and procedures to increase judicial oversight of state secrets privilege); Fuchs, *supra* note 72, at 168–75 (arguing that judiciary is competent to review government secrecy claims and that such review is part of judiciary's constitutional responsibilities); Telman, *supra* note 7, at 518–27 (lamenting that "courts have transformed the [p]rivilege into a new form of executive immunity").

⁸⁴ In 2008 and 2009, bills were introduced into both the Senate and the House. State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5607, 110th Cong. (2008); State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009). The Senate bills were debated in the Judiciary Committee and many changes were negotiated; however, the Act was never passed. For purposes of this analysis, I am using S. 417, 111th Cong. (2009). S. 417 is not substantively different from S. 2533 as reported to the Senate from the Judiciary Committee.

⁸⁵ S. 417.

⁸⁶ *Id.* § 4054(e)(1).

⁸⁷ *Id.*

⁸⁸ *Id.* § 4051(2).

⁸⁹ *Id.* § 4052(b)(1).

⁹⁰ *Id.* § 4052(c)(2).

⁹¹ *Id.* § 4052(b)(2).

⁹² *Id.* § 4052(f).

If the court finds that the evidence is privileged, it must determine whether “it is possible to craft a non-privileged substitute . . . that provides a substantially equivalent opportunity to litigate the claim or defense.”⁹³ If the United States is the defendant and if the United States refuses to provide a nonprivileged substitute, the court is required to “resolve the disputed issue of fact or law to which the evidence pertains in the non-government party’s favor.”⁹⁴

B. *The Incentive Problems*

These procedures are not wholly original. Many of them are similar to procedures now used in the Classified Information Procedures Act (CIPA).⁹⁵ Congress designed CIPA to protect the disclosure of classified information in criminal trials, especially the disclosure of classified information by the defendant.⁹⁶ The two major issues CIPA addresses are (1) the government’s interest in preventing the disclosure of classified information and (2) the defendant’s right to use classified evidence in his defense. CIPA requires pretrial notice regarding what information the defendant intends to disclose at trial⁹⁷ and allows the parties to admit agreed-upon substitutes instead.⁹⁸ If the government decides that even substitutes offer inadequate protection, the court must take “appropriate” action, including dismissing the parts of the indictment that depend on the classified information.⁹⁹

CIPA’s effectiveness relies on dueling internal incentives within the executive branch: its motivation to prosecute and its duty to prevent potential harm to national security by protecting classified information. Another possible motive is less benign—the desire to cover up embarrassing or illegal acts within the administration.¹⁰⁰ When determining whether to reveal sensitive information, therefore, executive officials balance whether the incentive to prosecute is stronger

⁹³ *Id.* § 4054(f).

⁹⁴ *Id.* § 4054(g). As discussed in Part II.E, *infra*, this pro-plaintiff rule, even taken to an extreme, will have little effect on the incentives inside the executive branch.

⁹⁵ Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2006).

⁹⁶ For a full background on CIPA, see 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5672 (1992).

⁹⁷ 18 U.S.C. app. § 5.

⁹⁸ *Id.* § 6(c).

⁹⁹ *Id.* § 6(e).

¹⁰⁰ For example, during the course of prosecuting a case alleging the theft of nuclear secrets, one embarrassment that surfaced was that documents involving top-secret nuclear information were improperly classified and routinely mishandled. DAN STOBBER & IAN HOFFMAN, *A CONVENIENT SPY: WEN HO LEE AND THE POLITICS OF NUCLEAR ESPIONAGE* 217–29 (2001). This type of revelation not only undermined the government’s case but, when it was revealed, triggered intense congressional scrutiny and criticism of how executive officials had handled secret materials. *Id.* at 217–18.

than the risk of harm to national security or potential embarrassment.¹⁰¹ Logically, when the risk of harm to national security or potential embarrassment, or the combination of the two, is stronger than the motivation to prosecute, it would be rational for the government to drop the prosecution (and vice versa).¹⁰²

What happens when the motivation to prosecute—the primary motivation to disclose classified information—is removed? There is some evidence that intelligence agencies and perhaps even the Department of Justice (DOJ) have refused to allow the disclosure of classified information at criminal trials not because of concerns of national security but to prevent the prosecution of government officials.¹⁰³ In the state secrets context, there is no incentive to prosecute, which throws the delicate balance of incentives that exist in the CIPA context into limbo.

Additionally, the government may want to stymie a civil suit for another reason—to prevent paying any monetary damages as a result of alleged government misconduct. This makes the motivations against revealing state secrets even stronger than in the CIPA context, because in a civil case the cost includes not only the harm to national security and the potential embarrassment to the government but also the potential payment to the plaintiff if the government loses the lawsuit.

Repudiating allegations of wrongdoing is the only incentive the government has against invoking the privilege. It is unclear, however, how strong this incentive is, because the government can still “win” the case by simply refusing to participate and invoking the state secrets privilege. The rest of the incentives—the harm to national security, the avoidance of embarrassment, and the avoidance of paying civil damages—all weigh in favor of invoking the privilege.

