

“NOTHING IS SO OPPRESSIVE AS A SECRET”:¹
RECOMMENDATIONS FOR REFORMING THE STATE
SECRETS PRIVILEGE

I. INTRODUCTION

“The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury.”²

Imagine being abducted, imprisoned, and tortured for months by captors who, at best, suspected that you were innocent—and, at worst, knew it. Or imagine losing a spouse in an accident you strongly believed was caused by someone else’s negligence. Then, imagine suing, reaching the discovery phase, and having the defendant refuse to produce key evidence. To do so, the defendant claims, would compromise national security. The defendant is the government, or a friend of the government; the court takes the defendant at its word, and your case is dismissed. That is precisely what happened to Khaled El-Masri,³ three widows whose civilian husbands died in an Air Force crash,⁴ and countless other plaintiffs with similar stories over the past fifty-plus years.⁵

The mechanism that closes courtroom doors in the faces of such plaintiffs is the state secrets privilege, an evidentiary privilege that belongs solely to the executive branch and is used to prevent disclosure of any evidence that the executive deems detrimental to national security.⁶ Use, and abuse, of this privilege has increased dramatically in recent decades,⁷ leading many scholars to advocate for its demise or reform.⁸ Adding fuel to this fire is the recent discovery that the seminal state secrets privilege case, *United States v. Reynolds*,⁹ was decided based on faulty information (some would say outright lies) from the

1. JEAN DE LA FONTAINE, FABLES 284 (René Radouant ed., Librairie Hachette 1929) (1678) (“*Rien ne pèse tant qu’un secret . . .*”), translated at <http://www.worldofquotes.com/author/Jean-de-la-Fontaine/1/index.html>.

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

3. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff’d sub nom. El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

4. *United States v. Reynolds*, 345 U.S. 1, 1 (1953).

5. See *infra* notes 64-77 and accompanying text for overview of cases in which the state secrets privilege has been invoked.

6. See *Reynolds*, 345 U.S. at 7-10 (explaining state secrets privilege, invoked by government to prevent divulging of evidence that could be detrimental to national security).

7. See *infra* notes 90-95 and accompanying text for a discussion of the increased use of the privilege.

8. See *infra* Part II.C for an overview of these proposals.

9. 345 U.S. 1 (1953).

executive branch.¹⁰ The daughter of one of the *Reynolds* decedents found that the documents her mother needed to move forward with her suit against the Air Force did not contain any information about secret testing, as the Air Force had claimed.¹¹ Rather, they contained damning evidence pointing to the Air Force's negligence as the cause of the crash that killed her father.¹² Thus, the very foundation on which the state secrets privilege was built has proven flimsy, and the time has come for change.

This Comment seeks to add to the state secrets privilege conversation by analyzing the reasons why courts should reevaluate the privilege, discussing the pros and cons of several previously offered proposals for change, and suggesting a route to reform. Part II of this Comment offers an overview of the state secrets privilege, describing how it came into being, how it works, and how it has been applied since its inception. It also introduces several commentators' past proposals for change. Part III.A discusses *El-Masri v. Tenet*¹³ as a recent example of the power of the privilege and offers the case as a specific example of why the privilege is ripe for reform. Part III.B offers more general reasons for reevaluating the privilege, focusing on the importance of confidence in the rule of law and the fact that judicial restraint is not mirrored in the executive branch. Part III.C evaluates and ultimately rejects proposals for implementing special procedural techniques in state secrets cases and for reallocating burdens of proof. Part III.D discusses the appropriate balancing test for state secrets privilege cases and advocates for implementation of a comparative standard when applying the privilege. Part IV concludes the Comment.

II. OVERVIEW

A. *Origin of the State Secrets Privilege*

The state secrets privilege is a common law evidentiary privilege that allows the government to withhold information from discovery upon a general showing that such information, if disclosed, would pose a "reasonable danger" to "national security."¹⁴ The state secrets privilege applies even where the "secret" information is essential to the plaintiff's ability to move forward with her case.¹⁵ Before delving into the privilege and its development, however, one must cast a glance backward—first to the treason trial of a former Vice President,¹⁶ then to

10. See *infra* notes 164-71 and accompanying text for a discussion of this revelation.

11. Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861, 890 (2004).

12. *Id.*

13. 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

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

15. *Id.* at 11 (finding that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake").

16. *United States v. Burr*, 25 F. Cas. 30, 38 (C.C.D. Va. 1807) (No. 14,692d).

the estate of a Civil War spy,¹⁷ and finally to the plight of three bereaved widows.¹⁸

In 1807, former Vice President Aaron Burr stood on trial for treason against the United States.¹⁹ In the early stages of this historic trial, Burr moved for a subpoena duces tecum to compel President Jefferson to hand over a letter from General James Wilkinson, which Burr contended contained information material to his defense.²⁰ The President cried foul, arguing that the letter contained information that “ought not to be disclosed.”²¹ The court sided with Burr, finding nothing in the letter that would “endanger the public safety” if disclosed.²² Chief Justice John Marshall, sitting as a circuit judge, then penned the following line: “If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”²³ Sixty-eight years later, in 1875, these words spawned a doctrine entirely barring spies from having their cases heard when they seek to hold the government accountable for wrongs imposed on them in the course of their duties.²⁴ Seventy-eight years after that, in 1953, a new doctrine emerged²⁵ which encroaches on the very “essence of civil liberty”²⁶ that Marshall himself identified: people’s right to seek legal redress for the wrongs they suffer.²⁷ This judicially created doctrine—a product of the Cold War—is the state secrets privilege.²⁸

1. The *Totten* Doctrine: *Totten v. United States* and *Tenet v. Doe*

If *United States v. Burr*²⁹ planted the seed of the state secrets privilege, then *Totten v. United States*³⁰ watered it and shined on it, so that *United States v. Reynolds*³¹ could bring it to life. *Totten* centered on an 1861 contract between William A. Lloyd and President Lincoln, under which Lloyd agreed to spy on Confederate forces in exchange for \$200 per month.³² Lloyd held up his end of

17. *Totten v. United States*, 92 U.S. 105, 107 (1875).

18. *Reynolds*, 345 U.S. at 2-12 (excluding accident report from trial involving Air Force airplane crash).

19. *Burr*, 25 F. Cas. at 30.

20. *Id.* at 31.

21. *Id.* at 37.

22. *Id.*

23. *Id.*

24. See *Totten v. United States*, 92 U.S. 105, 107 (1875) (excluding evidence of agreement between Union spy and President Lincoln).

25. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (creating state secrets privilege).

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

27. *Id.*

28. *Reynolds*, 345 U.S. at 7-8.

29. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

30. 92 U.S. 105 (1875).

31. 345 U.S. 1 (1953).

32. *Totten*, 92 U.S. at 105-06.

the bargain but did not receive the agreed-on sum.³³ When the administrator of Lloyd's estate sued the government to recover the money due under the contract, the Court of Claims dismissed the case after finding itself divided on the question of whether the President had the authority "to bind the United States by the contract in question."³⁴ The Supreme Court noted that the Court of Claims should not have considered that matter at all, because the highly confidential nature of the contract should have barred any enforcement action.³⁵ The Court reasoned that because the employment itself was shrouded in such secrecy, it was "implied" that both parties' "lips . . . were to be for ever sealed respecting the relation of either to the matter."³⁶

Then Justice Field called forth from the ground a sprout that would become the seemingly immovable oak that is the state secrets privilege: "[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."³⁷ The Supreme Court recently reaffirmed this categorical bar to suit, which has come to be known as the *Totten* doctrine, when it dismissed the case of two former Central Intelligence Agency ("CIA") operatives in *Tenet v. Doe*.³⁸

The former operatives, referred to as the "Does," claimed that the CIA had violated their equal protection and due process rights by renegeing on a promise to provide for them financially for life in return for their spy services and brought suit to enforce their agreement with the agency.³⁹ When the District Court for the Western District of Washington denied in part the government's motion to dismiss, CIA Director George Tenet appealed to the Ninth Circuit.⁴⁰ The Ninth Circuit held that the Supreme Court's decision in *Reynolds* had replaced the *Totten* doctrine with the state secrets privilege and remanded the case to allow the government to assert that privilege.⁴¹ The Supreme Court reversed, holding that the *Totten* doctrine is alive and well, and categorically barred the Does' action.⁴²

33. *Id.* at 106.

34. *Id.*

35. *Id.* This watershed opinion is less than two pages long and contains not a single citation to prior authority.

36. *Id.* at 106.

37. *Totten*, 92 U.S. at 107.

38. 125 S. Ct. 1230, 1237-38 (2005).

39. *Tenet*, 125 S. Ct. at 1233-34.

40. *Doe v. Tenet*, 329 F.3d 1135, 1140-41 (9th Cir. 2003), *rev'd*, 125 S. Ct. 1230 (2005).

41. *Tenet*, 329 F.3d at 1151-52.

42. *Tenet*, 125 S. Ct. at 1237 (declaring that "*Reynolds* . . . cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships"). Several commentators have discussed the differences between the *Totten* doctrine and the state secrets privilege. *E.g.*, Douglas Kash & Matthew Indrisano, *In the Service of Secrets: The U.S. Supreme Court Revisits Totten*, 39 J. MARSHALL L. REV. 475, 483 (2006) (pointing out that state secrets privilege proceeds from notion that suit is justiciable and determines whether certain evidence can come in, whereas *Totten* doctrine does not reach question of admissibility of evidence, because underlying cause of action is invalid); Daniel

2. The State Secrets Privilege: *United States v. Reynolds*

Reynolds makes clear that the rationale behind the *Totten* doctrine fed into the state secrets privilege but that the two notions are indeed distinct.⁴³ The *Reynolds* tale is a sad one, leading a recent commentator to charge that the state secrets privilege was “born with a lie on its lips.”⁴⁴ In *Reynolds*, three widows sued the United States Air Force under the Federal Tort Claims Act for the wrongful deaths of their civilian husbands—there was not a spy in sight.⁴⁵ The men were engineers employed by private organizations involved in the research and development of new electronic equipment being tested aboard a B-29 bomber.⁴⁶ The plane went down on its test run, killing nine of the thirteen people on board.⁴⁷

When the plaintiffs requested the Air Force’s official accident investigation report, the government moved to quash the motion, claiming that the report was privileged under Air Force regulations.⁴⁸ When this claim of privilege fell flat, the secretary of the Air Force wrote a letter to the district court, claiming that providing the report “would not be in the public interest.”⁴⁹ The danger, according to the secretary, stemmed from the fact that the aircraft was “engaged in a highly secret mission of the Air Force,” and the Judge Advocate General added that the reports could not be provided “without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.”⁵⁰ Despite these cries of impending doom, the district court ordered the Air Force to produce the reports; when the Air Force refused this order, the court invoked Federal Rule of Civil Procedure 37,⁵¹ ordering that “the facts on the issue of negligence would be taken as established in plaintiffs’ favor.”⁵² A final judgment was entered for the widows, which the court of

L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States*, 53 ADMIN. L. REV. 1273, 1298 (2001) (noting that “the *Totten* Doctrine saves the time and resources of the court . . . by not requiring the compilation, review, and argument of a long motion and declaration regarding a matter that so obviously concerns a state secret” (footnote omitted)); Holly L. McPherson, Comment, *Tenet v. Doe: Balancing National Security and Contracts to Spy*, 28 U. HAW. L. REV. 201, 220 (2005) (noting that *Totten* doctrine presents “categorical bar” to bringing action, whereas state secrets privilege at least offers chance that suit will move forward); see also Sean C. Flynn, Note, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 801-02 (2001) (expressing concern for “dangerous and unfounded” trend of expanding *Totten* doctrine’s scope).

