



NOTE

Does Justice “Need to Know”?: Judging Classified State Secrets in the Face of Executive Obstruction

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Abstract. Reams have been written on the state secrets privilege and its consequences for litigants’ rights. So too have scholars explored individuals’ rights to challenge security clearance decisions as they relate to employment. But there has never been a thorough exploration of how to resolve conflicts between the state secrets privilege and the security clearance system that arise where Article III courts seek to adjudicate complex state secrets privilege disputes. This Note seeks to fill that void by answering the question whether courts have the authority to influence security clearance decisions—or at least subsequent “need-to-know” determinations—for expert witnesses, special masters, and litigants’ counsel the courts deem necessary to assist them in adjudicating state secrets privilege assertions.

The state secrets privilege acts as an absolute bar to disclosure of privileged material. Even cases alleging horrific human and civil rights abuses like extraordinary rendition or torture are routinely dismissed when the government or its agents claim the privilege. Because of the harsh effects of the privilege, the Supreme Court set forth in its landmark 1953 case *United States v. Reynolds* that courts should take an active and discerning role in assessing state secrets privilege invocations: The privilege is appropriate only where a court is convinced “that there is a reasonable danger that compulsion of the evidence will expose” state secrets. And the Court warned that “abandonment of judicial control would lead to intolerable abuses.”

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In the years since *Reynolds*, many have come to fear that misuse of the privilege has become common. Particularly since 9/11, privilege invocations have surged, and the consequences flowing from the government’s seeking outright dismissal have been harsh. And many courts have moved toward accepting vague and general arguments from the executive on when the privilege applies. But in the face of these trends, some judges have attempted to regain control. Among other innovations, these judges have sought to involve special masters, expert witnesses, and litigants’ counsel to aid in the effective adjudication of complex state secrets privilege invocations, rather than accepting the executive’s arguments out of hand.

The executive branch has resisted judicial innovation. Because virtually everything that is allegedly a state secret is also classified, the executive has stifled disclosure of disputed information to expert witness, special masters, and litigants’ counsel on the basis that they do not “need to know,” as defined by the executive orders that shape the classification and security clearance system. The same orders purport to give the executive plenary power to determine who gets to access classified information and when.

Although several courts have confronted this issue, most have dodged it. This Note seeks to provide, for the first time, a thorough framework on which judges can draw in confronting this question. It concludes that based on doctrine and precedent from the Supreme Court and elsewhere, judges have the authority necessary to influence both the security clearance process itself and subsequent “need-to-know” determinations.

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Introduction

Some information is too sensitive to release to the public. Details of military strategies, sensitive technologies, and other state secrets could, in the wrong hands, endanger national security. The institutions of our government have recognized as much in creating the state secrets privilege. Described as “the most basic of government privileges,” it serves to “protect[] survival of the state, from which all other institutions derive.”¹ Though the precise provenance of the privilege is unclear, its first precedents date from early British law and the founding of the United States.² In practice, the privilege allows the federal government to unconditionally withhold sensitive materials from evidentiary records in court cases.³ A majority of commentators agree that in its most basic form, such a privilege is necessary and appropriate.⁴

But the privilege is prone to misuse and abuse.⁵ One can readily imagine circumstances in which the executive branch would prefer not to release

1. William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 93 (2005) (quoting Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 318 (1986)). Weaver and Pallitto rely in part on Justice Sutherland’s famous observation that “the power to ensure national survival is not one granted by the Constitution, but is a ‘necessary concomitant of nationality.’” See *id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).
2. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270-80 (2007) (noting that the first signs of the privilege in U.S. law came in the early nineteenth century but that the privilege did not emerge in its “modern form” until “the mid-twentieth century”); Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57, 58-65 (2009) (detailing the “first general instance” of the privilege’s use and its subsequent evolution); Weaver & Pallitto, *supra* note 1, at 97-98 (exploring the early origins of the state secrets privilege as a descendant of “crown privilege as it developed in the law of England and Scotland”).
3. TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION 5 (2011) (“If the privilege is appropriately invoked, it is absolute”).
4. See, e.g., Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 105-06, 106 nn.13-14 (2017) (listing circumstances in which there is, “[w]ithout doubt,” a legitimate interest in withholding secrets from the public).
5. See Weaver & Pallitto, *supra* note 1, at 87 (“The incentives to abuse the privilege are obvious”). As Justice Souter astutely observed in *Hamdi v. Rumsfeld*:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

embarrassing or self-incriminating evidence relevant to a challenger’s case,⁶ irrespective of whether that evidence actually contains state secrets. The Supreme Court recognized this problem when it admonished courts to carefully review state secrets privilege claims to “determine whether the circumstances are appropriate for the claim” and warned that “abandonment of judicial control would lead to intolerable abuses.”⁷

Many believe that since 9/11, the privilege has been invoked in a manner leading to precisely such abuses.⁸ Some point to the drastic increase in the frequency of the privilege’s invocation as a sign of trouble.⁹ Others focus on the myriad cases involving alleged human and civil rights violations in which the government claimed relevant evidence to be categorically privileged, resulting in dismissal.¹⁰ In any event, some courts appear to have grown skeptical and, in

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6. This Note uses the term “challenger” to denote any party opposed to the government’s motion to suppress evidence or dismiss the case on state secrets privilege grounds.
 7. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953).
 8. *See, e.g.*, Amanda Frost, *Essay, The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939-40 (2007) (concluding that the Bush Administration’s assertion of the state secrets privilege after 9/11 was qualitatively different from prior practice and that that difference “raises new concerns for the courts”); D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 436 (2012) (exploring the Ninth Circuit’s treatment of a state secrets privilege assertion stemming from an alleged extraordinary rendition as an example of the intolerable abuses of which the *Reynolds* Court warned).
 9. *See, e.g.*, Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173, 1188-91, 1189 fig.1 (2015) (detailing the drastic increase in state secrets privilege invocations since 9/11).
 10. *See, e.g.*, *id.* at 1191 (“Expansion of the [state secrets privilege] doctrine to new types of claims and cases (particularly ones involving allegedly egregious violations of constitutional and human rights) makes it more important than ever for judges to assess privilege claims properly.”); *see also, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073-74, 1089 (9th Cir. 2010) (*en banc*) (dismissing a suit against a private contractor for its role in the alleged extraordinary rendition, unlawful detention, and torture of Binyam Mohamed, an Ethiopian citizen who legally resided in the United Kingdom, because “the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable”); *Arar v. Ashcroft*, 585 F.3d 559, 563, 565-67 (2d Cir. 2009) (*en banc*) (involving a suit against the United States and several government officials for their roles in the alleged extraordinary rendition, unlawful detention, and abuse of Maher Arar, a Syrian-Canadian dual citizen). Although *Arar* was formally decided on *Bivens* rather than state secrets grounds, *see* 585 F.3d at 563 (“We do not reach issues of . . . the state secrets privilege.”); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), one of the court’s opinions argued that the majority had based its decision on the principles underlying the state secrets privilege but had called it by another name, *see Arar*, 585 F.3d at 583 (Sack, J., concurring in part and dissenting in part). Specifically, Judge Sack asserted that the majority opinion applied state secrets principles erroneously, resulting in “double counting,” and that the majority’s *Bivens* holding was “unnecessary inasmuch as the government assures us that this case could likely be resolved quickly

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a bid to rein in overuse of the privilege, have begun to innovate. Through the use of special masters, expert witnesses, and longstanding procedural devices such as *in camera* review, courts across the country have begun to more thoroughly scrutinize state secrets privilege claims.¹¹

The executive branch, for its part, has sought to limit judicial review through the classification and security clearance system.¹² The clearance system is a product of longstanding executive orders that, although issued by politically diverse administrations, vest power exclusively in the executive branch.¹³ Because virtually all purported state secrets are also classified, the executive has sought to use the clearance process as a bulwark against judicial attempts to consult with special masters, expert witnesses, and litigants’ counsel in judging privilege disputes.¹⁴ The executive argues that it holds ultimate authority over initial security clearance decisions as well as subsequent “need-to-know” determinations, which are made for each attempt to access classified information.¹⁵

This Note addresses the question whether courts adjudicating state secrets privilege disputes have the authority to compel security clearance decisions—or at least subsequent need-to-know determinations—for expert witnesses, special masters, and litigants’ counsel. Part I explores the history and development of the state secrets privilege, tracing its origins through the early United States to the present day. Part II reviews the tools in the judicial toolbox for making state secrets privilege assessments. Part III analyzes the process of granting security clearances and the longstanding practice of judicial review of executive orders governing the security clearance process. It then offers an argument based on precedent and policy for measured judicial involvement in security clearance-related decisions in state secrets privilege cases. Finally, the Note concludes with thoughts on where all this leaves us.