Because potential vindication is a weak motivation, and because there is no potential punishment for falsely invoking the state secrets privilege, the rational choice for the government is to continue to over-invoke the privilege and refuse to disclose the documents in almost every case, regardless of whether revealing the document would in fact harm national security.¹⁰⁴

¹⁰¹ In this Note, I use the phrase “potential embarrassment” to indicate any motivation by the government that is not related to genuine harm to national security caused by the revelation of a state secret, including the desire to cover up misdeeds, incompetence, or other matters that are related to a personal—not national—interest.

¹⁰² Or, more likely, the government will drop the charges that require revelation of the classified information in favor of other charges that do not require the documents.

¹⁰³ WRIGHT & GRAHAM, *supra* note 96, § 5672, at 744 nn.17–19 and accompanying text.

¹⁰⁴ Whether substantive judicial review changes these incentives is discussed in Part II.D, *infra*.

C. *The Role of Plaintiffs*

The effectiveness of substantive judicial review as a solution to abuse of the state secrets privilege relies heavily on another player—a sophisticated plaintiff. Here again, the CIPA context is different from the state secrets context in two ways. First, in CIPA cases, the government wants to help the judge disentangle classified information from the necessary evidence in order to further its prosecution. Second, it is expected that a CIPA defendant will often already know or have access to the classified information that she wishes to present at trial¹⁰⁵ and therefore is likely to be in a stronger position to argue its relative harm to national security (or lack thereof).

In the state secrets context, however, the plaintiff may not know whether there is classified information involved or the relative value of the classified information. Although the judicial review mechanism is an attempt to level the playing field for the plaintiff by allowing the plaintiff's lawyer to receive security clearance and an opportunity to argue *in camera*,¹⁰⁶ plaintiffs still face the disadvantage of not having long-term familiarity with the documents and their use by the government. It is unlikely that a plaintiff who is not knowledgeable about the classified documents at issue will be able to argue successfully that there is no genuine harm to national security.

Furthermore, “state secrets” include far more information than CIPA, perhaps making the doctrine more conducive to mosaic theory¹⁰⁷ or other similarly vague claims. CIPA covers only properly classified information and specific restricted data.¹⁰⁸ State secrets, however, generally are seen to include even nonclassified information and may be so expansive as to include “*any* information that, if dis-

¹⁰⁵ Cf. Classified Information Procedures Act, 18 U.S.C. app. § 5 (2006) (requiring defendant to give notice of intent to use classified information). For example, in the *Wen Ho Lee* case, Lee was a government employee with access to classified information, and the government indicted him for illegally transferring classified documents. Indictment at 3, 16, *United States v. Lee*, No. 99-1417 (D.N.M. Dec. 10, 1999), available at http://www.fas.org/irp/ops/ci/docs/lee_indict.html. While the government never charged him with espionage, see Paul Farhi, *U.S., Media Settle With Wen Ho Lee: News Organizations Pay To Keep Sources Secret*, WASH. POST, June 3, 2006, at A1, there was concern that Lee could threaten to reveal the secrets contained in the classified documents at trial and use this to “greymail” the government to drop the charges.

¹⁰⁶ See *supra* notes 89–91 and accompanying text (discussing *in camera* review and other tools in Senate proposal to aid judicial review of state secrets claims).

¹⁰⁷ Mosaic theory is discussed in depth in Part I.B.3, *supra*.

¹⁰⁸ 18 U.S.C. app. § 1 (“‘Classified information’, as used in this Act, means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954.”).

closed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.”¹⁰⁹ Allowing state secrets to include such a broad swath of information signals to courts that the privilege covers seemingly innocuous information, because if the privilege were restricted *only* to properly classified information, the definition of a “state secret” would be far more limited. Plaintiffs, like the widows in *Reynolds*, would be hard-pressed to argue convincingly that the government’s mosaic theory or any other vague argument is too expansive in the face of this broad definition of state secrets.

D. *The Current Effectiveness of Judicial Scrutiny*

This Note argues that judicial review will not necessarily be successful in determining whether information is a genuine state secret. As outlined below, judicial scrutiny in the state secrets privilege context fails to address any but the most obviously erroneous assertions of the privilege. Perhaps the *Reynolds*-like cases would be avoided, but less blatant cases are more numerous. In those cases there would be few incentives to reduce executive abuse—and judges would continue to lack significant guidance to determine whether the state secrets privilege should apply.

A major argument for judicial scrutiny is the *Reynolds* case itself: Had the Supreme Court simply allowed the trial court to demand *in camera* review of the document or to rule against the government when it refused to provide the document, such review arguably could have averted the fraud upon the court.

Although *Reynolds* might be an ideal case for demonstrating the effectiveness of judicial review, at the other extreme, there may be cases, as demonstrated below, where no judge is likely to be able to overrule a claim of state secrets privilege even with all of the relevant information. At this opposite extreme, the problem for plaintiffs is not that judges are ill-qualified to identify blatant abuse but that there appears to be a genuine threat to national security or foreign policy militating against denial of the claimed privilege. Between these two extremes are cases where there is no obvious governmental abuse, but where it is uncertain whether revelation of the information over which the government claims the privilege would harm national security. The success of reforms that rely on judicial review depends on whether judicial scrutiny will be effective in these middle-ground cases.

¹⁰⁹ State Secrets Protection Act, S. 2533, 110th Cong. § 4051(2) (2008) (emphasis added).