43. See *United States v. Reynolds*, 345 U.S. 1, 3 (1953) (stating that Court granted certiorari to resolve “an important question of the Government’s privilege to resist discovery” whereas *Totten* doctrine makes such resistance unnecessary, given that it bars suit altogether).

44. Graham, *supra* note 11, at 888.

45. *Reynolds*, 345 U.S. at 3.

46. *Reynolds v. United States*, 192 F.2d 987, 989 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1952).

47. *Id.*

48. *Reynolds*, 345 U.S. at 3-4.

49. *Id.* at 4.

50. *Id.* at 4-5.

51. FED. R. CIV. P. 37(b)(2)(A)(i) (providing that when party refuses to relinquish evidence in discovery, court can issue order that matters in question shall “be taken as established”).

52. *Reynolds*, 345 U.S. at 5.

appeals affirmed.⁵³

The Supreme Court, looking in part to *Totten*, stated that the privilege against revealing state secrets is “well established in the law of evidence.”⁵⁴ The Court then set out the following guidelines for invocation of the privilege: (1) the privilege belongs only to the government; (2) a claim of the privilege must be “lodged by the head of the department” that has control over the evidence in question, “after actual personal consideration by that officer”; and (3) the court must determine whether the privilege is appropriate “without forcing a disclosure of the very thing the privilege is designed to protect.”⁵⁵

A court is to determine whether the claim of privilege is proper but must do so without “forcing a disclosure” of the evidence in question.⁵⁶ The *Reynolds* Court provided no guidance as to how a judge is to determine that the privilege has been properly invoked but noted that disclosure of the evidence to the judge is not always necessary.⁵⁷ If the judge is satisfied that the evidence implicates secrets that should remain under wraps for the sake of national security, then the privilege has been properly invoked, and the judge need not go so far as to examine the “privileged” evidence.⁵⁸

Recognizing the impossible barrier this privilege could present to a plaintiff, the Court went on to note that the decision whether to review the material in question in camera should be informed by the degree to which the plaintiff’s case depends on the evidence.⁵⁹ Nevertheless, “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”⁶⁰ The Court pointed to *Burr* as authority for its approach.⁶¹

The Air Force’s assertions in *Reynolds* that divulging the reports would pose a threat to national security, combined with the Air Force’s willingness to

53. *Id.*

54. *Id.* at 6-7.

55. *Id.* at 7-8.

56. *Id.* at 8.

57. *Reynolds*, 345 U.S. at 10.

58. *Id.*; see also *Doe v. CIA*, No. 05 Civ. 7939, 2007 WL 30099, at *2 (S.D.N.Y. Jan. 4, 2007) (illustrating how court may be convinced that privilege was properly invoked to dismiss plaintiffs’ claims that agency violated their First, Fourth, and Eighth Amendment rights as well as Administrative Procedure Act, Privacy Act, and Federal Tort Claims Act). In *Doe v. CIA*, the court was satisfied by the submission of a classified and an unclassified declaration by then-Director of the CIA, Porter J. Goss, that his assertion of the privilege was based on his personal consideration of the matter. *Id.* at *2. The court further looked to the plaintiffs’ complaint, and concluded that “there is a reasonable danger that disclosure of the facts underlying Plaintiffs’ claims would jeopardize national security.” *Id.*

59. *Reynolds*, 345 U.S. at 11.

60. *Id.*

61. *Id.* at 9. In relying on *Burr*, the Court apparently overlooked the following qualifying language from that opinion: “Such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.” *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (emphasis added). In *Reynolds*, the matter was “immediately and essentially applicable to the point,” but it was suppressed nonetheless. *Reynolds*, 345 U.S. at 11.

allow the surviving crewmembers to testify, were enough to convince six Justices that the privilege was proper and that the reports should be excluded from evidence.⁶² Rather than start over again in the courts, the widows entered into a settlement agreement with the Air Force—this agreement was unsuccessfully challenged fifty years later when the privileged “state secrets” were revealed to pose no threat to anyone except the Air Force.⁶³

B. Development of the State Secrets Privilege

With the state secrets privilege securely stored in the government’s toolbox, the executive branch has used it to build fences between plaintiffs and material evidence in a wide range of cases, including wrongful death,⁶⁴ wiretapping and other surveillance activities,⁶⁵ noncompliance with environmental regulations,⁶⁶

62. *Reynolds*, 345 U.S. at 11.

63. *Herring v. United States*, 424 F.3d 384, 388-89 (3d Cir. 2005); Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES, Apr. 19, 2004, at A1. See *infra* notes 163-68 and accompanying text for a discussion of the circumstances surrounding *Herring*.

64. *E.g.*, *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992), *aff’d in part, vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992) (per curiam) (dismissing manufacturing and design defect suit against manufacturer of military weapons system, because plaintiffs would be unable to prove their case without evidence protected by state secrets privilege); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991) (dismissing action arising after sailor was killed due to allegedly defective weapons system, because plaintiff could not make out prima facie case without evidence barred by state secrets privilege); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1496 (C.D. Cal. 1993) (dismissing manufacture defect suit, because state secrets privilege precluded plaintiff from establishing prima facie case).

65. *E.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 52 (D.C. Cir. 1983) (reversing district court’s dismissal of case, because court erred in ruling that state secrets privilege prevented disclosure of names of attorneys general authorizing wiretaps); *Salisbury v. United States*, 690 F.2d 966, 977 (D.C. Cir. 1982) (affirming dismissal, because “litigation [would] lead to the eventual discovery of privileged matters” (internal quotation marks omitted) (alteration in original)); *ACLU v. Brown*, 609 F.2d 277, 282 (7th Cir. 1979) (barring plaintiffs from evidence related to government’s domestic intelligence files in case alleging unconstitutional intelligence gathering); *Halkin v. Helms*, 598 F.2d 1, 10-11 (D.C. Cir. 1978) (upholding secretary of state’s claim of privilege to bar evidence relating to whether National Security Agency had acquired and disseminated plaintiffs’ international communications); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) (denying government’s attempt to have suit dismissed based on state secrets privilege, because “dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security”); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1225-27 (D. Or. 2006) (denying government’s motion to dismiss electronic surveillance case based on assertion of state secrets privilege but leaving door open for government to renew motion for summary judgment if plaintiffs prove unable to make out prima facie case or government is unable to mount defense without revealing state secrets); *ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006) (granting defendant’s motion for summary judgment on “datamining” claims, because state secrets privilege prevented plaintiffs from establishing prima facie case, but denying defendant’s claim that it could not defend against the remainder of action without disclosing state secrets), *vacated*, 493 F.3d 644 (6th Cir. 2007); *Jabara v. Kelley*, 75 F.R.D. 475, 489 (E.D. Mich. 1977) (finding that government’s appropriately asserted claim of privilege must prevent plaintiff from receiving answers to some interrogatories in action for wiretapping damages).

66. *E.g.*, *Frost v. Perry*, 919 F. Supp. 1459, 1468 (D. Nev. 1996) (dismissing action because Air Force’s assertion of state secrets privilege barred plaintiff from evidence essential to prima facie case of Resource Conservation and Recovery Act violations), *aff’d sub nom. Kasza v. Browner*, 133 F.3d

illegal detainment of prisoners,⁶⁷ invasion of privacy,⁶⁸ noncompliance with the Freedom of Information Act (“FOIA”),⁶⁹ violation of First Amendment rights,⁷⁰ violation of the Fourth Amendment,⁷¹ contract disputes,⁷² patent infringement,⁷³

1159 (9th Cir. 1998); *Doe v. Browner*, 902 F. Supp. 1240, 1248 (D. Nev. 1995) (noting government’s invocation of state secrets privilege sixty-nine times to bar evidence in action alleging violations of Resource Conservation and Recovery Act), *aff’d sub nom. Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). For an interesting commentary on these cases, see Shannon Vibbert, *A Twisted Mosaic: The Ninth Circuit’s Piecemeal Approval of Environmental Crime in Kasza v. Browner*, 17 J. NAT. RESOURCES & ENVTL. L. 95 (2002-2003).

67. *E.g.*, *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) (granting government’s motion to dismiss after finding invocation of state secrets privilege valid), *aff’d sub nom. El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006) (discussing government’s motion for summary judgment in light of state secrets concerns in action brought under Torture Victim Protection Act and Fifth Amendment).

68. *E.g.*, *Patterson v. FBI*, 893 F.2d 595, 604-05 (3d Cir. 1990) (affirming summary judgment for Federal Bureau of Investigation (“FBI”) after government argued that disclosing sixth grader’s FBI file to his parents would threaten national security); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 82 & n.7 (D.D.C. 2004) (dismissing case of terminated FBI translator after determining that proper invocation of state secrets privilege left court no viable alternative).

69. *E.g.*, *Patterson*, 893 F.2d at 600-01 (affirming district court’s conclusion that FBI was exempt from FOIA request to produce documents containing state secrets).

70. *E.g.*, *id.* at 595 (affirming summary judgment in favor of FBI preventing plaintiff from accessing records pertaining to plaintiff’s First Amendment activities).

71. *E.g.*, *Black v. United States*, 62 F.3d 1115, 1119-20 (8th Cir. 1995) (affirming dismissal of action after finding invocation of state secrets privilege neither overbroad nor improperly invoked).

72. *E.g.*, *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1024 (Fed. Cir. 2003) (affirming dismissal of portion of action for which state secrets privilege was properly invoked); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1365 (Fed. Cir. 2001) (upholding invocation of state secrets privilege but finding summary judgment for government improper); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 406-07 (D.C. Cir. 1984) (finding that district court abused its discretion in honoring state’s invocation of state secrets privilege where state failed to “make a complete examination of its files, and present the court with a formal claim [of privilege] by the Secretary”); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 275 (4th Cir. 1980) (reversing dismissal and instructing trial court to attempt to adjudicate matter using evidence not protected by state secrets privilege); *N.S.N. Int’l Indus. v. E.I. DuPont de Nemours & Co.*, 140 F.R.D. 275, 281 (S.D.N.Y. 1991) (finding that government met all “procedural requirements” for assertion of state secrets privilege and sufficiently showed that national security would be compromised by divulgence of evidence in question). See generally, Anjetta McQueen, Comment, *Security Blanket: The State Secrets Privilege Threat to Public Employment Rights*, 22 LAB. LAW. 329 (2007), for further discussion of the state secrets privilege as it relates to cases brought by public employees against their employers.