Before I begin, a few words on the limitations of this inquiry. Although there is some reason to believe that now is the most promising time in years for

and expeditiously in the district court by application of the state-secrets privilege.” *Arar*, 585 F.3d at 583 (Sack, J., concurring in part and dissenting in part).

11. *See infra* Part II.B.

12. *See infra* Part III.B.

13. *See infra* text accompanying notes 237-41.

14. *See infra* Part III.B.3.

15. *See, e.g.*, Reply Memorandum in Support of Defendants’ Motion for Partial Summary Judgment at 25, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750-BR), 2013 WL 7898394 (“The grant of a security clearance requires a favorable determination *by the Executive branch* that an individual is trustworthy for access to classified information and, in addition, a separate determination by an official *within the Executive branch* that an individual has a demonstrated ‘need to know’ classified information.” (emphasis added)).

effective competition of the coordinate branches with the executive,¹⁶ I seek here only to clarify the doctrine and offer an argument for courts’ involvement in some security clearance-related decisions in the state secrets context. A more thorough accounting of how and whether the coordinate branches ought to use the current political moment to check the power of the executive is beyond the scope of this Note. I seek, in other words, only to set out an argument for why justice needs to know.

I. Sketching the Contours of the State Secrets Privilege

The state secrets privilege as it exists today is the product of a long, complicated history. Getting a handle on this history is critical to understand-

16. James Madison wrote in Federalist No. 51 of “the great security against a gradual concentration of the several powers in the same department” guaranteed by the separation of powers. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). By granting “to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others,” the system leverages “[a]mbition . . . to counteract ambition.” *Id.* at 321-22. Modern scholars discuss the same intuition with an eye to the effect of public popularity on interactions between the branches. See, e.g., Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98, 114 & tbl.5 (1989) (concluding, based on empirical modeling, that “[p]residential popularity clearly matters” to judges deciding whether to rule against the executive branch in domestic affairs cases); James Meernik & Elizabeth Oldmixon, *Internationalism in Congress*, 57 POL. RES. Q. 451, 454 (2004) (noting that members of Congress assessing whether to support or oppose a President’s foreign policy agenda are likely to consider, among other cues, “the degree of support the president enjoys among the public”); Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 921 (2007) (incorporating the argument that “popularity is a key element of presidential influence in foreign affairs”); Jeff Yates & Andrew Whitford, *Presidential Power and the United States Supreme Court*, 51 POL. RES. Q. 539, 548 (1998) (demonstrating empirically that Supreme Court “Justices are more likely to vote in support of popular presidents in domestic affairs situations”); see also Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1980 (2015) (“[P]residential administration is constrained by public opinion and by the need to maintain the President’s credibility with other political actors.”). Some have suggested that presidential popularity is less influential on court decisions in the foreign affairs context, see, e.g., Yates & Whitford, *supra*, at 547-48 (indicating that Justices of the Supreme Court in fact “vote in a counter-majoritarian manner in cases involving foreign/military affairs”), but there is reason to believe that such exceptionalism is outdated and that courts are on a path toward what some have described as the “normalization” of foreign affairs law—that is, treating foreign affairs like any other area of the law, see Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935 (2015). All this is to say that President Trump’s historic unpopularity may present an opportunity for the coordinate branches. See Aaron Bycoffe et al., *How Popular Is Donald Trump?*, FIVETHIRTYEIGHT, <https://perma.cc/8XYS-7AVU> (archived Jan. 23, 2018); Aaron Bycoffe, *Trump Is Beating Previous Presidents at Being Unpopular*, FIVETHIRTYEIGHT (Mar. 29, 2017, 12:38 PM), <https://perma.cc/RK66-TME3>; Dan Cassino, *Trump’s Low Approval Numbers Matter—Here’s Why*, HARV. BUS. REV. (Feb. 3, 2017), <https://perma.cc/7XBD-F35V>.

ing how tensions between the privilege and other doctrines of government power—like the security clearance regime—should be resolved.

A spoiler before I proceed: The precise origin of the state secrets privilege is unknown.¹⁷ But there are clues. In their groundbreaking work on the modern state secrets privilege, William Weaver and Robert Pallitto explain that the privilege is “[s]ometimes . . . characterized as pre-constitutional, even pre-legal, and as arising from the raw fact that countries have a responsibility to prevent becoming instruments of their own destruction.”¹⁸ Others assert that it is merely a common law evidentiary privilege like any other.¹⁹ One thing is clear—the privilege as it exists today is a product of judicial action. It is less clear, however, whether that action was one of lawmaking, as with common law, or one of excavating the requirements of the Constitution.²⁰ This question is quite important because if the doctrine’s requirement of robust judicial review of alleged state secrets is constitutionally required, it likely preempts executive-created security clearance roadblocks.²¹ If, on the other hand, it is merely a matter of common law, the contest between the executive and the judiciary in effective judicial review of state secrets is a closer one.²² I return to this question in Part I.B below.

A. The Origins of the State Secrets Privilege

This Subpart begins with the privilege’s early history, turns next to its canonization by the Supreme Court, and then addresses modern trends in how the privilege is used. Finally, with this history in mind, Subpart B below discusses the nature of the privilege.

17. See *infra* Part I.A.1.

18. Weaver & Pallitto, *supra* note 1, at 92–93.

19. See, e.g., EDWARD C. LIU & TODD GARVEY, CONG. RESEARCH SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT 1 (2012).

20. See, e.g., Chesney, *supra* note 2, at 1270 (“Is [the state secrets privilege] a constitutional rule derived from the separation of powers, or is it merely a common law rule of evidence of no greater stature than, for example, the spousal privilege?”).

21. See *id.* (“If the [privilege is constitutional in nature], there may be limits as to what Congress might do should it wish to alter or override the privilege’s impact on national security-related litigation.”).

22. See *id.* (“If the [privilege is a matter of common law] . . . Congress is at liberty to chart its own course in reconciling the tension between the government’s legitimate need for secrecy and the obligation to provide justice in particular cases.”).