This section looks at the practice in analogous areas of law to examine whether judicial scrutiny might be effective in middle-ground cases in the state secrets context. First, judicial scrutiny has provided some relief to plaintiffs in the analogous FOIA context.¹¹⁰ In one FOIA case for example, after *in camera* inspection, a court ordered the release of some documents that were “easily segregable,” although most of the documents were found to be properly withheld.¹¹¹ The use of special masters to review records also has helped plaintiffs in FOIA cases. In *Washington Post v. Department of Defense*,¹¹² the Department of Defense eventually “released approximately 85 percent of the records that it originally had denied [the plaintiff access to, previously designating them] as secret.”¹¹³ The procedure of third-party scrutiny “resulted in pressure on the government to conduct a better review of the records to determine what could be released.”¹¹⁴

Neither of these cases, however, involved mosaic theory, and the judges involved did not release information that the government continued to contest was harmful to national security. In *Washington Post*, the items released, which the Department ultimately acknowledged were miscategorized, involved the spoilage of food rather than more serious issues such as irregular rendition, torture, retaliation, or discrimination.¹¹⁵

Next, this Note examines what might have happened if there had been judicial review in recent state secrets cases. The obvious case where judicial review is likely to work is one in which the government blatantly lies. The best example of this situation is *Reynolds*.¹¹⁶ If a case like *Reynolds* were brought today, and a court subjected the government to substantive judicial review of its state secrets privilege, presumably the issue would resolve in one of three ways. First, the government would likely not assert the state secrets privilege, knowing that its claim would not stand up to judicial scrutiny. Second, if the government did assert the privilege, the court would reject it

¹¹⁰ In this section, I analogize to FOIA cases because there is little evidence about the effectiveness of judicial review in state secrets cases. The FOIA context is analogous, because in these cases the government claims that it cannot reveal the information sought due to national security concerns.

¹¹¹ *Public Citizen v. Dep’t of State*, 276 F.3d 634, 639 (D.C. Cir. 2002).

¹¹² *Wash. Post v. Dep’t of Def.*, 766 F. Supp. 1 (D.D.C. 1991).

¹¹³ Fuchs, *supra* note 72, at 175.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (citing *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 109th Cong. 20 (2005), available at <http://www.fas.org/sgp/congress/2005/030205overclass.pdf>).

¹¹⁶ See *supra* Part I.A (discussing *Reynolds*).

upon reviewing the document. Even if the government claimed that the document needed mosaic theory-type protection, the judge could demand that a redacted substitute merely show that the accident was the result of negligence. Third, the government could assert the state secrets privilege and refuse to turn over the document. In this case, as the proposal suggests, the court should automatically rule against the government on the piece of evidence, perhaps resulting in a verdict for the plaintiff.

In cases such as *El-Masri*,¹¹⁷ however, where documents are legitimately expected to implicate national security but the harm that their revelation would cause is disputed, judicial scrutiny may not change the outcome, at least with regard to the release of the contested documents. While *El-Masri* might have been allowed to proceed at least to discovery, the government still would have invoked the privilege.

The government's brief noted specific harms that would occur if the court forced it to disclose any information surrounding *El-Masri's* rendition, although it made those claims in a classified brief not available to the public.¹¹⁸ It is not difficult to imagine that the government would claim that any disclosure of the individuals and countries involved would compromise an integral part of an antiterrorism program and damage its diplomatic relationships with the cooperating countries, potentially also compromising the governments of those countries.

It seems unlikely that a judge in *El-Masri's* case would have found any way to release documents or substitutes relating to his claims.¹¹⁹ At the very least, the government would continue to claim that such a result would gravely harm diplomatic relations, and the court would not be able to reject easily the application of the privilege. While the court might try to sort through the availability of substitutes, the government has every incentive to fight each attempt to designate a substitute as inadequate to protect national security—any substitute might essentially admit that Macedonian and Afghani offi-

¹¹⁷ See *supra* Part I.B.1 (discussing *El-Masri*).

¹¹⁸ See Brief of Appellee at 36–37, *El-Masri v. Tenet*, No. 06-1667 (4th Cir. Sept. 11, 2006) (asserting “classified declaration” both describes “grave harms” resulting from revelation of declaration’s contents and “explains why the harm that may result from further proceedings . . . cannot be described more precisely on the public record”).

¹¹⁹ The government, for example, claimed that while there may be evidence of *El-Masri's* torture, that would not justify forcing the government to reveal the identity of other individuals who have (or have not) been involved in the program, the location of sites used . . . , the identity of foreign governments that may have cooperated in or known about the program and the nature or extent of any such cooperation, and other information concerning the Nation’s intelligence-gathering capabilities, sources, or methods, or foreign affairs.