73. *E.g.*, *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1269 (Fed. Cir. 2005) (upholding district court’s determination that state secrets privilege was properly invoked but reversing dismissal of case and remanding for further proceedings); *Foster v. United States*, 12 Cl. Ct. 492, 494 (Cl. Ct. 1987) (finding that properly invoked state secrets privilege prevented director of CIA from providing detailed public affidavit); *Am. Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157, 160-62 (Cl. Ct. 1983) (rejecting argument that Invention Secrecy Act is waiver of state secrets privilege, finding properly invoked privilege bars plaintiffs from “all discovery concerning cryptographic devices” and suspending proceedings with regard to those devices); *Clift v. United States*, 808 F. Supp. 101, 106-07 (D. Conn. 1991) (finding reasonable danger to national security, sustaining government’s claim of privilege without in camera review, and dismissing case).

misappropriation of trade secrets,⁷⁴ unlawful discrimination,⁷⁵ defamation,⁷⁶ and personal injury.⁷⁷ In adjudicating these cases, the courts have refined the contours of the state secrets privilege but have rendered it no less fatal to plaintiffs generally.⁷⁸

A particularly powerful expansion of the privilege emerged in *Halkin v. Helms*,⁷⁹ in which the government invoked the state secrets privilege to bar evidence material to charges that the National Security Agency had engaged in illegal wiretapping of former Vietnam protestors.⁸⁰ The D.C. Circuit in that case set forth the “mosaic” theory, under which even the most facially trivial information can fall under state secrets privilege protection.⁸¹ The court noted that modern intelligence gathering “is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair” and that someone with the savvy to do so can piece together “bits and pieces of seemingly innocuous information” to “reveal with startling clarity how the unseen whole must operate.”⁸² According to the *Halkin* court, judges do not have the wherewithal to distinguish evidence that is part of the mosaic from that which is merely scrap

74. *E.g.*, *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) (affirming district court’s determination that, while state secrets privilege was properly invoked in action for misappropriation of trade secrets, protected evidence was not central to defense and did not warrant dismissal).

75. *E.g.*, *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (affirming dismissal of employment discrimination action against CIA in light of proper invocation of state secrets privilege, because “the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk”); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (affirming dismissal of case on ground that defendants could not mount defense in religious discrimination case without disclosing state secrets); *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 815-16 (9th Cir. 1989) (finding that district court properly relied on asserted state secrets privilege to dismiss employment discrimination case homosexual government contractor employee brought against Department of Defense); *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (finding state secrets privilege properly invoked by FBI in racial discrimination action and affirming rejection of plaintiff’s motion to compel discovery); *Pack v. Beyer*, 157 F.R.D. 226, 231 (D.N.J. 1994) (noting extension of state secrets privilege to prison documents).

76. *E.g.*, *Trulock v. Lee*, 66 F. App’x 472, 475, 478 (4th Cir. 2003) (affirming district court’s decision to dismiss case in light of proper invocation of state secrets privilege and rejecting appellant’s argument that district court should have “devised further procedures to test the relevance of the privileged information before dismissing the case”); *Fitzgerald v. Penthouse Int’l, Ltd.* 776 F.2d 1236, 1243 (4th Cir. 1985) (concluding that district court did not err in dismissing case in which state secrets privilege prevented testimony of key expert witnesses).

77. *E.g.*, *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (stating that CIA’s ultra vires actions in performing domestic surveillance on plaintiff did not prevent assertion of state secrets privilege); *In re United States*, 872 F.2d 472, 479-80 (D.C. Cir. 1989) (agreeing with district court’s determination that litigation could move forward without “compromis[ing] national security”).

78. *See, e.g.*, *Nat’l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 397 (S.D.N.Y. 1982) (holding that head of department claiming privilege must personally consider each item for which claim is to be lodged rather than reviewing sampling thereof).

79. 598 F.2d 1 (D.C. Cir. 1978), *reh’g en banc denied*, 598 F. 2d 1, 11 (D.C. Cir. 1979).

80. *Halkin*, 598 F.2d at 3-4.

81. *Id.* at 8.

82. *Id.*

material.⁸³

The state secrets privilege received another boost in *Ellsberg v. Mitchell*,⁸⁴ which centered on the warrantless electronic surveillance of the defendants and attorneys involved in *New York Times Co. v. United States (Pentagon Papers)*.⁸⁵ In *Ellsberg*, the Court of Appeals for the D.C. Circuit emphasized that “[w]hen properly invoked, the state secrets privilege is absolute.”⁸⁶ The court also set forth another notion that dominates state secrets jurisprudence: “No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.”⁸⁷ This absolute approach means that if the privilege is properly invoked, it is as though the evidence in question never existed.⁸⁸ This exclusion of evidence leads to dismissal of the case in three instances: (1) the plaintiff cannot make out a prima facie case without the excluded evidence, (2) the defendant cannot set forth a sufficient defense without the excluded evidence, or (3) the subject matter of the action is itself a state secret. In the latter two instances, dismissal results even if the plaintiff has enough nonprivileged information to establish a prima facie case.⁸⁹

By 1983, at least one court had noticed an upward tick in the number of cases in which the state secrets privilege was being asserted.⁹⁰ Indeed, invocation of the privilege has increased dramatically since its formal debut in *Reynolds*.⁹¹ Between 1953 and 1976, the government invoked the state secrets privilege in only four reported cases.⁹² That number jumped to fifty-one cases reported

83. *Id.* at 9. In a lengthy opinion discussing why he voted for a rehearing of the case en banc, Judge Bazelon took issue with the notion that “internal security matters are too subtle and complex for judicial evaluation,” pointing out that courts “regularly deal with the most difficult issues of our society.” *Id.* at 15 (Bazelon, J., dissenting from denial of rehearing en banc) (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972)). It is noteworthy that fear of judicial error in the face of national security concerns was at the heart of several notorious World War II cases. See *Korematsu v. United States*, 323 U.S. 214, 223-34 (1944) (upholding mass exclusion of Japanese American citizens from large areas of West Coast); *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943) (upholding curfew for Japanese American citizens during World War II). See *infra* notes 176-85 and accompanying text for a discussion of these cases.

84. 709 F.2d 51 (D.C. Cir. 1983).

85. 403 U.S. 713 (1971).

86. *Ellsberg*, 709 F.2d at 57.

87. *Id.*

88. *Id.* at 64.

89. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 576-77 (1994).

90. *Ellsberg*, 709 F.2d at 56.

91. See William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005) (noting that use of privilege has increased more than tenfold in last thirty years as compared to first twenty years following *Reynolds*).

92. *Id.*; see also *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (discussing U.S. government's assertion of state secrets privilege with respect to patent application); *Therault v. United States*, 395 F. Supp. 637, 642 (C.D. Cal. 1975) (upholding government's withholding of Air Force accident report because of potential risk to national security); *Pan Amer. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139-41 (S.D.N.Y. 1973) (noting that CIA withheld

between 1977 and 2001.⁹³ Between 2002 and the present, the federal government has invoked the privilege—either as a defendant or as an intervenor⁹⁴—in at least eleven reported cases.⁹⁵ Further, while courts frequently lament the draconian or “harsh” nature of dismissing a suit due to the state secrets privilege,⁹⁶ the number of cases dismissed has increased over the years.⁹⁷

In surprising contrast to this trend, three cases decided in 2006 seem to indicate recent willingness on the part of district courts to prevent the government’s claim of privilege from ending the litigation.⁹⁸ One of these cases was vacated and remanded with instructions to dismiss for lack of jurisdiction,⁹⁹ however, and *El-Masri v. Tenet*¹⁰⁰ illustrates the privilege’s continuing vitality.¹⁰¹

discovery documents and claimed state secrets privilege in case involving hijacked airplane); *Heine v. Raus*, 305 F. Supp. 816, 818-19 (D. Md. 1969) (describing government’s assertion of state secrets privilege in action for slander against former CIA employee).

93. *Weaver & Pallitto*, *supra* note 91, at 101.

94. While cases in which the government asserts the privilege as an intervenor might appear to be less problematic than those in which the government is a defendant, one must dig deeper before being satisfied that this is indeed the case. For example, Kenneth Graham points out that in *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), *aff’d in part, vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992) (per curiam), the government intervened on behalf of a major campaign contributor. Graham, *supra* note 11, at 893-94. That case came only one year after the same company was sued in *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). There, the “government official who made the privilege claim was a former officer of the corporation.” Graham, *supra* note 11, at 894.

95. *Tenet v. Doe*, 125 S. Ct. 1230, 1234 (2005); *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005); *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1263 (Fed. Cir. 2005); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1012 (Fed. Cir. 2003); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754, 758-59 (E.D. Mich. 2006), *vacated*, 493 F. 3d 644 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff’d sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 68 (D.D.C. 2004); *see also Trulock v. Lee*, 66 F. App’x 472, 473-75 (4th Cir. 2003) (affirming government’s invocation of state secrets privilege); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 84 (D.D.C. 2004) (quashing deposition in light of proper invocation of state secrets privilege).

96. *E.g.*, *Bareford*, 973 F.2d at 1144 (noting that although dismissal is “harsh” for plaintiff, placing public in jeopardy would be harsher still).

97. *See* Erin M. Stilp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 839 (2006) (noting that not only has number of state secrets privilege invocations increased, but number of cases dismissed because of privilege also has increased).

98. *See Al-Haramain*, 451 F. Supp. 2d at 1224 (concluding that no threat to national security would flow from plaintiffs being able to prove that they were subject to surveillance); *ACLU*, 438 F. Supp. 2d at 765 (finding that state secrets privilege does not bar suit where publicly disclosed information is sufficient to establish prima facie case); *Hepting*, 439 F. Supp. 2d at 991-94 (relying on public disclosure of information in denying government’s motion to dismiss plaintiff’s claim based on state secrets privilege).

99. *ACLU v. NSA*, 493 F.3d 644, 720 (6th Cir. 2007).

100. 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

101. *See El-Masri*, 437 F. Supp. 2d at 541 (dismissing plaintiff’s Alien Tort Statute action after finding government properly invoked state secrets privilege).