1. Early years

The state secrets privilege has a lengthy and perplexing pedigree. Some scholars believe it to be an offshoot of the United Kingdom’s “crown privilege.”²³ The crown privilege flows from the power of the monarchy and grants the government “absolute authority . . . to withhold documents from disclosure in judicial proceedings.”²⁴ Under the crown privilege, the government’s position on allegedly privileged information must be accepted by a reviewing court without question.²⁵ Robert Chesney identifies the nineteenth century canonization of the common law of evidence in treatises as a possible vessel for the crown privilege’s passage across the Atlantic.²⁶ The fit is awkward, however, because of the structural mismatch between the U.S. and U.K. governments.²⁷

But observers have also noted that precursors to the state secrets privilege, such as the so-called public safety privilege, existed in the United States from the time of the Founding.²⁸ The earliest glimmer can be traced to the mother of all precedents, *Marbury v. Madison*.²⁹ Although best known for its holding on judicial review, *Marbury* in dicta also touched on issues of secrecy. Opining that Levi Lincoln, acting Secretary of State under President Jefferson, would by virtue of his post “not have been ‘obliged’ to disclose information ‘communicated to him in confidence,’” Chief Justice Marshall set the table for the privilege.³⁰ *Marbury*’s vague implications for the privilege were then clarified

23. See Weaver & Pallitto, *supra* note 1, at 97 (“The state secrets privilege derives from crown privilege as it developed in the law of England and Scotland.”); *id.* at 99 (noting that the crown privilege is an awkward fit in part because “separation of powers is ill-defined and occupies a relatively less important role in the British Constitution than in that of the United States”).

24. *Id.* at 98.

25. See *Duncan v. Cammell, Laird & Co.* [1942] AC 624 (HL) 641 (Eng.) (explaining that the crown privilege “treat[s] a ministerial objection taken in proper form as conclusive”).

26. See Chesney, *supra* note 2, at 1273-77.

27. The differences between a system of coequal branches and one of parliamentary monarchy are—it almost goes without saying—significant. See Weaver & Pallitto, *supra* note 1, at 99. The U.S. Supreme Court ultimately grappled with this reality, explicitly adopting aspects of the crown privilege while placing substantial limits on the unilateral power of the executive. See *United States v. Reynolds*, 345 U.S. 1, 9-11 (1953); see also *infra* Parts I.B, III.B. But see Weaver & Pallitto, *supra* note 1, at 99 (asserting that the Court’s case law, including its opinion in *Reynolds*, “does not sufficiently respect [the] oversight functions” of Congress and the courts).

28. See, e.g., Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 204 n.669 (2010) (noting that precursors to the state secrets privilege “reach back to the founding of the Republic”); Weaver & Pallitto, *supra* note 1, at 94-95.

29. 5 U.S. (1 Cranch) 137 (1803); see Chesney, *supra* note 2, at 1271 (calling *Marbury* the “first glimmer of the state secrets privilege in American law”).

30. See Chesney, *supra* note 2, at 1272 (quoting *Marbury*, 5 U.S. (1 Cranch) at 144).

somewhat in *United States v. Burr*.³¹ Prosecuted for treason, Aaron Burr sought to subpoena exculpatory evidence contained in a letter written to President Jefferson.³² The government asserted that the information was privileged.³³ Though Chief Justice Marshall sided with the government,³⁴ his reasoning was more important than the ruling. Rather than relying on an undifferentiated executive privilege resting exclusively on separation of powers concerns, he noted that significant consideration should be given to whether information in the letter would “endanger the public safety” if released.³⁵ In so doing, he introduced for the first time a critical element of the nascent state secrets privilege: the risk to the public in disclosing purportedly privileged information.

Then, in 1875, the Supreme Court decided its first case directly on point. In *Totten v. United States*, a deceased Union spy’s executor sought to enforce an employment contract the deceased allegedly had with President Lincoln.³⁶ The suit alleged that the spy, William Lloyd, had been promised \$200 per month for his service as a covert operative in the South during the Civil War.³⁷ But at the end of the war, Lloyd was reimbursed only for his expenses.³⁸ When he died, the executor of his estate, Enoch Totten, brought suit to compel performance of the contract.³⁹ The Supreme Court, embracing an especially strong form of the state secrets privilege tantamount to a jurisdictional bar, held that such a suit could not stand because the contract it sought to enforce, one for covert operations, was *itself* a secret.⁴⁰ Writing for a unanimous Court, Justice Field opined that “public 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.”⁴¹ The court offered little rationale, but the so-called *Totten* bar emerged as a doctrine precluding judicial

31. 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.).

32. See Chesney, *supra* note 2, at 1272.

33. *Burr*, 25 F. Cas. at 31.

34. See *id.* at 37-38.

35. See *id.* at 37. For more on this distinction, see Chesney, *supra* note 2, at 1272-73.

36. See 92 U.S. 105, 105-06 (1875).

37. *Id.*; see also Crook, *supra* note 2, at 57-59 (providing background on Lloyd and the case).

38. *Totten*, 92 U.S. at 106.

39. See *id.* at 105.

40. See *id.* at 106-07.

41. *Id.* at 107.

review of cases—at least those related to employment contracts⁴²—the very subject matter of which threatened national security.⁴³

2. Canonization

The state secrets privilege crystallized into its modern shape in 1953 with the Supreme Court’s decision in *United States v. Reynolds*.⁴⁴ *Reynolds* concerned a suit filed by the widows of three civilian observers killed when the B-29 bomber they were aboard crashed during testing of secret electronic equipment.⁴⁵ The widows sought to compel production of the military’s crash report as evidence in their suit, but the government refused.⁴⁶ The Court noted that “the privilege against revealing military secrets” was “well-established in the law of evidence.”⁴⁷ Nevertheless, writing for the majority, Chief Justice Vinson also acknowledged the tensions involved in cases like *Reynolds*: “Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”⁴⁸

Reynolds is important in three respects. First, it recognized the state secrets privilege as separate and distinct from other kinds of executive privilege.⁴⁹ Second, it made clear that the privilege was absolute when appropriately

42. There was, until recently, good reason to believe that this jurisdictional bar was limited to circumstances where both parties submit to contractual secrecy obligations. Cf. *id.* at 106-07 (“The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. . . . The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.”). But *Totten*’s holding was reaffirmed and expanded beyond employment contract disputes. See *Tenet v. Doe*, 544 U.S. 1, 8-11 (2005) (expanding *Totten* to bar any suit the topic of which is itself a state secret).

43. See, e.g., *Tenet*, 544 U.S. at 8-11.

44. 345 U.S. 1 (1953).

45. *Id.* at 2-3.

46. *Id.* at 3.

47. *Id.* at 6-7; *id.* at 7 n.11 (collecting cases).

48. *Id.* at 8. *Reynolds* itself starkly exemplifies executive misuse of the state secrets privilege: “It is now known that the investigative report at issue in [*Reynolds*] did not actually contain information about the classified equipment that had been aboard the doomed flight” Chesney, *supra* note 2, at 1288.

49. See *Reynolds*, 345 U.S. at 7 (acknowledging that “[j]udicial experience with the privilege which protects military and state secrets”—as distinct from other kinds of “government claims to privilege”—“has been limited in this country”).

invoked.⁵⁰ Third, and most significantly, it unequivocally reserved to the judiciary the final authority to assess assertions of the privilege and provided a standard by which to do so.⁵¹ The standard *Reynolds* established for such review has two elements: First, “There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”⁵² Second, “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”⁵³ There is significant tension in the second element, which I address in Part II below.

3. Modern trends

During the two decades immediately following *Reynolds*, invocations of the state secrets privilege “remained relatively rare.”⁵⁴ Since 1973, however, they have been much more commonplace.⁵⁵ Observers have offered several explanations, pointing to a general upward trend in the number of lawsuits filed, embarrassing revelations of misconduct by intelligence agencies involving warrantless surveillance during the early 1970s, statutory and constitutional innovations that provided more private actions against the government, or some combination of the above.⁵⁶ Regardless of the cause, the frequency of cases involving state secrets privilege invocations skyrocketed in the early 1970s and then roughly plateaued for nearly three decades.⁵⁷

The frequency with which the privilege was invoked spiked once more after 9/11.⁵⁸ The increase has been “both dramatic and undeniable,” even

50. *See id.* at 7-9 (holding that “the claim of the privilege will be accepted without requiring further disclosure” if the court is satisfied that “the circumstances are appropriate for the claim of privilege”).