Id. at 27–28.

ciala were complicit in El-Masri's abduction and torture, which would be no less problematic for our foreign relations.¹²⁰ Faced with classified government threats of serious foreign policy implications, a judge would most likely rule in favor of the government's right to use the privilege. Although the judge must rule as a matter of law that the questions of fact resolve in El-Masri's favor without a substitution, this ruling and whatever compensation that El-Masri may win from this concession would be far from the justice that he had sought—an official acknowledgement, explanation, and apology.¹²¹

The more pertinent question is whether judicial review might work in cases that legitimately implicate some need for governmental secrecy but where a substitute *might* be crafted. Consider, for example, *Edmonds v. United States Department of Justice*,¹²² brought by Sibel Edmonds, a contract linguist at the FBI. During the course of her employment, she reported to "FBI management officials . . . serious breaches in the FBI security program and a breakdown in the quality of translations as a result of willful misconduct and gross incompetence."¹²³ She was subsequently fired, which she claimed was in retaliation for whistleblowing.¹²⁴

The government asserted the state secrets privilege, claiming that the nature of her employment and the facts surrounding her termination would compromise national security.¹²⁵ After reviewing the classified declarations submitted by the government, the court ordered "the government to specifically detail why it is not possible to disentangle sensitive information from nonsensitive information to permit the plaintiff's claims to go forward and for the government to defend against these claims."¹²⁶ The court ended up ruling in the government's favor after the "government subsequently submitted an additional classified declaration specifically addressing in great detail why each of the plaintiff's claims is unable to go forward without the release of privileged information."¹²⁷

In this case, the court did not review the actual documents that were at issue; it merely reviewed the government's declarations. But

¹²⁰ See, e.g., *id.* at 40–47 (opposing "creative" special procedures to allow admission of evidence).

¹²¹ Press Release, ACLU, Khaled El-Masri, Victim of CIA Kidnapping and Abuse, Seeks Acknowledgement, Explanation and Apology (Nov. 28, 2006), available at <http://www.aclu.org/safefree/extraordinaryrendition/27520prs20061128.html>.

¹²² 323 F. Supp. 2d 65 (D.D.C. 2004).

¹²³ *Id.* at 67.

¹²⁴ *Id.* at 68–70.

¹²⁵ *Id.* at 68.

¹²⁶ *Id.* at 78–79.

¹²⁷ *Id.* at 79.

the government would likely file the same declarations even if the court were to review the actual documents. As discussed above, unlike in the CIPA context, there is no incentive for the government to disentangle the secret information or to agree to a substitute.

Faced with government assertions of disastrous consequences “in great detail,”¹²⁸ a court would then be left to try to parse whether the information could be disentangled or substituted. If the government asserts that mosaic theory applies, this task might be impossible. Since under mosaic theory even a seemingly innocuous piece of information, like the number of translation employees in the FBI or allegations of incompetent management, could threaten national security, without the government’s help a court would be hard pressed to conclude that it could determine whether admittedly unclassified information could be released. While it is impossible to know for certain what the documents might reveal and how a court might react, it is reasonable to hypothesize that a court would rather err on the side of caution—and arguably, it is in the best interest of the nation for it to do so. Even if the government cries wolf too many times, no judge wants to be the one to have called the government’s bluff incorrectly.

These cases demonstrate that, while the proposed reform may result in mandatory findings of fact against the government, the reform would not result in the government reducing its overreliance on the privilege or providing substitutes for the documents at issue. Instead, it is most likely to result simply in default verdicts for some plaintiffs.¹²⁹

E. The Potential and Shortcomings of a Pro-plaintiff Default Rule

Another proposal for reform that attempts to address the incentives issue is the creation of a pro-plaintiff default rule¹³⁰—that is, when the government successfully invokes the state secrets privilege, it results in an automatic ruling in favor of the plaintiff.¹³¹ For example, in *Reynolds*, when the government successfully invoked the

¹²⁸ *Id.*

¹²⁹ While default verdicts for plaintiffs would provide at least some compensation, which plaintiffs in state secrets cases are currently denied, this proposed change fails to address what I contend is the real purpose of state secrets privilege reform: to prevent the invocation of the privilege in order to avoid acknowledging responsibility and in order to cover up misconduct by executive officials.

¹³⁰ While this pro-plaintiff rule is stronger than the one discussed above, the same critique regarding the insignificantly changed incentives also applies. *See supra* note 94 and accompanying text.

¹³¹ *See* J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 601–09 (1994) (proposing two alternate compensation schemes for when government invokes state secrets privilege).

state secrets privilege for the crash report, thereby blocking the plaintiff's ability to investigate the reasons for the crash, the court would then rule in favor of the plaintiff, finding negligence as a matter of law rather than fact.¹³²

The theory behind this default rule is that like the incentive to prosecute, it creates an incentive for the government to reveal the information. When one considers the actual incentives behind asserting the privilege, however, this default rule does not substantially change the outcomes.

For the purposes of exploring these incentives, assume the worst-case scenario for the government: The government always loses the case when it successfully asserts the state secrets privilege, resulting in a full payment to the plaintiff. The incentives are somewhat changed in this scenario. The government must weigh the potential harm to national security and the potential embarrassment from revealing the state secret against the definite payout when invoking the state secrets privilege. If the potential harm and embarrassment outweigh the cost of paying the plaintiff's claimed damages, the government should not reveal the information.

Additionally, if we assume the worst about government abuse—that there is no real threat to national security (as in the case of *Reynolds* and as many scholars fear is often the case)—then the government only weighs the cost of the payout against the potential embarrassment.

Whenever the potential for embarrassing the government by revealing the information outweighs the one-time payout for invoking the privilege, the government should still logically refuse to reveal the information. Even if the government has to pay the plaintiff damages, it still has protected itself from embarrassment, a powerful incentive when the person with the most to lose (the head of the department that would be embarrassed) is making the decision whether to reveal the information and does not bear the monetary cost herself.