Khaled El-Masri is a German citizen of Lebanese descent who claims he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonia on New Year's Eve of 2003.¹⁰² For the next five months, El-Masri claims he was beaten, tortured, and shuffled from one secret prison to the next—without ever being charged with a crime—as part of the United States' "extraordinary rendition" program, under which suspected terrorists are imprisoned in foreign countries.¹⁰³ El-Masri contends that the CIA knew he was innocent within one month of his capture, but he was not "released" (i.e., flown, blindfolded, to Albania and deserted alongside an abandoned road) until May 28, 2004.¹⁰⁴ The court honored the government's claim of privilege and barred El-Masri's case on finding that it could not be litigated without potentially compromising state secrets.¹⁰⁵ While the court expressed its regret that El-Masri was left without recourse,¹⁰⁶ it looked to "well-established and controlling legal principles [which] require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets."¹⁰⁷

C. Past Proposals for Change

Legal scholarship on the state secrets privilege is filled with proposals for changing it. I have classified these proposals into three types: (1) foundational proposals for change, which center on rethinking the underlying basis for the privilege; (2) procedural proposals for change, which seek to reform the privilege through special procedural techniques or legislation; and (3) proposals for heightened review, which suggest that courts give less deference to executive assertions of impending doom.

1. Foundational Proposals

Some commentators focus on the underlying problem of overclassification¹⁰⁸ as contributing to the excessive invocation of the privilege.¹⁰⁹ Others, such as James Zagel, find the balancing test on which the

102. *Id.* at 532.

103. *Id.* at 532-34.

104. *Id.* at 534.

105. *Id.* at 539.

106. *El-Masri*, 437 F. Supp. 2d at 541.

107. *Id.* at 539.

108. See, e.g., Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133-34 (2006) (presenting evidence of systemic problem of overclassification within U.S. government). Fuchs argues that overclassification caused the Supreme Court to be underinformed as it decided the now-infamous case of *Korematsu v. United States*, 323 U.S. 214 (1944). Fuchs, *supra*, at 152. "Had the Court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that the government lacked sufficient evidence, and it likely would have been able to discern the improper rationale for the policy." *Id.*

109. See, e.g., James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 879-80 (1966) (questioning validity of suggestion that government is entitled to rebuttable presumption that material

privilege is based to be flawed.¹¹⁰ In his 1966 seminal work on the state secrets privilege, Zagel notes that when thinking about the privilege, one should not weigh the conflict between the public interest in national security and private interest of the litigant.¹¹¹ Rather, one should focus on the public interest in national security versus the “public and private interest in maintaining fairness and efficiency in litigation.”¹¹² Zagel argues that this balancing test should be conducted “in as specific a context as possible. That is, the decision should be made with the knowledge of exactly what information or material is in question and the purpose for which it is to be disclosed.”¹¹³

2. Procedural Proposals

Several commentators suggest special adjudication techniques to protect privileged information, while still allowing a plaintiff his day in court, or at least compensating him for losing that day.¹¹⁴ For example, protective orders or in camera proceedings could allow a trial to move forward while reducing the risk of harmful disclosure of information vital to national security.¹¹⁵ Some commentators add that the usual burdens of production and persuasion should be shifted when one party is put to a disadvantage due to the exclusion of

claimed to be secret is necessarily so).

110. *Id.* at 877.

111. *Id.* at 877 n.7.

112. *Id.* at 887.

113. *Id.* at 885; *see also* Fuchs, *supra* note 108, at 169 (arguing that mosaic theory makes specificity requirement particularly essential to prevent every bit of government-related information from potentially falling under state secrets privilege); Andrew R. Sommer, Note, *The State Secrets Privilege in Prepublication Review: Proposing a Solution to Avoid a Seemingly Inevitable Tragedy*, 12 GEO. MASON L. REV. 211, 230-31 (2003) (suggesting that courts impose same specificity requirements on invocations of state secrets privilege that they do in FOIA litigation).

114. *See* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 772-73 (1991) (discussing potential use of protective orders, sanctions, in camera hearings and proceedings, and evidentiary presumptions); Zagel, *supra* note 109, at 897-98 (discussing possibility of special tribunal tasked with adjudicating cases involving state secrets); Veronica M. Fallon, Comment, *Keeping Secrets from the Jury: New Options for Safeguarding State Secrets*, 47 FORDHAM L. REV. 94, 109-13 (1978) (discussing in camera nonjury trials, jury security clearance, special masters, protective orders, summaries of classified documents, and declassification as alternative options for safeguarding state secrets); Flynn, *supra* note 42, at 808-12 (proposing in camera reviews, judicial review akin to that conducted under FOIA, and special masters with expertise in national security issues); Gardner, *supra* note 89, at 593-95 (suggesting use of special masters, special tribunals, or special juries composed of jurors with security clearance); McPherson, *supra* note 42, at 226-28 (suggesting in camera reviews, security clearance for courtroom personnel, and congressional relief); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 587-89 (1982) (suggesting use of protective orders, in camera proceedings, stipulation of facts, special masters, and evidentiary presumptions rather than completely losing evidence). Gardner proposes a particularly thought-provoking statute, The State Secret Privilege Compensation Act, which would compensate plaintiffs who are barred from court by the government's successful invocation of the privilege. Gardner, *supra* note 89, at 601-04.

115. Note, *supra* note 114, at 587. The Court of Appeals for the Second Circuit suggested an in camera trial in the patent infringement case of *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958), which was brought under the Invention Secrecy Act.

evidence under the state secrets privilege.¹¹⁶ Because the traditional evidentiary burdens are based on “many factors, including access to evidence, the costs of incorrect decisions, and the likelihood of one party being in the wrong,” some argue that these burdens should be “[r]econsider[ed]” when the state secrets privilege interacts with them in a way that makes it nearly impossible for courts to curb executive activities.¹¹⁷ This kind of burden shifting should be aimed at compensating for the lost evidence in a way that allows the litigation to continue, thereby allowing the court to “fulfill its constitutional role with respect to executive secrecy needs and controls on executive action.”¹¹⁸

The Federal Advisory Committee on the Rules of Evidence (“Committee”) proposed another kind of procedural remedy when it weighed in on the state secrets privilege problem in 1974. The Committee proposed Rule 509(b) to Congress as part of the broader proposed Article V, which outlined several evidentiary privileges.¹¹⁹ The proposed rule read: “The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.”¹²⁰ A companion rule, Rule 509(e), read:

If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.¹²¹

Before the Committee proposed this rule to Congress, it drafted an earlier version of Rule 509(b), which read: “The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of substantial [] danger that the evidence will disclose a secret of state.”¹²² “Secret of state” was defined as “information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States.”¹²³ The Committee revised this version before submitting the proposal to Congress after the District of Columbia Conference Committee expressed the following prophetic concern: “This is a shockingly broad privilege which should be substantially narrowed. Subsection (a), the definition, limits

116. *E.g.*, Note, *supra* note 114, at 588-89 (suggesting evidentiary burden should be shifted when plaintiff has made prima facie case of extensive surveillance and government withholds all evidence necessary to rebut defense of reasonableness or good faith).

117. *Id.* at 589.

118. *Id.*

119. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 509.02 (Joseph M. McLaughlin ed., 2d ed. 2007). Proposed Rule 509 was captioned, “Secrets of State and Other Official Information.” *Id.* § 509.01.

120. *Id.*

121. *Id.*

122. *Id.* § 509 app. at 01[3].

123. 3 WEINSTEIN & BERGER, *supra* note 119, § 509 app. at 01[3].

‘secrets of state’ only by the caprice of the administrative officers concerned”¹²⁴

Proposed Rule 509 was extremely controversial because it granted the government the power to stop litigants in their tracks, and it appeared to come out of nowhere.¹²⁵ Despite the Committee’s attempt at narrowing the privilege rule, Congress rejected the proposal, adopting instead Rule 501, which broadly declares that in federal courts “the privilege of a . . . government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.”¹²⁶ One commentator recently reintroduced the notion of adopting a new rule of evidence, suggesting that the idea is ripe for reconsideration “in light of the increased use of the state-secrets privilege.”¹²⁷

3. Proposals for Heightened Review

One proposal for heightened review turns on allowing Congress to grant independent counsel the power to challenge the executive branch’s invocations of the state secrets privilege.¹²⁸ While the proponent of this idea admits the constitutionality of such an arrangement is not settled, he argues that it is grounded in the concept of separation of powers, and the Constitution could allow independent counsel to request judicial evaluation of specific invocations of the state secrets privilege.¹²⁹ Indeed, the Constitution makes clear that most military and foreign affairs powers rest with Congress, while there are only “four textual commitments of military or foreign affairs powers to the President.”¹³⁰

Further, despite repeated claims of judicial incompetence, there is nothing to indicate that the courts do not have the expertise to evaluate state secrets.¹³¹ On the other hand, there are plenty of indications that the executive branch is “[o]verrated” in its ability to separate necessary secrecy from convenient secrecy.¹³² After all, “career secret-keepers [such as CIA personnel] no doubt possess the natural human tendency of overestimating the importance of one’s own bailiwick.”¹³³ In light of these realities, legislation explicitly assigning to the judiciary the task of reviewing state secrets privilege invocations, at the behest of

124. *Id.*

125. *Id.* § 509.02 (noting proposed rule, at first glance, appeared to recognize unprecedented power of government to keep information from litigants).

126. FED. R. EVID. 501.

127. Stilp, *supra* note 97, at 863-65.

128. Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*, 18 NOVA L. REV. 1787, 1789 (1994).

129. *Id.* at 1831-33.

130. *Id.* at 1833.

131. *See id.* at 1835-36 (noting judiciary routinely deals with “the most important and complex issues” and arguing state secrets are no different).

132. *See id.* at 1839-40 (emphasizing pressure on intelligence officers to please their superiors and to “reconcile intelligence with established executive policy”).

133. Kaplan, *supra* note 128, at 1839.

independent counsel, could reduce the potential for abuse of the privilege.¹³⁴

Finally, there is an argument that courts should eliminate the mandate that the privilege is absolute and instead review claims of privilege employing a “comparative standard” that considers the degree to which national security is likely to be compromised from the discovery of evidence in the course of litigation.¹³⁵ This Comment now turns to a discussion and evaluation of the most attractive of the past proposals for change and ultimately recommends an approach to reforming the privilege.

III. DISCUSSION

This discussion of the possibilities for reforming the state secrets privilege is placed within the context of *El-Masri v. Tenet*,¹³⁶ which illustrates the crushing effect the privilege can have on plaintiffs who seek to effectuate their rights.¹³⁷ Part A examines the state secrets privilege in the context of the war on terror, using *El-Masri* as an illustration of the problem. With the *El-Masri* case as a backdrop, Part B considers two broad reasons why the privilege is ripe for change: (1) the need for confidence in the rule of law, and (2) the lack of executive restraint. Having established the reasons why the state secrets privilege must be reformed, Part C advances the conversation by scrutinizing two proposals made in the past and explaining why—although facially appealing—they should not be implemented. Part D suggests that courts should reform the state secrets privilege by adopting a comparative standard to strike an appropriate balance in state secrets cases and offers an example of how that comparative standard would work.