51. *See id.* at 9-11.

52. *Id.* at 7-8 (footnote omitted).

53. *Id.* at 8 (footnote omitted).

54. Chesney, *supra* note 2, at 1291.

55. *See id.* at 1291-98.

56. *See id.* at 1292-93.

57. Compare *id.* app. at 1315-17 (documenting the relative infrequency of state secrets privilege assertions and adjudications—averaging about one case every three years—during the era between *Reynolds* and the early 1970s), with *id.* app. at 1317-30 (documenting the increased, but relatively consistent, frequency of state secrets privilege assertions and adjudications—more than two cases per year—during the era between the early 1970s and 2001).

58. Daniel Cassman’s dataset recorded a total of 161 invocations of the privilege throughout the entire history of the United States before 9/11. See Cassman, *supra* note 9, at 1195 fig.3. He recorded 142 invocations between that date and “late 2014.” *Id.* at 1187 n.90, 1195 fig.3.

controlling for the increase in the overall size of the federal docket.⁵⁹ And the types of cases in which the privilege has been claimed have also changed somewhat; whereas “the privilege was almost unheard of in private suits” before 2001, 9/11 marked “an enormous increase in the number of assertions” of the privilege “in cases to which the government was not a party.”⁶⁰ In his important empirical work on the privilege, Daniel Cassman suggests that this pattern “may be a result of more private lawsuits implicating national security issues concurrent with greater reliance upon private military contractors in the wars in Afghanistan and Iraq.”⁶¹ Regardless, in recent years the privilege has been invoked not only in cases involving the government—such as criminal prosecutions,⁶² federal agency whistleblower disputes,⁶³ challenges to the constitutionality of the No-Fly List,⁶⁴ civil rights actions against the government challenging extraordinary rendition,⁶⁵ and challenges to the

59. *Id.* at 1189-90. Based on statistical modeling, Cassman found that “the post-September 11 era is associated with an increase of 5.8 state secrets cases per year,” a statistically significant association. *Id.* at 1190. Even controlling for confounding variables like the increased size of the federal docket, Cassman determined that more than half of this increase is directly attributable to “the post-September 11 era” alone. *Id.* “Given that only 2.4 state secrets cases were decided per year before September 11, an increase of almost 6 cases per year . . . mark[s] a sea change in the use of state secrets doctrine.” *Id.*

60. *Id.* at 1191.

61. *Id.*

62. See *id.* at 1192-93, 1193 fig.2; see also, e.g., United States v. Aref, 533 F.3d 72, 79-80 (2d Cir. 2008) (applying the state secrets privilege in a criminal case subject to the requirements of the Classified Information Procedures Act).

63. See, e.g., Edmonds v. U.S. Dep’t of Justice, 323 F. Supp. 2d 65, 67-68, 81-82 (D.D.C. 2004) (determining that the government “properly invoked the state secrets privilege” in a case involving a Federal Bureau of Investigation (FBI) interpreter’s termination, which she claimed was due to her reporting misconduct within the FBI’s language department), aff’d mem., 161 F. App’x 6 (D.C. Cir. 2005).

64. See, e.g., Mohamed v. Holder, No. 1:11-cv-50 (AJT/TRJ), 2014 WL 11516538, at *1 (E.D. Va. Oct. 30, 2014).

65. See, e.g., Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (acknowledging but not ruling on the government’s assertion of the state secrets privilege in a case involving an alleged extraordinary rendition); see also Replacement Brief for John Ashcroft et al., *Arar*, 585 F.3d 559 (No. 06-4216-cv), 2008 WL 8132330, at *13 (“[T]he United States made a formal assertion of the state-secrets privilege.”). For a working definition of extraordinary rendition, see GARVEY & LIU, *supra* note 3, at 8. See also Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (discussing the plaintiffs’ allegations about the federal government’s “extraordinary rendition program,” which they claimed was designed “to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation”). See generally Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007).

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government’s dragnet surveillance programs⁶⁶—but also in cases involving only private parties, such as suits against companies complicit in government surveillance⁶⁷ and extraordinary rendition programs,⁶⁸ and even contracts, intellectual property, and torts disputes.⁶⁹

Even before its recent expansion, some warned of the deleterious effect the state secrets privilege could have on plaintiffs, particularly in cases involving the *Totten* bar.⁷⁰ For instance, in a 1989 case involving a widow’s effort to vindicate her deceased husband’s rights, the D.C. Circuit wrote that “denial of a forum without giving the plaintiff her day in court . . . is indeed draconian.”⁷¹ And evidence suggests that the proliferation of state secrets privilege invocations has been further compounded by a shift in the type of privilege most often invoked—since 9/11, a greater proportion of litigants than ever

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66. *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006) (involving a state secrets privilege assertion for evidence related to a National Security Agency (NSA) data collection program), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).
 67. *See, e.g.*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006) (involving AT&T’s alleged “implementation of] a warrantless surveillance system on behalf of the NSA”). The Ninth Circuit subsequently remanded the case in light of subsequent legislation. *See* Hepting v. AT&T Corp., 539 F.3d 1157, 1157 (9th Cir. 2008) (mem.); *see also* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).
 68. *See, e.g.*, *Mohamed*, 614 F.3d at 1075-76 (involving a corporation’s alleged provision of “flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture”).
 69. *See, e.g.*, Lane v. Halliburton, No. Civ.A H-06-1971, 2006 WL 2583438, at *1-3 (S.D. Tex. Sept. 7, 2006) (noting that the defendant defense contractor in a personal injury and fraud suit had “asserted several possible federal defenses, including . . . the state secrets doctrine”); Defendant L-3 Communications Vertex Aerospace, LLC’s Answer to Plaintiffs’ Third Amended Complaint at 2-4, McLead v. L-3 Commc’ns Vertex Aerospace, LLC, No. 2:08-cv-00264 (S.D. Tex. Nov. 24, 2009), 2009 WL 4401397 (asserting in a case involving a wrongful death suit against a helicopter maintenance company that “Plaintiffs’ claims are barred in whole or in part by the political question doctrine and the state secrets doctrine”); Memorandum of Defendants CACI International Inc. et al. in Support of Their Motion to Dismiss Plaintiffs’ Complaint at 1-2, 17, Ibrahim v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007) (No. 1:04-cv-01248), 2004 WL 2472007 (involving only private parties but suggesting that if the case were allowed to proceed, the state secrets privilege would be asserted to preclude discovery in a case involving intelligence contractors allegedly involved in torture); Notice of Removal ¶ 14, Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006), 2006 WL 520176 (invoking the state secrets privilege in a suit involving personal injury and wrongful death claims against a defense contractor).
 70. *See* Totten v. United States, 92 U.S. 105, 107 (1875) (acknowledging a jurisdictional bar against courts adjudicating employment contract disputes involving secret contracts like those between a spy and the President); *see also supra* notes 36-43 and accompanying text (detailing the *Totten* bar and its recent applications).
 71. *In re* United States, 872 F.2d 472, 477 (D.C. Cir. 1989).

before have sought to duck behind the strong form of the privilege, the *Totten* bar to judicial review.⁷² That is, rather than seeking to block disclosure of particular evidence, as was the case in *Reynolds*, these litigants seek to have the entire case thrown out because the case’s subject matter is allegedly too secret for a courtroom. Litigants today thus face an even more pernicious and “draconian” state secrets privilege than that which the D.C. Circuit warned about in 1989.⁷³