To counterbalance these incentives, a pro-plaintiff default rule might use an increased punishment, like treble damages, to further incentivize the government against unnecessary invocation of the privilege. But increased monetary damages only change the degree of incentive weighing against government abuse—not the type. As outlined below, monetary penalties may have little effect on government actors.

¹³² The original *Reynolds* district court ruled in favor of the plaintiff for exactly this reason when the government refused to submit the document for *in camera* review, but it was later reversed by the Supreme Court. *United States v. Reynolds*, 345 U.S. 1, 5, 12 (1953).

The concept of monetary penalties as a countervailing weight relies on several assumptions. First is the idea that avoidance of embarrassment is quantifiable.¹³³ Second, and perhaps more important, this model assumes that the actor trying to avoid embarrassment will be rational. Embarrassment is not an emotion that generally lends itself to rational action.¹³⁴

But even if the government, in avoiding embarrassment, was a rational decisionmaker, the question of who pays is also a major factor. This model assumes that the decisionmaker who is avoiding embarrassment pays the cost of that embarrassment. But in reality, the taxpayers foot the bill for avoiding embarrassment rather than the executive branch or the individual department head. A rational decisionmaker may be willing to allow another individual to pay far more to cover up his personal embarrassment than he himself would be willing to pay. And even if there are political ramifications for spending money to avoid embarrassment—that is, even if a high payout draws criticism from taxpayers—the punitive damages might have to be extraordinarily high in order to create this incentive, given that multimillion-dollar spending is not unusual for the federal government.

In addition to the above concerns, a pro-plaintiff default rule could create perverse incentives for plaintiffs. CIPA was passed in part because of concerns about greymail—that is, that criminal defendants would stymie government prosecutions by threatening to reveal classified information at trial.¹³⁵ A plaintiff who believes that her claim may implicate a genuine state secret would realize that the government may be willing to pay large sums to protect that secret. The plaintiff would now be motivated not only by recovering her own damages but also by the hefty punitive damages, less her cost of litigation. These incentives may also encourage plaintiffs whose cases do not necessarily implicate state secrets to try to broaden their claims, since successfully forcing the government to invoke the state secrets privilege would work in the plaintiff's favor, providing the plaintiff with punitive damages she would not otherwise be entitled to and also potentially reducing litigation costs since such a case may never reach the trial phase.¹³⁶

¹³³ It is arguable, however, that blackmail is an example of the quantification of embarrassment.

¹³⁴ Consider the idea that exorbitant sums are demanded and paid as a result of blackmail as a demonstration of the irrationality of the actor being blackmailed.

¹³⁵ DYCUS ET AL., *supra* note 62, at 529–30.

¹³⁶ Perhaps a solution to the problem of creating inappropriate incentives for plaintiffs would be to include punitive damages that create negative incentives for the government

In sum, a pro-plaintiff default rule is unlikely to prevent the government from invoking the state secrets privilege to avoid embarrassment, even when there is no genuine threat to national security. Although such a rule would provide plaintiffs with some relief by compensating them for their injuries, it would fail to vindicate their claims or satisfy their desire to know the truth. Further, a pro-plaintiff default rule that includes punitive damages may prevent the government from invoking the state secrets privilege in some cases when it would have otherwise done so, but it is unclear how effective this incentive would be or how large a punishment would have to be in order to create the necessary deterrent against overreliance on the privilege.

III

POTENTIAL ADMINISTRATIVE AND PROCEDURAL REMEDIES

The above analysis shows that while substantive judicial review of documents that could allegedly damage national security if released might resolve some cases, there are a large number of cases where judicial review will not help. In cases where judicial review may not reduce the government's incentives to abuse the state secrets privilege, other remedies internal to the executive branch may be more successful.¹³⁷

In the sixty years since *Reynolds*, the administrative state has grown significantly in the United States. With that growth has come the development of effective, internal administrative checks using

but not to award those damages to the plaintiff. Instead, these punitive damages would go to a third party, such as a charity. However, this still assumes that some amount of money paid by taxpayers would outweigh potential government embarrassment.

¹³⁷ Between the acceptance and publication of this Note, the Obama administration announced internal executive branch reforms for the use of the state secrets privilege. These measures include several of the reforms proposed in this Note, such as Attorney General approval and reporting to Congress, and other reforms consistent with those proposed here, such as the use of a review board to approve the use of the privilege. See note 1, *supra*. Although some of these reforms mirror proposals in this Note, the Obama administration has not outlined the underlying justifications for the reforms—specifically, why internal executive branch reforms are preferable to adopting the congressional proposal of increased judicial oversight. This Part argues that executive branch reforms are necessary for effective oversight of the privilege. The Obama administration's reforms, while perhaps only a starting place, see note 1, *supra*, are a welcome change, and, as this Note argues, they are more likely to be an effective step toward cabining abuse of the privilege than judicial review alone.

“structural separation and supervision within an agency”¹³⁸ in addition to judicial review.