A. *El-Masri v. Tenet: The State Secrets Privilege Meets the War on Terror*

The *El-Masri* case shows not only that the state secrets privilege is alive and well in our courts today, but also that it is particularly threatening to plaintiffs in the age of the war on terror. Courts should reevaluate their approach to the state secrets privilege, especially in light of the harsh realities of life in the post-9/11

134. *Id.* at 1861. Although not addressing the notion of independent counsel, Senators Edward Kennedy (Democrat from Massachusetts), Patrick Leahy (Democrat from Vermont), and Arlen Specter (Republican from Pennsylvania) introduced a bill on January 22, 2008 that speaks to judicial review of evidence the government claims must remain secret. State Secrets Protection Act, S. 2533, 110th Cong. (as scheduled for consideration by S. Comm. on the Judiciary, March 6, 2008). The State Secrets Protection Act would mandate that courts hold in camera hearings to examine evidence the government claims is protected by the privilege. *Id.* § 4052(b)(1). While a complete treatment of this bill is beyond the scope of this Comment, it is important to note that the bill does not go far enough toward reforming the privilege, because it does little more than ensure that a court reviews the evidence in question. *Id.* § 4054(c). This is a step in the right direction, but it is only the first step; it would remain up to the judiciary to continue down the path to reform by adopting the comparative standard advocated in Part III.D of this Comment.

135. Note, *supra* note 114, at 584.

136. 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

137. See *infra* notes 138-155 and accompanying text for a discussion of the *El-Masri* case.

world, as illustrated by *El-Masri*.¹³⁸ An alleged victim of the United States' "extraordinary rendition" program,¹³⁹ Khaled El-Masri was denied his day in court when the government invoked the privilege, barring his claim against the former Director of the CIA and related defendants.¹⁴⁰ The Director accomplished this dismissal by convincing the court that the CIA could not defend itself against El-Masri's charges without revealing secrets about the extraordinary rendition program, which would endanger national security.¹⁴¹

The court noted that its dismissal of the case said nothing about the "truth or falsity of [El-Masri's] factual allegations; they may be true or false, in whole or in part."¹⁴² If one were to assume El-Masri's allegations were true, it would follow that the state secrets privilege shielded the government from liability for (1) having an innocent man abducted in a foreign country;¹⁴³ (2) holding him for twenty-three days in Macedonia without access to a lawyer, a translator, a consular officer, or his wife;¹⁴⁴ (3) stripping him of clothing, sodomizing him with a foreign object, and beating him;¹⁴⁵ (4) forcing him to make a videotaped statement that he had not been mistreated;¹⁴⁶ (5) shackling him, dragging him to an airplane, and drugging him;¹⁴⁷ (6) flying him to Kabul, Afghanistan, beating him again, and placing him in a cold cell;¹⁴⁸ (7) holding him for four months in a CIA-run facility called the "Salt Pit";¹⁴⁹ (8) repeatedly interrogating him and denying his requests for outside contact, while refusing to charge him with a crime;¹⁵⁰ (9) allowing him to go thirty-seven days without food;¹⁵¹ and, finally, (10) abandoning him on the side of a road in Albania.¹⁵² El-Masri claims that throughout most of his ordeal, the CIA knew he was innocent.¹⁵³ Even if only a portion of these allegations is true, then it is indeed an exercise in the art of understatement to say the state secrets privilege shield seems inappropriate.

The *El-Masri* court noted that "courts must carefully scrutinize the assertion of the [state secrets] privilege lest it be used by the government to shield 'material not strictly necessary to prevent injury to national security.'"¹⁵⁴ Nevertheless, in the very next breath, the court says it "must also bear in mind

138. *El-Masri*, 437 F. Supp. 2d at 532-33.

139. *Id.* at 532.

140. *Id.* at 539.

141. *Id.* at 538-39.

142. *Id.* at 540.

143. *El-Masri*, 437 F. Supp. 2d at 532.

144. *Id.* at 532-33.

145. *Id.* at 533.

146. *Id.*

147. *Id.*

148. *El-Masri*, 437 F. Supp. 2d at 533.

149. *Id.*

150. *Id.*

151. *Id.* at 533-34.

152. *Id.* at 534.

153. *El-Masri*, 437 F. Supp. 2d at 534.

154. *Id.* at 536 (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)).

the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."¹⁵⁵ This same deference to the government's word on what poses a threat to national security formed the basis of a judicial mistake commentators have decried for decades—the detention of thousands of innocent Japanese American citizens based on the government's assertion that they were a threat.¹⁵⁶ As it turned out, that threat did not exist.¹⁵⁷ What if allowing plaintiffs like El-Masri to have their day in court similarly poses no real threat? Are we repeating the mistakes of the past?

While recent cases such as *El-Masri* present compelling reasons to reconsider the state secrets privilege, there are also more general reasons for reevaluating our approach to this privilege. First, confidence in the rule of law is essential to any "government of laws,"¹⁵⁸ and history shows that the state secrets privilege threatens that confidence.¹⁵⁹ Second, the executive branch does not mimic the judiciary's restraint, and claims of privilege that essentially boil down to "[t]rust us"¹⁶⁰ should be met with wariness. Each of these reasons is considered in turn below.

B. Reasons for Reevaluating the State Secrets Privilege

1. Confidence in the Rule of Law

"The government of the United States has been emphatically termed a government of laws, and not of men."¹⁶¹ It is a matter of common sense that if a government of laws is to function properly, there must be confidence among the people in the rule of law. Further, because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹⁶² there cannot be confidence in the rule of law absent confidence in the judiciary. With this in mind, courts should reexamine the state secrets privilege, especially in light of the embarrassing mistake revealed in *Herring v. United States*.¹⁶³

Herring was the action that ensued when Judith Palya Loether, the daughter of one of the widows involved in *United States v. Reynolds*,¹⁶⁴ finally read the now-declassified accident reports suppressed in that case. Loether discovered in 2000 that the reports, which allegedly contained the security-

155. *Id.*

156. *Korematsu v. United States*, 323 U.S. 214, 218-19 (1944).

157. See *infra* notes 179-85 and accompanying text for a discussion of *Korematsu*.

158. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

159. See, for example, *infra* notes 163-70 for a discussion of the mistake revealed in *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

160. Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 144 (2006).

161. *Marbury*, 5 U.S. (1 Cranch) at 163.

162. *Id.* at 177.

163. 424 F.3d 384 (3d Cir. 2005).

164. 345 U.S. 1 (1953).

threatening information requiring invocation of the privilege, included no information about a secret mission or secret equipment being tested.¹⁶⁵ Instead, the report contained page after page of documentation revealing that the Air Force's negligence caused the crash.¹⁶⁶ As one commentator wryly noted, "revealing the reports would not have brought down the Republic[,] but it would have sunk the government's defense in the *Reynolds* action."¹⁶⁷ Upon making her discovery, Loether sought a writ of error *coram nobis* from the Supreme Court, which the Court denied.¹⁶⁸

When "secret" evidence will be disclosed in the future, through declassification or other means, there is a danger that the judicial system eventually will be embarrassed by faulty decisions centering on that evidence.¹⁶⁹ Judith Loether's story provides one illustration of this potential realized: all that separated her, and the American public, from the truth behind government's assertion of the state secrets privilege was a computer, the search phrase "B29 + accident," and a \$63 fee for having the documents mailed to her.¹⁷⁰ In today's world of instant access to information, mistakes like the one made in *Reynolds* are likely to be revealed—and the news is sure to spread. When this Comment was drafted, a Google search for "Judy Loether" produced more than 500 hits, and her story was covered by both print and radio news outlets.¹⁷¹ When the seminal case for a doctrine as contentious as the state secrets privilege is exposed as being founded on exactly the kind of error on the Court's part—and outright dishonesty on the executive branch's part—that plaintiffs have feared, the judicial branch should take a hard look at its willingness to trust the executive.

Ironically, this willingness to trust the executive branch seems to stem in part from the judiciary's fear of error. The judiciary has either convinced itself, or has allowed itself to be convinced, that it simply does not have the wherewithal to determine whether information the government claims must be protected in the interest of national security is truly vital.¹⁷² This self-doubt seems misplaced, given that courts decide matters of equal complexity on a daily basis—why are they competent to decide these matters but not competent to

165. Siegel, *supra* note 63.

166. *Id.*

167. Graham, *supra* note 11, at 890.

168. *Id.* at 891. The writ of error *coram nobis* is an extraordinary writ used to correct gross judicial error. See *infra* notes 182-83 and accompanying text for a discussion of this writ in connection with *Korematsu*.

169. See *infra* notes 178-85 for a discussion of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), as examples of this danger realized.

170. Siegel, *supra* note 63.

171. See, e.g., Siegel, *supra* note 63 (covering Judy Loether's story in *L.A. Times*); *Administration Employing State Secrets Privilege at Quick Clip* (NPR radio broadcast Sept. 9, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4838701> (discussing Judy Loether's story on radio).

172. See Fuchs, *supra* note 108, at 163 (noting that courts have been "reluctant to probe" for reasons that government information is withheld and have "adopted a doctrine of deference to executive claims that secrecy is needed").

evaluate matters of state secrecy in the context of litigation?¹⁷³ In a particularly compelling response to the argument against judicial competency, James Zagel reminds us that, “[t]he privilege was judicially created, and it is foolish to assert that the judiciary is without power to supervise its exercise.”¹⁷⁴

Much is made of the notion that in today’s world of highly sophisticated national security methods, and highly sophisticated methods for fighting the war on terror, even seemingly innocuous pieces of information can be part of a larger “mosaic.”¹⁷⁵ The argument goes that those skilled in such matters (today, terrorists are the favorite villain) can piece together these apparently unimportant bits of information to reveal the larger picture.¹⁷⁶ Thus, the argument continues, only those who have the entire mosaic already before them (i.e., the executive branch) are able to determine which pieces of information can safely be revealed and which must be kept secret.¹⁷⁷

While this may be a tempting argument for allowing the executive to call the state secrets shots, courts must remember that this line of argument is largely responsible for two of the biggest judicial embarrassments in United States history: *Hirabayashi v. United States*¹⁷⁸ and *Korematsu v. United States*.¹⁷⁹ In these now-infamous cases, the Supreme Court blessed first a strict curfew for Japanese American citizens and then the exclusion of these citizens from large portions of the West Coast.¹⁸⁰ It was later discovered that they posed no threat at all.¹⁸¹ The District Court for the Northern District of California acknowledged this error when it vacated Korematsu’s conviction by granting a writ of *coram nobis* in *Korematsu v. United States*.¹⁸² This is an extraordinary writ that is reserved for correcting “errors that result in a complete miscarriage of justice.”¹⁸³

173. See *id.* at 170 (offering sampling of complex matters that courts regularly decide); Kaplan, *supra* note 128, at 1835 (pointing out that “courts routinely deal with the most important and complex issues of our society”).