B. The Nature of the State Secrets Privilege

Before proceeding to the crux of the contemporary dispute over the state secrets privilege, a few words on its nature. As noted previously, *Reynolds* did not clarify the source of the privilege; depending on how a reader cocks her head, the doctrine’s allocation of adjudicatory power to the courts could be understood as a necessary incident of the United States’s constitutional structure or simply as a matter of federal common law. But the source of the power matters, particularly when it comes to conflicts between the executive and judicial branches over how state secrets cases ought to be handled. As discussed in Part III.B below, if the separation of powers requires that courts be able to review invocations of the privilege, then the executive is on weaker footing in its attempts to immunize its security clearance decisions from scrutiny.⁷⁴

The doctrinal underpinnings of the privilege are vexing. While a handful of important precedents point to a privilege born of constitutional separation of powers concerns, other evidence paints a picture of an overgrown offspring of the common law.⁷⁵ But it is not necessary for the purposes of this Note to

72. See Donohue, *supra* note 28, at 168 (explaining that the government has started using the state secrets privilege to seek “not just suppression of evidence, but dismissal of the case” where plaintiffs have alleged “constitutional violations and criminal activity”); Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 809 (2010) (“In the wake of the 9/11 attacks, the Government’s position on the state secrets privilege builds upon the characteristics of the *Totten* cases and attempts to give the privilege expanded and very troubling dimensions.”); see also Frost, *supra* note 8, at 1939-40 (concluding that the Bush Administration’s invocation of the state secrets privilege as a ground for dismissing cases after 9/11 was qualitatively different from prior practice and that that difference “raises new concerns for the courts”). But see Chesney, *supra* note 2, at 1308 (concluding that “the current pattern of implementation of the state secrets privilege does not depart significantly from its past usage”).

73. Cf. *In re United States*, 872 F.2d at 477.

74. See *infra* text accompanying notes 288-90; see also *supra* notes 21-22 and accompanying text.

75. Compare, e.g., *United States v. Nixon*, 418 U.S. 683, 706-08 (1974) (holding that executive privilege generally is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution” and alluding in dicta to the state secrets privilege as having constitutional underpinnings), *El-Masri v. United*

footnote continued on next page

resolve this imponderable. Instead, we must simply acknowledge that the state secrets privilege probably has some constitutional underpinnings—that it is quasi-constitutional.⁷⁶ Put another way, a court faced with resolving disputes regarding the privilege is likely to consider the privilege’s history and conclude that its source is not run-of-the-mill common law, but rather a hybrid of constitutional principles and common law rules of evidence. I return to the implications of this conclusion in Part III.B below.

II. Judicial Tools for Resolving State Secrets Disputes

Where the state secrets privilege is invoked in litigation, courts have a number of tools at their disposal to judge its propriety.⁷⁷ Some are longstand-

States, 479 F.3d 296, 303 (4th Cir. 2007) (noting that the state secrets privilege “performs a function of constitutional significance” though it “was developed at common law”), *and Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 100 (D.D.C. 1974) (“[T]he [state secrets] privilege is . . . based upon the constitutional doctrine of separation of powers . . .”), *with Tenet v. Doe*, 544 U.S. 1, 11 (2005) (Stevens, J., concurring) (describing the strong form of the state secrets privilege, the *Totten* bar, as a “federal common-law rule”), *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (explaining that the Supreme Court “has supervisory authority over the federal courts, and . . . may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals,” but that such power “exists only in the absence of a relevant Act of Congress” (quoting *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959), superseded in other part by statute, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 and 28 U.S.C.))), *and Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958) (holding that the state secrets privilege may be abrogated by Congress and is thus merely a common law evidentiary rule rather than a constitutional doctrine).

76. As Robert Chesney explains:

A careful review of the origin and evolution of the [state secrets] privilege suggests that both explanations are true to some extent. The privilege emerged in the traditional common law way, through a series of judicial decisions tracing back at least to the early nineteenth century. These early pronouncements—some of which had constitutional overtones—dealt with a series of evidentiary questions that were quite distinct from one another and which did not necessarily concern matters of a diplomatic or military nature. In the hands of mid-nineteenth century treatise writers actively seeking to rationalize and systematize the body of common law evidentiary rules, these disparate threads eventually were woven together under the umbrella concept of a multifaceted “public interest” privilege, some aspects of which were referred to under the subheading of “state secrets.”

. . . [After the early 1970s,] opinions discussing the privilege frequently have sounded separation of powers themes, suggesting a constitutional foundation to reinforce the common law origins of the doctrine.

Chesney, *supra* note 2, at 1270-71.

77. As noted above, the test set forth in *Reynolds* requires (1) that “[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer”; and (2) that “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege.” *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (footnote omitted).

ing devices contemplated by the Court’s decision in *Reynolds* and reaffirmed in subsequent lower court decisions,⁷⁸ such as in camera or ex parte review of disputed information.⁷⁹ Others are more recent judicial innovations born, at least in part, of the proliferation of state secrets privilege invocations discussed above.⁸⁰ That is, because the state secrets privilege has become increasingly “draconian” in its consequences for litigants’ rights,⁸¹ some courts have developed tools to safeguard their role as ultimate adjudicators while also protecting litigants from abuse of the privilege.⁸² Specifically, some courts have considered ordering disclosure of relevant classified information to security-cleared expert witnesses, special masters, and litigants’ counsel, with the idea that these parties can aid the court in privilege adjudications.⁸³

A. Relatively Established Tools: In Camera and Ex Parte Review

In camera and ex parte review are firmly grounded in longstanding doctrine. The Supreme Court articulated a standard in *Reynolds* that clearly contemplated such review.⁸⁴ But *Reynolds* also cautioned courts not to “automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.”⁸⁵ Instead, the Court required a balancing—in some matters, where “all the circumstances of the case” convince a court “that there is a reasonable danger that compulsion of the evidence will expose” state secrets, no direct in camera examination of the disputed evidence is warranted.⁸⁶ Ultimately, however, the Court was clear: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,”

78. See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983).

79. See *infra* Part II.A.

80. See Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. (forthcoming Aug. 2018) (manuscript at 15) (on file with author); *infra* Part II.B.

81. *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989); see *id.* (“[D]enial of the forum provided under the Constitution for the resolution of disputes is a drastic remedy that has rarely been invoked.” (alteration in original) (citation omitted) (quoting *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985)); see also *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (“[W]e recognize the gravity of our conclusion that [the plaintiff] must be denied a judicial forum for his Complaint, and reiterate our past observations that dismissal on state secrets grounds is appropriate only in a narrow category of disputes.”).

82. See Sinnar, *supra* note 80 (manuscript at 21-31).

83. See *infra* Part II.B.

84. See *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

85. *Id.* at 10.

86. *Id.* *Reynolds* and subsequent cases have established the norm of assessing “the circumstances of the case” based on affidavits and other papers filed by the parties. See *id.* at 5; *infra* text accompanying note 93.

so thorough judicial assessment must be the standard.⁸⁷ It left discretion with individual judges to determine what level of access to allegedly privileged information was necessary to meet this standard.

Chief Justice Vinson, writing for the Court in *Reynolds*, provided some guidance as to how courts applying the standard ought to decide whether to review disputed evidence in camera: “Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted”⁸⁸ Conversely, in cases involving facts like those in *Reynolds*, where the evidence appeared unimportant, the claim of privilege “will have to prevail.”⁸⁹ Put another way, “The degree to which the court may ‘probe in satisfying itself that the occasion for invoking the privilege is appropriate’ turns on ‘the showing of necessity which is made’ by [challengers].”⁹⁰ The more critical the evidence is to a challenger’s case, the more appropriate thorough in camera review is.⁹¹

Courts have since reaffirmed and honed *Reynolds*’s fundamental holding. The D.C. Circuit, for instance, held in 1983 that “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.”⁹² In sum, in camera review is undoubtedly within the power of a court reviewing a state secrets privilege invocation, though many courts are still profoundly deferential to executive invocations, preferring to resolve disputes on affidavits rather than completing in camera review.⁹³

87. *Reynolds*, 345 U.S. at 9-10.