This Part applies the administrative law approach of creating internal checks to the state secrets privilege. It proposes executive branch reforms that may reduce abuse of the state secrets privilege by increasing incentives for executive officials to self-police. Self-policing is not a method of avoiding external oversight. Instead, it is a mechanism that capitalizes upon the executive branch’s expertise in national security while creating disincentives for using the privilege in two ways: It makes invocation of the privilege more difficult administratively, and it creates burdensome consequences for its successful invocation. There is evidence that internal self-policing has been successful in other areas of national security law. Additionally, basic accountability mechanisms used in other areas of national security law are notably absent from the administration of the state secrets privilege, including reporting mechanisms and inspectors general.

Section A begins by exploring how these mechanisms have worked in other areas of national security law and then discusses how one may apply them in the context of the state secrets privilege. It then discusses how to cabin mosaic theory. Drawing on notice-and-comment procedures from the administrative law paradigm, it proposes a similar mechanism for determining the circumstances under which the government may invoke the state secrets privilege. This reform may help restrict the privilege while garnering public support for the scope of information that the privilege should cover.

Section B explores additional judicial mechanisms beyond substantive judicial review that may more appropriately address problems with the privilege and its stymieing effect on civil litigation.

A. Administrative Reform for State Secrets

1. Creating Incentives To Self-Police

Instead of creating a system based on the CIPA, a better approach to state secrets regulation may be a self-contained, heavily administrative paradigm like the one that governs FISA.¹³⁹ When the government seeks a warrant under FISA, the government’s incentives are one-sided, and there is no adversarial process to provide an advocate to counter the government’s assertions of harm to national security. FISA, however, more effectively constrains the government

¹³⁸ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 887 (2009) (describing how internal checks prevent abuse by diffusing agency power among individuals).

¹³⁹ See Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1871 (2006).

than the current common law state secrets privilege by using internal mechanisms to deter abuse.¹⁴⁰

FISA governs electronic and physical searches related to surveillance of foreign powers, broadly defined to include foreign government agents, spies, foreign terrorist organizations, and their members, among others.¹⁴¹ The Fourth Amendment's usual warrant process does not govern these searches; they fall instead under the executive branch's broad intelligence-gathering authority derived from its national security and war powers. Like the state secrets privilege, when this warrantless search power was first recognized it involved lopsided incentives—the government had every interest in surveilling potential enemies and had little disincentive against overreaching. Also like the state secrets privilege, this executive power was ripe for abuse, and during the Nixon administration, the government heavily abused it—not only for spying on foreign enemies but also Nixon's domestic political enemies.¹⁴² To prevent abuse, Congress passed FISA, requiring the government to apply for a special warrant to conduct foreign intelligence surveillance¹⁴³ and creating a special court,¹⁴⁴ composed of Article III judges, which must approve the application.

While the special court usually approves FISA warrants, the DOJ must undergo a rigorous process to apply, which includes a statement of facts, a description of procedures to minimize the collection, retention, and dissemination of information gathered (“minimization”), details on the facilities that the government will use, the information the government expects to obtain, and certification by the Attorney General.¹⁴⁵ Furthermore, because the same officials at the DOJ appear before the same seven judges for these warrants over many years, DOJ officials have incentives to maintain credibility as repeat players. Judges who are intimately familiar with the process can easily

¹⁴⁰ It should be noted that the FISA process also has been harshly criticized, especially after recent amendments that broadened executive power and reduced judicial oversight. See William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1214 (2007) (“This Article is a requiem for FISA, and a plea for our government to restore the constitutional values that FISA wisely straddled—promoting national security while safeguarding civil liberties.”). A full examination of these criticisms is outside the scope of this Note. Instead, this Note argues that FISA may achieve incremental reform of executive abuse.

¹⁴¹ 50 U.S.C. § 1801(a)–(b).

¹⁴² See S. REP. NO. 95-604, at 7–8 (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908–09 (noting that Nixon administration's use of warrantless wiretapping “exceeded [that of] previous administrations” but was “by no means atypical” among previous administrations).

¹⁴³ 50 U.S.C. § 1802(b).

¹⁴⁴ *Id.* § 1803.

¹⁴⁵ *Id.* § 1804.

identify a series of abuses, and individual attorneys associated with the abuses could suffer increased scrutiny or complete loss of credibility.

Furthermore, individual civil servants within the DOJ have every incentive not to rely on skimpy evidence or otherwise abuse the FISA process because they must seek the Attorney General's sign-off every time they apply for FISA warrants. Their credibility within the institution, and perhaps even their job security, depends on not abusing the Attorney General's credibility by seeking her clearance on applications that overreach or are outright false.

Although self-policing within the executive branch seems counterintuitive, there is evidence that it does reduce abuse. In a recent public dispute between the New York Police Department (NYPD) and the DOJ, the NYPD Chief argued that the DOJ was not aggressive enough with its applications for FISA warrants. In at least two cases, the DOJ refused to apply for FISA warrants for the NYPD because the DOJ did not believe the probable cause standard had been met.¹⁴⁶ Attorney General Michael Mukasey replied that the DOJ was properly applying the standard and that it would not push beyond the limits of the law because of its "intensely practical desire to preserve our credibility before the court."¹⁴⁷

Relative to obtaining a FISA warrant, the government can invoke the state secrets privilege much more easily. The only requirements are for the head of the department involved to personally consider the matter and invoke the privilege.¹⁴⁸ The Supreme Court created this process many years before Congress and the President instituted reforms within the intelligence agencies to prevent abuse and to protect civil rights.¹⁴⁹ Additionally, the same judges who are experienced in dealing with information that implicates national security do not routinely review the state secrets privilege. This lack of repeat appearances results in the government having less concern about credibility before the judge and having more ability to intimidate an

¹⁴⁶ Letter from Raymond W. Kelly, Police Comm'r of the City of N.Y., to Michael B. Mukasey, Att'y Gen. of the U.S. (Oct. 27, 2008), available at <http://online.wsj.com/public/resources/documents/Mukasey111908.pdf>.