174. Zagel, *supra* note 109, at 892. Additional evidence of the fallacy of the argument against judicial competency is the fact that in the pre-Vietnam era, courts were perfectly willing to decide issues centering on the President’s war power. Louis Fisher, *The War Power: No Checks, No Balance*, in CONGRESS AND THE POLITICS OF FOREIGN POLICY 1, 5-10 (Colton C. Campbell et al. eds., 2003). If courts can decide fundamental issues of the President’s power with regard to war, surely they are fit to decide whether pieces of evidence are detrimental to national security.

175. See *supra* notes 81-83 and accompanying text for an explanation of the mosaic theory.

176. See *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (arguing that intelligence would be jeopardized if state secrets privilege were denied).

177. See *id.* (arguing that executive, rather than court, is better equipped to determine what information must be kept privileged).

178. 320 U.S. 81 (1943).

179. 323 U.S. 214 (1944).

180. *Korematsu*, 323 U.S. at 217-19; *Hirabayashi*, 320 U.S. at 85-89.

181. See Fuchs, *supra* note 108, at 151 (noting that by simply requiring explanation of evidence on which military based its conclusion, Supreme Court “would have learned that the government lacked sufficient evidence, and it likely would have been able to discern the improper rationale for the policy”).

182. 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

183. *Korematsu*, 584 F. Supp. at 1419.

The Court based the faulty *Hirabayashi* and *Korematsu* decisions on little more evidence than the word of the military, because “the government used its institutional credibility as a litigating tactic, arguing that courts could not accurately judge national security risks, particularly because World War II presented ‘new’ security risks ‘wholly unprecedented in the history of this country.’”¹⁸⁴ This language sounds eerily familiar in today’s context and should provide yet another reason for courts to rethink their approach to the deference accorded to the executive branch when it invokes the state secrets privilege. Indeed, the district court that vacated *Korematsu*’s conviction recognized such danger when it noted that *Korematsu* “stands as a caution that in times of distress the shield of . . . national security must not be used to protect governmental actions from close scrutiny and accountability.”¹⁸⁵

2. Judicial Restraint Is Not Mirrored in the Executive Branch

The hallmark of a judge is his or her impartiality. This impartiality is not the hallmark of a President. The restraint that attends the judicial branch is not mirrored in its executive counterpart. This lack of executive restraint is evinced by the gross overclassification of information that has persisted since the mid-twentieth century.¹⁸⁶ Further, this lack of restraint has become particularly clear in recent years and is most recently illustrated by legislation such as the Military Commissions Act.¹⁸⁷ In this environment, extreme deference to the executive branch’s assertions of the necessity of barring evidence under the state secrets privilege seems dangerously misplaced.

Deference is based on trust; in the state secrets privilege context, that trust comes in the form of believing that the executive branch would not cloak information in secrecy unless it was necessary to do so. Nevertheless, “the executive has a bureaucratic tendency to overvalue its privacy.”¹⁸⁸

184. Green, *supra* note 160, at 133 (quoting Brief for the United States at 16, 34, 60, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870)).

185. *Korematsu*, 584 F. Supp. at 1420.

186. See *infra* notes 196-99 and accompanying text for a discussion of this overclassification.

187. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered titles and sections of U.S.C.). Section seven of the Act, codified in 28 U.S.C.A. § 2241, gives the President the authority to suspend habeas corpus for people he believes to be enemy combatants. 28 U.S.C.A. § 2241(e) (West Supp. 2007). Further, § 2241(e)(2) provides:

Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Id.

188. Zigel, *supra* note 109, at 894.

Indeed, this propensity of the executive to operate under the cloak of secrecy, rather than out in the daylight for all to see, made necessary the FOIA.¹⁸⁹ Concern for excessive executive secrecy is particularly fitting in the face of the “unitary executive” theory that the Bush administration has embraced with such enthusiasm.¹⁹⁰ This theory holds that the Constitution vests in the president exclusive administrative authority, untouchable by the legislative and judicial branches.¹⁹¹

One effect of this mentality of secrecy and absolute power on the function of our government was highlighted by a 2001 congressional hearing on the CIA’s refusal to provide Congress with requested information.¹⁹² This hearing took place when the CIA refused to provide information on its computer security policies and encouraged other executive agencies to do the same.¹⁹³ Further, “[s]ymptomatic of the CIA’s misguided perception of its responsibilities to Congress, the agency would not even cooperate [with the hearing] by providing a witness to discuss why they won’t cooperate.”¹⁹⁴ Where Congress is not given access to information from the executive branch sufficient to exercise its oversight responsibilities, executive assertions that national security requires shielding certain secrets from plaintiffs should be checked judicially. The judiciary, rather than the legislature, is the appropriate vehicle for change in the administration of the state secrets privilege, given that the privilege is a judicial creation.¹⁹⁵

The sheer volume of classified information in the U.S. government deflates the presumption that classified documents necessarily are secret.¹⁹⁶ The amount of classified information maintained by the United States government is indeed staggering. In 2004 alone, there were 15.6 million classification actions, and the cost of the classification program grew from “an estimated \$4.7 billion in 2002 to \$7.2 billion in 2004.”¹⁹⁷ High-ranking government officials—including former Secretary of Defense Donald Rumsfeld, former Deputy Under Secretary of Defense for Counterintelligence and Security Carol A. Haave, and former Director of the CIA Porter Goss—have admitted that the government

189. 5 U.S.C. § 552 (2000 & Supp. IV 2004). See *infra* notes 246-50 and accompanying text for a discussion of the FOIA.

190. See Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 722-30 (2005) (tracing George W. Bush’s adherence to unitary executive theory).

191. *Id.* at 604-05.

192. See generally *Is the CIA’s Refusal to Cooperate with Congressional Inquiries a Threat to Effective Oversight of the Operations of the Federal Government?: Joint Hearing Before the Subcomm. on Government Efficiency, Financial Management and Intergovernmental Relations and the Subcomm. on National Security, Veterans Affairs and International Relations of the H. Comm. on Government Reform*, 107th Cong. (2001) (discussing committee’s concern that CIA’s refusal to respond could weaken congressional oversight of executive branch departments and agencies).

193. *Id.* at 2-3.

194. *Id.* at 9 (statement of Rep. Christopher Shays, Chairman, H. Subcomm. on National Security, Veterans Affairs and International Relations).

195. Kaplan, *supra* note 128, at 1818.

196. Zagel, *supra* note 109, at 880.

197. Fuchs, *supra* note 108, at 133.

overclassifies significantly.¹⁹⁸ Haave conceded that as much as half of the information labeled “classified” has no reason to be so categorized.¹⁹⁹ This admitted overclassification carries the logical inference that much of the material deemed “secret” by the executive branch could be made public without consequence. Extending that logic to the state secrets privilege reveals that governmental cries for secrecy merit judicial scrutiny.

Most children have had the experience of creating a game, establishing the rules in their own interest, and then watching in dismay as those rules turn on them in the hands of opponents. This lesson carries over to all the powers and privileges we create as adults; common sense says privileges should be crafted with an eye to the effect they would have in the hands of someone with reason and inclination to abuse them.²⁰⁰ The traditional approach to the state secrets privilege would work perfectly in an ideal world, where the executive branch never tried to overstep its constitutional bounds, where information was only classified when truly necessary, and where a government-defendant’s own interest in winning (or deflecting) a case against it always came second to its interest in protecting the greater good. Perhaps one day we will enjoy such circumstances, but they do not exist now, did not exist when the state secrets privilege was created, and are not likely to exist in the foreseeable future.²⁰¹ Thus, courts should inject the administration of the state secrets privilege with a much-needed dose of realism and scale back the deference accorded the executive branch.

C. *Evaluation and Rejection of Past Proposals for Change*

1. Special Procedural Techniques Are Too Burdensome

Legal scholarship is rich with proposals for changing the state secrets privilege.²⁰² This discussion is limited to two types of proposals, because they are particularly tempting but ultimately unavailing: (1) those advocating special procedural techniques, and (2) those suggesting changes to the traditional burdens of production and persuasion. The first, and possibly most frequently offered, type of suggestion for lessening the privilege’s blow to plaintiffs is to

198. *Id.* at 133-34.

199. *Id.* at 133 (citing *Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 108th Cong. 82 (2004) (statement of Carol A. Haave, Deputy Under Secretary of Defense, Counterintelligence & Security, U.S. Department of Defense)).

200. The Supreme Court recognized this necessity in the extreme when, reviewing President Lincoln’s suspension of the writ of habeas corpus during the Civil War, the majority noted, “Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.” *Ex parte Milligan*, 71 U.S. 2, 125 (1866).

201. See Fuchs, *supra* note 108, at 153 (noting incentive for government to keep secrets, because “national security secrecy ends public inquiry into allegations of misconduct as well as forecloses any governmental liability”).

202. See *supra* Part II.C for an overview of these proposals.

allow courts to employ special procedures in cases involving state secrets.²⁰³ Allowing special techniques—such as disclosure of the evidence under protective orders, use of special masters, and trying state secrets cases before juries with security clearance²⁰⁴—in state secrets cases arguably would present benefits to both the plaintiffs and to the government.²⁰⁵

These techniques could result in fewer cases being dismissed upon proper invocation of the privilege, because the danger of public exposure of the sensitive evidence would be reduced sufficiently to allow the court to adjudicate the case.²⁰⁶ Further, such techniques could result in less animosity between plaintiffs and the government, because increased assurance of secrecy could encourage the government not to dispute admission of the evidence when it is required for litigation.²⁰⁷ Along these same lines, safeguarding sensitive evidence could create an environment in which the government fights for exclusion of evidence only in the most extreme cases.²⁰⁸ Against this backdrop, courts would be better positioned to separate legitimate claims that discovery of the evidence would pose a threat to the nation from those driven by the government's desire to keep out evidence that poses a threat to its case.²⁰⁹ Finally, the availability of such procedures "should ease the psychological strain on the judiciary when the question of privilege is very close."²¹⁰

On the other hand, requiring the judiciary to embrace a relatively infrequently used procedure, or set of procedures, would present a new strain that easily could outweigh any attendant reduction in "psychological strain." To burden an already strained judiciary with the potential for having to create a new jurisprudence centered on the circumstances in which to apply these special procedures seems ill-advised unless absolutely necessary.²¹¹ Ultimately, proposals for special adjudication techniques would likely be as burdensome as they would be beneficial, and they therefore should be rejected in favor of

203. See *supra* notes 114-15 for a list of these commentators.

204. See *supra* notes 114-15 and accompanying text for an introduction to these proposals.

205. See Askin, *supra* note 114, at 772-73 (noting that special techniques would allow government to maintain secrecy when truly necessary while removing danger of privilege being used to hide harmful mistakes that have no connection with national security).