88. *Id.* at 11.

89. See *id.* (“Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege.”).

90. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 982 (N.D. Cal. 2006) (quoting *Reynolds*, 345 U.S. at 11), remanded *per curiam*, 539 F.3d 1157 (9th Cir. 2008).

91. One astute observer has pointed out that Chief Justice Vinson may have misapplied his own standard in *Reynolds*. After announcing the rule, he “us[ed] ‘reasonable danger’ not as the measure of whether the information could be disclosed without harming national security, but instead as the measure of whether such information was likely to [have been] discussed” in the disputed evidence in the first place. Chesney, *supra* note 2, at 1287 (quoting *Reynolds*, 345 U.S. at 10). The difference lies in the assessment of potential harm to national security—the standard announced in *Reynolds*—versus assessment of the likelihood that a disputed piece of evidence contains secret information at all—the standard as mistakenly applied by Chief Justice Vinson. See *id.* “Fortunately, courts following in the wake of *Reynolds* seem largely to have avoided this fundamental error.” *Id.* at 1289.

92. *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

93. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163 (2006); cf. Sinnar, *supra* note 80 (manuscript at 14) (discussing the significant pressure placed on judges to defer to the executive’s position in national security cases).

B. Judicial Innovations in State Secrets Adjudications

In camera and ex parte review of state secrets privilege assertions have significant shortcomings. Crucially, parties challenging the government cannot participate and are thus deprived of the opportunity to meaningfully advocate for the disclosure of potentially important evidence.⁹⁴ Some courts have experimented with devices designed to protect the rights of litigants. Most relevant for the purposes of this Note, courts have flirted with compelling limited disclosure to parties positioned to inject some amount of adversarial rigor into the process of assessing a state secrets privilege claim.⁹⁵ I address this possibility below.

1. Special masters

Several courts have considered compelling disclosure of allegedly privileged information to special masters with expertise helpful to courts in making privilege determinations.⁹⁶ In fact, in cases often overlooked by recent scholarship, judges went so far as to appoint special masters pursuant to the Federal Rules of Civil Procedure⁹⁷ to aid in adjudicating sensitive national security disputes.

In 1987, Judge Oberdorfer of the District Court for the District of Columbia appointed a special master to assist in adjudicating a suit by the Washington Post against the U.S. Department of Defense for information on its failed April 1980 attempt to rescue U.S. hostages in Tehran.⁹⁸ The D.C. Circuit, on a petition for a writ of mandamus, upheld the district court’s appointment of the special master, noting that it satisfied the requirement in Rule 53 of the Federal Rules of Civil Procedure of a showing of exceptional

94. See, e.g., Doe v. CIA, 576 F.3d 95, 107 (2d Cir. 2009) (noting that applying the *Reynolds* standard can at times result in “the parties los[ing] the benefit of an adversarial process, which may [otherwise] have informed and sharpened the judicial inquiry and which would have assured each litigant a fair chance to explain, complain, and otherwise be heard”).

95. See Sinnar, *supra* note 80 (manuscript at 21-31).

96. For a thorough assessment of the potential costs and benefits of using special masters in national security litigation, see Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 105-11 (1992); and David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 677-79 (2005).

97. See FED R. CIV. P. 53.

98. See Wash. Post v. U.S. Dep’t of Def., 766 F. Supp. 1, 3-4 (D.D.C. 1991). Judge Oberdorfer appointed Kenneth C. Bass III as special master in January 1988, at which point the government petitioned the D.C. Circuit for a writ of mandamus to revoke the appointment. See *In re U.S. Dep’t of Def.*, 848 F.2d 232, 233-34 (D.C. Cir. 1988). The D.C. Circuit denied that petition, *id.* at 239, and the special master submitted his report in December 1989, *Wash. Post*, 766 F. Supp. at 3.

circumstances.⁹⁹ In the D.C. Circuit panel’s view, Judge Oberdorfer had appropriately dismissed as insufficient alternative means of assessing sensitive materials, such as randomly sampling the large number of disputed documents or using security-cleared law clerks to review the contested materials.¹⁰⁰ Further, the D.C. Circuit signaled that it would apply broad deference to trial courts’ decisions to appoint special masters in circumstances such as those in the *Washington Post* case—that is, even where sensitive national security information was at issue.¹⁰¹ Although adjudicated under the national security exemption of the Freedom of Information Act (FOIA),¹⁰² the case is nonetheless instructive.

In a slightly older case, Judge Pratt of the Eastern District of New York went even further in a dispute involving the state secrets privilege.¹⁰³ In that litigation, a lawsuit by Vietnam War veterans and their families against manufacturers and suppliers of the herbicide known as Agent Orange, the court appointed a special master, initially for the purpose of “supervis[ing] all pretrial discovery” for one phase of the case.¹⁰⁴ But by the court’s order, the special master was given broader authority to “rule[] on the privilege claim[s]” involved in the case.¹⁰⁵ “Ultimately, the government gave extraordinary access to the special master, who spent weeks in a ‘special guarded room in the Pentagon’ reviewing tens of thousands of documents for relevance prior to the

99. See *In re U.S. Dep’t of Def.*, 848 F.2d at 235, 237-38. The current version of Rule 53 provides that “a court may appoint a master only to . . . hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by . . . some *exceptional condition*.” FED. R. CIV. P. 53(a)(1) (emphasis added).

100. See *In re U.S. Dep’t of Def.*, 848 F.2d at 237-38.

101. See *id.* (“A trial judge familiar with the case clearly has discretion to choose which method is best.”). The court concluded:

[W]here a massive number of classified documents exists such that the judge and his law clerk simply cannot examine them all, and where the judge has reasonably concluded that alternative methods of document review are infected with serious problems, appointment of a master to structure the judge’s review of these documents is appropriate so long as the judge retains decisional authority over the issue in question.

Id. at 239.

102. *Wash. Post*, 766 F. Supp. at 3-5; see Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2016)); see also 5 U.S.C. § 552(b)(1) (exempting from the Act matters “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy”).

103. *In re “Agent Orange” Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983).

104. See *id.* at 429.

105. *Id.* at 431.

government deciding whether any of these documents qualified for state secrets protection.”¹⁰⁶

A third case addressed the appointment of a magistrate judge as a special master in a state secrets privilege dispute. In *Loral Corp. v. McDonnell Douglas Corp.*—a contract dispute between Loral, a subcontractor, and McDonnell Douglas, a supplier for the Air Force—Judge Frankel of the Southern District of New York “ordered the case referred generally to a magistrate as special master.”¹⁰⁷ On review, the Second Circuit held that Rule 53 “permits reference to a master on a showing that some exceptional condition requires it” and that the district court had satisfied that requirement by finding that the case required quicker adjudication than the court would otherwise have been able to provide.¹⁰⁸

More recently, several courts have entertained the idea of appointing special masters to help adjudicate complex national security matters, though none has actually followed through. For instance, in *ACLU v. Department of Defense*, Judge Hellerstein of the Southern District of New York considered appointing a state secrets special master in a case involving alleged abuse and torture of prisoners in U.S.-owned and -operated detention centers overseas.¹⁰⁹ There, the court was particularly concerned with the “glacial pace” at which the government was responding to FOIA requests, and it threatened the defendant agencies with an ultimatum: Hurry up and comply, or “procedures [would] be established to identify such documents in camera or [by appointing] a special master with proper clearance.”¹¹⁰ The government complied enough for the court to be satisfied with its ability to review materials in camera without the appointment of a special master,¹¹¹ but the case highlights that special masters have not been completely forgotten by modern courts as a means of adjudicating privilege invocations.