¹⁴⁷ Letter from Michael B. Mukasey, Att'y Gen. of the U.S., to Raymond W. Kelly, Police Comm'r of the City of N.Y. (Oct. 27, 2008), available at http://online.wsj.com/public/resources/documents/WSJ_200811202Kelly.pdf.

¹⁴⁸ See *supra* text accompanying notes 18–19.

¹⁴⁹ The *Reynolds* opinion was issued in 1953, while two major congressional acts regulating national security were enacted decades later. See Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. §§ 1–16 (2006)); Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1871 (2006)). Additionally, Executive Order 12,333, the primary regulation of intelligence agencies by presidential order, was issued in 1981. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 (2006).

Article III judge with exaggerated (or false) claims of dire harm to national security.

The important internal incentive to maintain credibility within the DOJ and with a court that regularly oversees the FISA process, combined with the external pressures of an independent judiciary that is knowledgeable in the subject area and well-versed in FISA procedures, arguably creates an incentive to be more conservative when claiming the need for a FISA warrant.¹⁵⁰ If such incentives could be replicated for the state secrets privilege, they may serve to reduce the number of cases where the government has the incentive to abuse the privilege.

But in the context of the state secrets privilege, the incentives to abuse the privilege are not balanced against the fear of losing credibility in front of the court that must approve all invocations of the privilege. Credibility is a strong countervailing weight, in part because of its long-lasting effect. If the reviewing judges believe that the government is lying, or if the government refuses to cooperate with the process, the punishment will last longer than a single cash payout of punitive damages.

Although it may be impossible to litigate all state secrets cases in one specialized court as in the FISA context, two internal incentives may reduce significantly the temptation to overreach: (1) the incentive of individual attorneys to maintain credibility within the institution; and (2) the strong incentive the Attorney General faces to ensure that the privilege is not being invoked abusively, since she will ultimately be responsible for all invocations of the privilege if a certification process is instituted.

2. *Inspectors General and Accounting Mechanisms*

Notably absent from state secrets privilege doctrine is a role for an inspector general and an accounting mechanism under which the government would have to report the number of times and the context in which it has invoked the privilege. The President could easily create this requirement, and it constitutes the most basic of internal oversight mechanisms.

Most executive agencies have an inspector general who investigates claims of abuse.¹⁵¹ Inspectors general have been successful at

¹⁵⁰ This Note assumes a judiciary that has some ability to conduct judicial review and deny warrants. It is unclear whether the recent changes to the FISA process under the 2008 revisions have effectively removed any judicial review, and if so, what long term effects that change will have on incentives.

¹⁵¹ See Inspector General Act of 1978, 5 U.S.C. app. at 466–98 (2006) (establishing inspectors general for most executive agencies and outlining their authority).

rooting out abuses within agencies. For example, in 2008 the FBI's Inspector General reported that it had uncovered thousands of abuses of NSLs.¹⁵²

An inspector general should be required to conduct internal oversight of the state secrets privilege. Because the executive branch is responsible for national security matters, it may have the most competence to determine whether there have been abuses and whether the rules are adequate. An independent inspector general would be in a better position than the judiciary to investigate whether the privilege is being abused: She would have access to all of the information across all jurisdictions and understand the context in which claims of privilege arise. Her objection to the use of the privilege would also not result in governmental cries of judicial incompetence.

Accountability to Congress for the use of the state secrets privilege should also be required, because this is a standard method of creating checks on executive branch functions that are ripe for abuse. For example, the DOJ is required to keep track of the number of times it applies for FISA warrants¹⁵³ or uses NSLs.¹⁵⁴ This type of accounting makes it easier to quantify the use of the NSLs, and the frequency of use can alert inspectors general to abuses. Keeping internal records makes congressional oversight more effective by allowing Congress to determine easily whether the privilege is being used excessively and which cases merit investigation for abuse. Using the NSL and FISA accounting mechanisms as models, executive departments should be required to keep detailed reports of the number of times the privilege is invoked, the types of cases in which it was applied, and the internal procedures followed to determine that the privilege applied.

3. *Public Rules, Secret Facts*

A serious concern about invoking the state secrets privilege is that there are no real internal rules for when it should be applied. This lack of consistent standards causes two major sets of problems for the government. First, the absence of official standards makes it easier for individual agencies to adopt more lax standards and thus abuse the privilege. Second, it creates a public perception that the

¹⁵² Dan Eggen, *FBI Chief Confirms Misuse of Subpoenas*, WASH. POST, Mar. 6, 2008, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/05/AR2008030500463.html>.

¹⁵³ Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1807, 1862 (2006).