206. *Cf. Zagel, supra* note 109, at 900 (positing that closer scrutiny would likely result in fewer invocations of state secrets privilege).

207. *Id.* at 887.

208. *Cf. id.* at 900 (positing that judicial scrutiny likely would lead to in fewer executive claims of state secrets privilege).

209. See Askin, *supra* note 114, at 760-61 (observing that claims of national security create risk that administration acts in self-interest rather than in interests of nation).

210. Zagel, *supra* note 109, at 887.

211. A quick look at the judiciary's financial status illustrates this point. The federal judiciary requested \$6.26 billion for the 2006 fiscal year, which was a 9.4% increase over the 2005 fiscal year. News Release, Fed. Judicial Ctr., Judiciary Asks for Funding to Maintain Course (Apr. 5, 2006), available at http://www.uscourts.gov/Press_Releases/budget.html. This increase was necessitated in large part by the increase in the courts' caseload. *Id.* This caseload no doubt would increase were the courts tasked with creating new judicial procedures for state secrets cases.

something more workable.²¹²

Examination of one facially persuasive procedural proposal illustrates the problems inherent in such suggestions. One commentator has offered a three-part procedural proposal for cases in which proper invocation of the state secrets privilege would prevent a case from moving forward: (1) the government is provided the option of “accepting an appropriate sanction to compensate the plaintiff for loss of the evidence or disclosing the evidence to plaintiff under protective order”; (2) if the government discloses the evidence, and summary judgment is not warranted, “the court could require a waiver of jury trial”; and (3) “[i]f sanctions are not feasible” and the government insists that any disclosure of the evidence would “intolerably burden national security interests, the government would be allowed to prove its contention in the face of a strong presumption against secret decisionmaking.”²¹³ While this proposal arguably strikes a fair balance between the plaintiff and the government, implementing it would impose too heavy a burden on the courts.

Under step one, the court must give the government the option of “accepting an appropriate sanction” to make whole the plaintiff denied his day in court.²¹⁴ This step presents a significant challenge: how is the court to determine an “appropriate” sanction? First, courts would need to decide for what the plaintiff is actually being compensated. One option would be to impose a sanction commensurate with what the plaintiff likely would receive in damages if he prevailed in the litigation. That option, however, would create problems if the relief sought was declaratory or injunctive rather than monetary. Alternatively, the sanction could be tied to the plaintiff’s loss of his day in court.²¹⁵ Given that our legal system is founded on the right of litigants to resolve

212. See *infra* Part III.D for a suggestion and discussion of a workable solution.

213. Askin, *supra* note 114, at 772-73.

214. *Id.* at 772.

215. Although an in-depth treatment of a compensatory legislative remedy for plaintiffs thwarted by the state secrets privilege is beyond the scope of this Comment, the notion is worthy of mention. J. Steven Gardner proposed a statutory scheme under which plaintiffs would receive between \$1,000 and \$250,000 if the trial court finds that the plaintiff had a “reasonable possibility” of winning, but for the exclusion of essential evidence under the state secrets privilege. Gardner, *supra* note 89, at 602, 606. While Gardner’s “State Secret Privilege Compensation Act” (or the alternative “State Secret Compensation Application Act”) is an attractive idea, the details of his proposal leave too much room for dispute. See *id.* (outlining proposed statutory schemes). The fundamental problem with the proposed legislation stems from its posture as a consolation prize of sorts for plaintiffs who *might have* won at trial. Under any form of compensatory legislation, a plaintiff who just as easily could have lost or won will receive recompense. To award compensation to plaintiffs so situated seems inequitable when that compensation is presented as remuneration for a win in court that very easily would not have materialized. To solve this dilemma, compensatory legislation should be presented as consolation for losing one’s day in court. Under this rubric, it matters not whether the plaintiff would have won or lost in court, because the compensation is triggered by the government successfully denying the plaintiff her opportunity to try. The details of such legislation are a topic for another day, but a couple of points are warranted here. First, the compensation provided would have to be substantial enough to be meaningful but not so large as to encourage abuse. Second, because the government will have to pay money to plaintiffs under such legislation, the ultimate cost of those awards will be passed on to the taxpayer. If the privilege has been properly invoked, this seems entirely fair. When a plaintiff loses

disputes through the court system, loss of this opportunity would seem to carry a high price—but how high should it be? Courts would face an additional quandary in cases where the damages claimed exceeded that price. In those cases, courts might have to choose between two “appropriate” sanctions, which would create the problem of establishing a basis on which to make that decision. Resolving even a couple of these issues would require courts to create volumes of new jurisprudence, which cautions against adopting this approach.

The second step in Askin’s proposal presents a constitutional quandary: “[I]n camera proceedings are inconsistent with our Constitution’s commitment to public trials.”²¹⁶ Askin notes that if the choice is between an in camera trial and no trial at all, then the former is the lesser of the two evils.²¹⁷ While this may be true, the underlying problem persists: the plaintiff is forced to choose between a “lesser” trial and no trial, while the defendant receives the benefit of this imposition on the plaintiff. The third step of Askin’s proposed procedural scheme presents similar problems as the first and leads courts into a cul-de-sac of reasoning. The first prong of this step would require courts to determine that sanctions are not feasible. The discussion of step one highlights the burden this determination will present. Under the second prong, the government can successfully bar the plaintiff from the privileged evidence if it can prove that disclosure would “intolerably burden national security.”²¹⁸ Further, the government must prove this contention “in the face of a strong presumption against secret decisionmaking.”²¹⁹ It seems reasonable to predict that the government will argue that it cannot prove the contention against such a presumption without revealing the very evidence it wants to keep secret. And by revealing that information, the result sought to be avoided in the first place (endangerment of national security) will, presumably, have come to pass. The challenges inherent in this and similar “special techniques” solutions to the state secrets privilege puzzle diminish their value.²²⁰ Fortunately, the result sought by these proposals can be achieved through less onerous means.²²¹

2. Reallocating Burdens of Proof Is Ultimately Unhelpful

Another possible solution offered in the scholarship is to reduce or shift the

her day in court for the sake of national security, then the nation enjoying that security should bear the burden. It is unfair to allow the government to externalize the cost of national security onto individual plaintiffs—making plaintiffs “pay” more than their share through loss of their opportunity to litigate alleged wrongs. Instead, that cost should be spread among the beneficiaries of national security. Proper state secrets privilege compensatory legislation would be one way to achieve this cost spreading.

216. Askin, *supra* note 114, at 773.

217. *Id.*

218. *Id.*

219. *Id.*

220. See Anthony Rapa, Comment, *When Secrecy Threatens National Security: Edmonds v. Department of Justice and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 272-75 (2006) (noting problems attendant to prior proposals for change).

221. See *infra* Part III.D for a recommended approach to reforming the privilege.

traditional burdens of proof in cases in which successful invocation of the state secrets privilege renders key evidence unavailable to either the plaintiff or the defendant.²²² Like proposals for special adjudication techniques, this idea is appealing, but it ultimately presents more challenges than it overcomes. Theoretically, reallocation of burdens would level the playing field by “compensat[ing]” for the loss of the evidence in question.²²³ Analogizing litigation to a video game, imagine the plaintiff and defendant enter the fray carrying equally powerful machine guns. The defendant, however, has a secret weapon (the state secrets privilege) that blows the plaintiff’s machine gun out of his hand, and replaces it with a musket. Obviously, a battle between a machine gun and a musket will not be much of a battle at all. In fact, there will be little sense in fighting. Reducing plaintiff’s burden, however, would be like restoring his machine gun. When the government uses its “secret weapon,” the court would bestow a similar “weapon” on the plaintiff, and a fair fight could ensue.

While no specific burden-shifting scheme has been offered in the scholarship, a possible scenario could look like this: Plaintiff enters the action bearing the burdens of production and persuasion. Defendant successfully invokes the state secrets privilege, thereby shrinking the plaintiff’s universe of producible evidence. The plaintiff’s burden of production would then shift to the defendant, who must offer other evidence that the plaintiff could use to proceed with her case. Throughout, the burden of persuasion would rest with the plaintiff, although the court could reduce it from clear and convincing evidence to a preponderance.

This type of scheme was hinted at in *Reynolds*.²²⁴ There, the Air Force refused to allow plaintiffs to discover accident reports but offered instead to allow plaintiffs to examine surviving crew members.²²⁵ The Court appeared to bristle at the plaintiffs’ refusal to accept this offer, noting that they “were given a reasonable opportunity” to proceed with the alternate evidence, and “should have . . . accepted” the Air Force’s offer.²²⁶

While the notion of adjusting burdens of proof to account for missing evidence seems like a fair solution—and certainly seems preferable to denying plaintiffs their opportunity to litigate—such a scheme probably would do little more than replace the plaintiff’s disadvantage with chaos on all sides. The executive branch would no doubt argue fiercely that it should not be forced to choose between protecting national security and bearing an increased evidentiary burden. More significantly, in many cases, reducing the plaintiff’s burden of production or persuasion would make absolutely no difference. If the state secrets privilege makes all essential evidence unavailable to plaintiffs, then they will not be able to meet even a reduced burden of production or persuasion.

222. Note, *supra* note 114, at 588-89.

223. *Id.* at 589.

224. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (allowing plaintiffs to examine surviving crew members but not discover accident reports).

225. *Id.*

226. *Id.*

Unless courts are willing to translate successful invocation of the privilege into a loss for defendants, then a burden reduction scheme simply is not helpful. For all of these reasons, the burden-shifting proposal should be rejected in favor of a comparative standard.

D. Appropriate Balancing Test and Application of a Comparative Standard

“When it becomes clear . . . that what is demanded is not an explanation for the bad news but rather a change in outcomes, the Court may start searching for new methods of interpretation.”²²⁷ The time has come to start this search with regard to the state secrets privilege. The most promising “new method of interpretation” to take the sting out of the state secrets privilege, while honoring its purpose of safeguarding national security, is the application of a comparative standard, which looks to both the degree of potential harm and the chances of that harm coming to pass.²²⁸ Before one can discuss this comparative standard, however, one must establish the appropriate balancing test on which to base that standard.

The *El-Masri* court’s statement that “El-Masri’s private interests must give way to the national interest in preserving state secrets”²²⁹ illustrates a common, fundamental flaw in thinking about the state secrets privilege. Courts should not view questions of the privilege as a balancing act between an individual plaintiff’s private interest in the litigation at hand versus the public interest in national security. That scale will always tip in favor of the latter, as it well should.²³⁰ Instead, courts should weigh the public interest in national security against the public interest in fair and effective decision making and rule of law.²³¹ When engaging in this line of thought, courts should keep close in mind the mistakes of the past, such as the recently revealed *Reynolds* error.²³² This backward glance reveals a strong reason to doubt the state secret privilege’s ability—as currently employed—to coexist with fair and effective decision making.