106. Sinnar, *supra* note 80 (manuscript at 30) (emphasis omitted) (quoting PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 93 (enlarged ed. 1987)).

107. See *Loral Corp. v. McDonnell Douglas Corp.* (*In re Loral Corp.*), 558 F.2d 1130, 1131 (2d Cir. 1977).

108. See *id.* at 1133. The court also noted that a magistrate judge was an especially suitable master, given Congress’s endorsement of magistrate judges through the Magistrate’s Act. See *id.*; see also Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b) (2016)). But the court’s rationale appears to have been primarily focused on a concern that “[f]urther long-term delay in this case to await the availability of a judge would compound the problems of protecting the confidentiality of the classified material.” *Loral Corp.*, 558 F.2d at 1133.

109. See *ACLU v. Dep’t of Def. (ACLU I)*, 339 F. Supp. 2d 501, 502, 504 (S.D.N.Y. 2004).

110. See *id.* at 504.

111. See *ACLU v. Dep’t of Def. (ACLU II)*, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (detailing the in camera review method Judge Hellerstein ultimately adopted), superseded in other part by statute, Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184 (codified as amended at 5 U.S.C. § 552 app. at 41-42 (2016)).

2. Expert witnesses

The second procedural innovation is the appointment of expert witnesses who can aid judges in adjudicating disputes pursuant to the Federal Rules of Evidence.¹¹² Two courts have recently considered availing themselves of this device. The first was the Northern District of California in *Hepting v. AT&T Corp.*, a case involving a telecommunications company’s alleged role in the federal government’s warrantless wiretapping program.¹¹³ The defendants, with support from the United States as an intervening party, moved to dismiss the case, claiming that adjudicating the dispute would necessarily disclose important state secrets.¹¹⁴ Judge Walker rejected the motion, noting that the “very subject matter of th[e] action” was not a state secret because the government itself had, through public statements, “disclosed the general contours” of the disputed program.¹¹⁵ But the court also recognized the challenges the case presented and “propose[d] appointing an expert pursuant to [Rule 706 of the Federal Rules of Evidence] to assist the court in determining whether disclosing particular evidence would create a ‘reasonable danger’ of harming national security.”¹¹⁶ Judge Walker thought the device particularly “appropriate given the complex and weighty issues a court will confront in navigating any future privilege assertions.”¹¹⁷ The defendants, unhappy with the decision, responded that the court was not competent to second-guess state secrets privilege claims because only executive officials could see the entire national security and intelligence picture and thus fully comprehend the national security consequences of disclosing information.¹¹⁸ The defendants even erroneously claimed that no court had ever used an expert or advisor to

112. See FED. R. EVID. 706 (providing for court-appointed expert witnesses).

113. 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006), remanded *per curiam*, 539 F.3d 1157 (9th Cir. 2008).

114. See *id.* at 979.

115. *Id.* at 993-94. Another example of a court considering public disclosures in assessing a state secrets privilege assertion is *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978). There, the district court had concluded that the challenged program, known as Project SHAMROCK, was not itself a secret because “congressional committees investigating intelligence matters had revealed so much information about SHAMROCK that such a disclosure would pose no threat to the NSA mission.” *Id.* at 10.

116. *Hepting*, 439 F. Supp. 2d at 1010 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

117. See *id.*

118. See AT&T Corp.’s Response to July 20, 2006 Order to Show Cause Regarding Appointment of Expert at 2-5, *Hepting v. AT&T Corp.*, No. 3:06-cv-00672-VRW (N.D. Cal. July 31, 2006), 2006 WL 2203557 [hereinafter AT&T Brief]. This argument is in some ways a form of what David Pozen calls the “mosaic theory.” Cf. Pozen, *supra* note 96, at 630 (describing the mosaic theory in the national security context as the notion that seemingly innocuous pieces of information could be assembled by an adversary to discover “strategic vulnerabilit[ies]”).

aid in adjudicating a state secrets assertion, apparently ignoring or ignorant of the Agent Orange litigation discussed above.¹¹⁹ Judge Walker ultimately decided that appointing an independent expert was premature but, as described below, his creativity ultimately inspired another court.¹²⁰

In *Al-Haramain Islamic Foundation v. Bush*, attorneys for a nonprofit allegedly linked to terrorists challenged National Security Agency surveillance programs they believed had intercepted their confidential conversations with clients.¹²¹ The government invoked the state secrets privilege as a total bar to the court’s jurisdiction.¹²² Citing Judge Walker’s approach in *Hepting*, Judge King of the District of Oregon noted that appointing a special master was a viable option that would enable the “[trial] to proceed while limiting disclosure of information covered by the privilege.”¹²³ Ultimately, though, he opted to explore another procedural innovation, soliciting the parties’ perspectives on (among other things) “hiring an expert to assist the Court in determining whether any of these disclosures may reasonably result in harm to the national security.”¹²⁴ But while the court rejected the defendant’s assertion that the case must be summarily dismissed on state secrets grounds and entertained innovative means of adjudicating the privilege, it certified its decision for immediate appeal to the Ninth Circuit.¹²⁵ And although the court of appeals agreed with the district court that “[i]n light of extensive government disclosures” about the surveillance program the claim was not categorically barred under *Reynolds* and *Totten*, the Ninth Circuit panel nonetheless concluded that the sealed document at issue in the case was “protected by the state secrets privilege.”¹²⁶

Appointment of experts thus stands as an often-discussed but still relatively theoretical judicial tool in state secrets adjudications.

3. Security-cleared counsel

The third procedural innovation is that of ordering disclosure of some allegedly privileged information to the challengers’ counsel so that they may

119. See AT&T Brief, *supra* note 118, at 2-3 (“[N]o court has ever utilized a Rule 706 expert, or any other type of expert or advisor, in determining whether information is entitled to the absolute protection afforded by the state secrets privilege.”); see also Sinnar, *supra* note 80 (manuscript at 28 n.144).

120. See Sinnar, *supra* note 80 (manuscript at 28-29).

121. 451 F. Supp. 2d 1215, 1218 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).

122. *See id.* at 1220.

123. *See id.* at 1221.

124. *Id.* at 1232-33.

125. *Id.* at 1233 (citing 28 U.S.C. § 1292(b)).

126. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007).

meaningfully participate in the court’s evidentiary adjudications. For obvious reasons, having the challenger’s counsel in the room enhances due process in an adversarial system.¹²⁷ In the criminal context, Congress has blessed courts’ facilitation of precisely such a process in the Classified Information Procedures Act (CIPA),¹²⁸ which empowers courts to compel disclosure of evidence important to a defendant’s case to that defendant¹²⁹—or at least to her lawyers.¹³⁰ And if a defendant’s lawyer is ineligible for appropriate clearances, a court may appoint supplemental or replacement counsel who is eligible.¹³¹

In the civil context, disclosure to cleared counsel resides in a decidedly grayer area. No CIPA-like device exists for courts seeking to resolve the disputes of civil litigants, and as Robert Timothy Reagan has noted, the government has little incentive to share important information when it is itself the defendant.¹³²

127. See Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57-62, 87-88 (1998) (exploring some of the reasons why adversarialism—or at least a sense of adversarialism—is central to the U.S. justice system); Kwoka, *supra* note 4, at 110-13 (detailing the constitutional pedigree and importance of robust adversarial process).

128. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. at 6-12 (2016)).