¹⁵⁴ USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 118(c), 120 Stat. 192, 218 (2006).

standards are applied differently by different administrations, leading to speculation that a single administration is abusing its power.¹⁵⁵

Adopting an administrative law approach to state secrets may provide the opportunity for public discussion of the rules governing the privilege. Like FISA, the rules for invoking the privilege could be public, while the facts of each individual case remain secret.¹⁵⁶ This way, experts, individuals, and lawmakers can weigh in on what should constitute a proper process for invoking the privilege and what weight should be given to countervailing considerations. The rules could require that the official seeking to invoke the privilege represent to the judge what specific harms revelation of the state secret could cause and provide internal certification by an additional executive official outside of the department invoking the privilege that the revelation would result in those harms. It could also set minimum standards for what type of information would qualify for mosaic theory protection: For example, if the government decides to assert a mosaic theory claim, it may have to prove to the judge that the information is not easily accessible to the public (if it is not classified) and provide detailed assertions as to what information that piece of the mosaic could be combined with to harm national security.¹⁵⁷ These types of standards would make it more difficult to claim mosaic theory broadly without proving what the mosaic actually is and how likely it is that foreign agents already know—or could easily acquire—the specific piece of information the government seeks to protect.

While the rules for invoking the state secrets privilege should be resolved publicly, they should include at least one mandatory rule: certification of the privilege by the Attorney General. It is counter to current national security procedures that a CIA Director could invoke the state secrets privilege to quash a claim of constitutional violations without the Attorney General's personal consideration. As the executive branch's top law enforcement official, the Attorney General herself should be required to consider the consequences of invoking the privilege. Since the Attorney General is already well-versed in bal-

¹⁵⁵ See, e.g., Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and Its Alternatives*, 117 YALE L.J. POCKET PART 82, 85 (2007), <http://thepocketpart.org/2007/10/01/hallett.html> (“The Bush Administration has perfected the art of invoking the state secrets privilege and now invokes it as a matter of course in most post-9/11 civil liberties cases.”).

¹⁵⁶ I suggest that there be a notice-and-comment type process for drawing the parameters of the state secrets privilege, whereas Congress mandated the regulations governing electronic surveillance in FISA.

¹⁵⁷ This information would be provided *ex parte* and *in camera* to a district court judge.

ancing protection of civil rights with national security concerns,¹⁵⁸ and because she is routinely involved in national security measures, she may be the best executive official to assess whether invocation of the privilege is appropriate.

B. Judicial Procedural Checks on the Privilege

There is a role for judges beyond substantive judicial review. Simply because a court cannot adjudicate a case at the time does not mean that it should never adjudicate it. When judges dismiss cases based solely on state secrets, they should do so without prejudice and stay the statute of limitations.¹⁵⁹

The reasoning that a court can never adjudicate a case because of the state secrets privilege is contrary to the conventional understanding of classification. When a document is classified, the default assumption is that it will eventually be declassified.¹⁶⁰ A government official must reassert the classification for it to continue. While documents are generally classified for longer than their original classification stipulates, judges should not ignore the fact that even executive officials understand that most secrets are not secrets forever. Keeping this in mind, when judges must dismiss cases because of the state secrets privilege, they should do so without prejudice.

Judges should also toll the statute of limitations on any case that the state secrets privilege has barred and for which the government is a defendant. Statutes of limitations were designed to give reprieve to potential defendants so that the prospect of litigation cannot haunt them indefinitely.¹⁶¹ In the case of the state secrets privilege, however, it is the defendant itself that has prevented the timely resolution of the case, and the public policy considerations for a statute of limitations do not apply.

¹⁵⁸ See *supra* note 63 and accompanying text. Whether the Attorney General adequately performs this task is beyond the scope of this Note.

¹⁵⁹ This type of tolling has been proposed before. Rita Glasionov, Note, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458, 481–83 (2009) (arguing for equitable tolling of claims). This Note provides the first analysis, however, of why equitable tolling is justified based on the nature of classified information.

¹⁶⁰ Exec. Order No. 12,958, 3 C.F.R. 333, 337 (1995) (limiting term of classification to ten or twenty-five years).

¹⁶¹ See *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944) (“The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”).

CONCLUSION

The state secrets privilege as it exists today is ripe for abuse. This Note has analyzed the primary proposal for reform and its shortcomings. Increased judicial review alone does not significantly change the government's incentives for invoking the state secrets privilege, and without the government's cooperation, it is unclear whether the judiciary will be able to counter executive claims of extraordinary danger when such claims are not obviously absurd.

Instead, this Note argues that there are stronger mechanisms for creating the incentives to reduce abuse of the executive branch's national security powers. Creating internal incentives for maintaining credibility and the possibility of review by an Inspector General or Congress should help counter the incentives to invoke the privilege improperly. Additionally, creating standard public rules about when and how the government can invoke the privilege should create transparency and additional accountability. These mechanisms are more likely to create the appropriate "formula of compromise" envisioned by the Supreme Court in *Reynolds*, providing both the appropriate level of deference and oversight.¹⁶²

Even in a democratic society, so long as there are national security concerns, there must be secrets and there must be a limit on who may have access to those secrets. With secrecy, however, comes the potential for abuse. But creating appropriate incentives to prevent abuse and allowing at least the rules for invoking the state secrets privilege to be public can reduce the real and perceived abuse of the state secrets privilege as it currently exists.

¹⁶² See *supra* note 22 and accompanying text.