This balancing test also should include consideration of the public interest in maintaining the integrity of the separation of powers on which this country was built.²³³ The Court of Appeals for the Third Circuit recognized this essential

227. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 953 (1987).

228. Note, *supra* note 114, at 584-86.

229. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006), *aff’d sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

230. See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) (noting that when individual interest is stacked against public interest, latter will almost always prevail automatically).

231. Zagel, *supra* note 109, at 885.

232. See *supra* notes 163-68 and accompanying text for a discussion of truth behind the privilege claim in *Reynolds*.

233. Zagel notes that “the separation of powers argument works against the executive, for it is normally a judicial function to determine the existence of a privilege.” Zagel, *supra* note 109, at 893.

issue when it decided *Reynolds* in favor of the plaintiffs:

[T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.²³⁴

Further, the Constitution does not entrust the President with exclusive domain over governmental secrecy.²³⁵

To minimize this separation of powers problem, courts should be particularly wary when the government invokes the privilege as a defendant. "Whether or not the federal government has an overriding interest in the sanctity of its secrets when sought in aid of purely private litigation, the government's claim is substantially weakened when it is itself the accused wrongdoer."²³⁶ One must keep in mind, however, that the executive branch can have a vested interest in the outcome of a case even when it is not a party. The government often intervenes on behalf of private companies,²³⁷ many of which are large campaign contributors.²³⁸

Even where the government does not have an immediate financial interest in the company being sued, one can imagine a loss for a government contractor having a trickle-down effect on the executive. That is, if a government contractor is forced to remain entangled in expensive litigation, it could be inclined to recoup that money by increasing its rates on subsequent contracts. Thus, the government could have a downstream financial interest in ensuring that its contractors are spared litigation costs to the greatest extent possible. Further, the official invoking the privilege might have a personal interest in the corporation's success, as was the case in *Zuckerbraun v. General Dynamics Corp.*,²³⁹ where the official was a former officer of the company being sued.²⁴⁰ Another important point to consider in the context of corporate defendants is the public's interest in corporate responsibility.²⁴¹ When the government intervenes in a suit involving a corporate defendant, the state secrets privilege shields the company from liability, reducing the incentive to conduct business in a responsible manner.²⁴²

234. *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

235. Kaplan, *supra* note 128, at 1816; *see also* Fuchs, *supra* note 108, at 139 (arguing that "secrecy claims must be measured against our historic and constitutional commitments to government openness").

236. Askin, *supra* note 114, at 768.

237. *E.g.*, *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) (noting U.S. Navy's intervention in suit to assert privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1237 (4th Cir. 1985) (same); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1487 (C.D. Cal. 1993) (noting intervention of U.S. Air Force Secretary and Acting Secretary of Defense in suit to assert privilege).

238. Graham, *supra* note 11, at 893-94.

239. 935 F.2d 544, 546 (2d Cir. 1991).

240. Graham, *supra* note 11, at 894.

241. Gardner, *supra* note 89, at 589-90.

242. *Id.*

When the proper balancing test is employed, especially in light of what we now know of courts' mistakes in the past, it becomes clear that the deference traditionally provided to the executive branch in this context is based on questionable reasoning. Properly balancing the competing interests involved reveals that the "absolute" approach to the privilege should give way to the more nuanced comparative standard.²⁴³ Using this standard, courts should consider the degree to which national security is likely to be compromised by discovery of the evidence in question during litigation rather than adhere to the traditional view of the privilege as "absolute."²⁴⁴

When employing the comparative standard, courts should examine the degree of likelihood that the specific information in question, if revealed, would pose a specific danger to the national security.²⁴⁵ This specificity requirement is a key first step to restoring the balance the state secrets privilege so often disrupts, because it places equal burdens on plaintiffs and defendants. Plaintiffs must state their injury with specificity to sustain a claim, and the government should be held to the same standard when invoking the state secrets privilege. To allow the government to hamstring the plaintiff's claim with a general statement of the injury that would flow from disclosure of the evidence—i.e., danger to the national security—is inequitable because it bestows on the government an advantage denied to the plaintiff.

Courts have experience with this sort of comparative analysis in the context of FOIA, under which they must evaluate the appropriateness of executive branch claims that requested material is exempt from disclosure because it poses a threat to security.²⁴⁶ "If a threat is too subtle or complex for the executive to convince a court of its significance, there is reason to doubt the existence of the alleged danger."²⁴⁷ In the FOIA context, Congress made clear that it wanted courts to review claims of secrecy to ensure that they were legitimate.²⁴⁸ This experience should alleviate many of the implementation problems inherent in other proposals for changing the way the state secrets privilege is used against plaintiffs.²⁴⁹ Further, this experience undermines the "mosaic theory" argument for deference to executive claims of privilege, which assumes that the courts are

243. *Id.* at 591 (referring to comparative standard as transforming privilege "from an absolute privilege to a qualified privilege"); Note, *supra* note 114, at 584-86.

244. See Note, *supra* note 114, at 584 (arguing that courts should replace standard that considers only potential "prejudicial impact" of disclosure with one that considers whether potential for danger outweighs "disclosure value" of evidence to plaintiff).

245. See Zagel, *supra* note 109, at 885 (arguing that specificity is key and noting that "the mere fact that information is sensitive does not mean that it must necessarily be kept secret").

246. Note, *supra* note 114, at 585-86; see also McPherson, *supra* note 42, at 228 (noting that FOIA-style reviews would protect national security while avoiding prohibition of valid claims).

247. Note, *supra* note 114, at 585-86.

248. Fuchs, *supra* note 108, at 162. "By directing de novo review (instead of the ordinary arbitrary and capricious review under the [Administrative Procedures Act]), Congress signaled its wish that the courts undertake a new review of the facts and law, without relying on the original agency decision." *Id.*

249. See *supra* Part III.C for a discussion of some of these proposals.

ill-equipped to grasp the subtleties of national security concerns.²⁵⁰

Let us consider a hypothetical to illustrate how the comparative standard might play out: Plaintiff works for the CIA, and sues for unlawful employment discrimination. In response, the CIA invokes the state secrets privilege, claiming that the litigation necessarily would disclose the plaintiff's personnel files, which would reveal the kind of work he did for the Agency, which would in turn threaten national security. Under the currently used model, the CIA likely would prevail in this assertion—taking the CIA at its word, it seems reasonable to believe that such files could contain information that might threaten national security if revealed.

Under a comparative standard, however, the court would take a closer look, and first consider the specific evidence in question. If the plaintiff were a custodial worker not given access to information of the sort that is likely to implicate security interests, then the likelihood probably would be low that his personnel files contain top-secret information bearing on national security. On the other hand, if the plaintiff were a high-ranking official whose job centered on particularly sensitive information, the likelihood might be greater. Under the second prong of the standard, the CIA would have to point to the specific danger to national security that could flow from disclosure—a general statement of impending danger is not enough under the comparative standard.²⁵¹ For example, would the litigation reveal a weakness in our chain of intelligence that an enemy could use against us? Would it expose a new intelligence-gathering method essential to anticipating attacks on our soil? Presumably either of these options could inhere if the employment action in question involved denying the plaintiff a particular position in a top-secret project, and the litigation would require inquiry into the details of the position and the plaintiff's corresponding qualifications. On the other hand, this hypothetical evidence might simply reveal the CIA to be a garden variety discriminatory employer.

Combining these closely related areas of inquiry under the comparative standard would provide the courts with a clearer picture of whether the privilege should apply. The comparative standard would thus liberate the courts from their self-imposed position of extreme deference to the word of the executive branch and would prevent plaintiffs from needlessly being denied their day in court.

To justify this change in approach, however, we must confront the mandate that the state secrets privilege, when properly invoked, is absolute.²⁵² As one commentator has noted, "absolute in force is not the same as unlimited in range or scope. A principle or right can be absolute when applied without being applicable to every situation."²⁵³ Extending this thought from principles and rights to privileges leads to the conclusion that merely because the state secrets

250. See *supra* notes 81-83 and accompanying text for a discussion of the mosaic theory.

251. See *supra* note 245 and accompanying text for a discussion of this specificity requirement.

252. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

253. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 *Geo. L.J.* 899, 903 (1979).

privilege is absolute when applied does not mean it absolutely must apply when the government says it should. Under the current analysis, the privilege applies when invoked by the head of a department with control over the evidence in question, and the court is convinced that there is a “reasonable danger” that discovering the evidence could pose a threat to national security.²⁵⁴ Given the extreme deference courts traditionally give the executive branch in state secrets privilege questions, convincing the courts of this “reasonable danger” is far from difficult.

The comparative standard would provide a better way for courts to determine not the extent to which the privilege should apply but whether it should apply. If it does apply, then the evidence is still absolutely barred from disclosure, despite the effect on the plaintiff’s case. Nevertheless, the comparative standard would help ensure that this draconian “absolute” privilege applies only where it is truly necessary and would reopen the doors of justice to many plaintiffs who have heretofore been denied the opportunity to fight for their rights.

IV. CONCLUSION

Jean de la Fontaine was right. There is “nothing . . . so oppressive as a secret”²⁵⁵—a reality to which too many plaintiffs can attest. For the sake of confidence in the rule of law, and because the executive branch has shown time and again that it does not exhibit the kind of restraint necessary to using such a privilege properly, the time has come to reform the state secrets privilege. The need for change is particularly acute in this age of the war on terror. “National security” remains on the lips of politicians and citizens alike, and concern for national security threatens to overshadow concern for the civil liberties and ordered, transparent justice on which this country was built.²⁵⁶ In this light, the state secrets privilege gives the executive a powerful one-two punch: (1) it serves as a successful litigation tactic; and (2) it gives the government an opportunity to play the seemingly unbeatable “national security” card, highlighting executive power. As long as courts continue to administer state secrets privilege claims as they have in the past, the executive has every reason—and every opportunity—to abuse its privilege. By analyzing state secrets privilege claims using a comparative standard, which looks both to the degree of potential harm and the chances of that harm being realized, courts will be better positioned to ferret out abusive claims and protect plaintiffs’ right to their day in court.²⁵⁷

While the comparative standard appears to be the most viable solution to our state secrets showdown, there are, no doubt, other routes to reform that could work. It is my hope that the conversation about the state secrets privilege will heat up, inspiring courts to implement changes necessary to chill its effect on

254. *Reynolds*, 345 U.S. at 4 n.4, 10.

255. DE LA FONTAINE, *supra* note 1, at 284.

256. The latest example of this threat is the Military Commissions Act, discussed *supra* at note 187.

257. See *supra* Part III.D for a discussion of this standard.

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plaintiffs. The bottom line is that the state secrets privilege is being abused and must be changed. The time has come to beware the secrets we keep.

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