129. 18 U.S.C. app. at 7-8 (setting forth procedures governing disclosure of classified information to criminal defendants as well as substitute evidence, provided the substitute would leave the defendant with “substantially the same ability to make his defense”); *id.* at 6 (providing for protective orders against further disclosures once classified evidence has been given to a defendant); see Ian MacDougall, Note, *CIPA Creep: The Classified Information Procedures Act and Its Drift into Civil National Security Litigation*, 45 COLUM. HUM. RTS. L. REV. 668, 681-82 (2014). The U.S. Attorneys’ Criminal Resource Manual describes it this way:

An essential provision of a protective order [under CIPA] is the appointment by the court of a Court Security Officer (CSO). The CSO is an employee of the Department’s Justice Management Division; however, the court’s appointment of a CSO makes that person an officer of the court. In that capacity, the CSO is responsible for assisting both parties and the court staff in obtaining security clearances (not required for the judge); in the proper handling and storage of classified information[; and in operating the special communication equipment that must be used in dealing with classified information.

OFFICES OF THE U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL § 2054 (1997), <https://perma.cc/GH28-NTNJ>. In effect, this gives district courts the power to appoint a special officer empowered to facilitate the security clearance process for counsel on both sides of criminal matters.

130. See, e.g., United States v. Odeh (*In re Terrorist Bombings of U.S. Embassies in E. Afr.*), 552 F.3d 93, 122 (2d Cir. 2008) (holding that disclosure can be limited to those eligible for security clearances “as long as the application of this requirement does not deprive the defense of evidence that would be ‘useful to counter the government’s case or to bolster a defense’” (quoting United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008))); LIU & GARVEY, *supra* note 19, at 3 (“[S]ome defendants may be ineligible for the necessary security clearances. In these cases, courts may issue protective orders prohibiting cleared counsel from sharing any classified information with the defendant.”).

131. See LIU & GARVEY, *supra* note 19, at 3; MacDougall, *supra* note 129, at 680.

132. See ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE MANAGEMENT: AN ANNOTATED GUIDE 21 (2011), <https://perma.cc/44JT-9477>.

But here, too, courts have innovated. Judges have begun the process of effecting what Ian MacDougall terms “CIPA creep”: applying the principles of CIPA beyond criminal adjudications.¹³³ Take *Horn v. Huddle*, an action by a former Drug Enforcement Administration employee against Central Intelligence Agency (CIA) and State Department employees who allegedly eavesdropped unlawfully on his phone conversations.¹³⁴ Then-Chief Judge Lambarth of the District Court for the District of Columbia was unequivocal in applying CIPA outside the criminal context; he stated that he was providing the plaintiff “an opportunity to argue that this information is not a state secret through CIPA-like proceedings.”¹³⁵ The court accordingly ordered that security clearance review be expedited for eligible counsel so that they could access information critical to the plaintiff’s case.¹³⁶ Although ultimately vacated following a settlement between the parties,¹³⁷ *Horn* represents another judicial move toward meaningful participation in state secrets adjudications.

III. Security Clearance as a Veto Against Effective Judicial Review of State Secrets Privilege Invocations

The executive branch has not sat idly by as the judiciary has crafted innovative means of adjudicating complex state secrets privilege disputes. Wherever courts

133. See MacDougall, *supra* note 129, at 672-73. Courts and observers have noted both that the state secrets privilege has expanded significantly since the passage of CIPA, *see supra* Part I.A.3, and that Congress’s passage of CIPA “creates no new rights of or limits on discovery,” *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989). *See also* H.R. REP. NO. 96-831, pt. 1, at 5, 27 (1980) (stating that CIPA’s protective order provision “is not intended to affect the discovery rights of a defendant”). Rather, CIPA codifies and endorses the basic structure of the state secrets privilege as outlined in *Reynolds*. *See* *United States v. Jin*, 791 F. Supp. 2d 612, 618 (N.D. Ill. 2011) (noting that CIPA presupposes, rather than creates, a privilege, which “most likely has its origins in the common-law privilege against disclosure of state secrets”). Insofar as CIPA recognized the common law nature of the privilege, courts may be more comfortable tweaking CIPA’s scope to mirror expanded contexts in which the privilege is invoked. Cf. MacDougall, *supra* note 129, at 690-707 (detailing CIPA’s creep into civil litigation).

134. See *Horn v. Huddle (Horn I)*, 636 F. Supp. 2d 10, 13 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010).

135. *Id.* at 18.

136. See *Horn v. Huddle (Horn II)*, 647 F. Supp. 2d 55, 66 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010); *see also* Al-Haramain Islamic Found. v. Bush (*In re NSA Telecomms. Records Litig.*), 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009) (“Defendants shall arrange for . . . [the] lead attorney for plaintiffs herein and up to two additional members of plaintiffs’ litigation team to apply for [Top Secret/Sensitive Compartmented Information] clearance and shall expedite the processing of such clearances so as to complete them no later than [thirty-nine days from the date of the order].”). Whether courts properly have power to compel expedited security clearances is a matter of some controversy, as discussed in Part III.B below.

137. See *Horn v. Huddle (Horn III)*, 699 F. Supp. 2d 236, 238 (D.D.C. 2010).

have sought to exercise their power to ameliorate the due process concerns flowing from such adjudications, the executive branch has cried foul. Its arguments fall roughly into two categories: (1) irrespective of *Reynolds* and its progeny, courts *should not* have the power to review state secrets privilege invocations;¹³⁸ and (2) even if courts *can* determine whether evidence is a state secret, they are nevertheless powerless to weigh in on the executive’s security clearance decisions and related “need-to-know” determinations.¹³⁹ Because most evidence that falls within the state secrets privilege is also classified, this latter argument amounts to a claim that judges are not allowed to disclose privileged information to anyone—including special masters, expert witnesses, or litigants’ counsel—without the executive’s blessing, foreclosing the promising innovations discussed above.

For the purposes of this Note, I will set aside the first argument, which has been explored extensively in past scholarship,¹⁴⁰ and focus on the second. *Can* courts weigh in on security clearance decisions? What about subsequent determinations of whether a potential recipient “needs to know” classified information? Before endeavoring to answer these questions, I first turn to the definition and process of security clearance.

A. What’s in a Clearance?

A security clearance is, at bottom, “a determination that an individual . . . is eligible for access to classified national security information.”¹⁴¹ The clearance system is not a product of statute.¹⁴² Rather, it is laid out in a series of executive

138. For full-throated defenses of this proposition, see ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 5, 74-75 (2007). See also John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 430-34, 451 (2003) (arguing that the Constitution’s “textual and structural distribution of authority” suggests that courts should play no role in issues of warmaking nor, specifically, in disputes surrounding war declaration). For a more thorough discussion of institutional competency arguments and an alternative viewpoint on the competence of courts to assess secrets, see Fuchs, *supra* note 93, at 168-75; and Sinnar, *supra* note 80 (manuscript at 8-10).

139. See, e.g., Reply Memorandum in Support of Defendants’ Motion for Partial Summary Judgment, *supra* note 15, at 25 (“The grant of a security clearance requires a favorable determination *by the Executive branch* that an individual is trustworthy for access to classified information and, in addition, a separate determination by an official *within the Executive branch* that an individual has a demonstrated ‘need to know’ classified information.” (emphasis added)).

140. See sources cited *supra* note 138.

141. MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., R43216, SECURITY CLEARANCE PROCESS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (2016).

142. That is not to say that Congress has been entirely silent on the issue of security clearances and classification. In 2004, it passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which addressed security clearances among other issues. See Pub. L. No. 108-458, § 3001, 118 Stat. 3638, 3705-10 (2004) (codified as amended at 50 U.S.C. § 3341 (2015)). But this legislation did not seek to set substantive standards;

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orders spanning from President Truman¹⁴³ to President Eisenhower¹⁴⁴ to President Obama,¹⁴⁵ promulgated originally for the purpose of “establish[ing] uniform standards and procedures for evaluation of the loyalty’ of federal government employees.”¹⁴⁶ Starting from “a strong presumption against the issuance or continuation of a security clearance,”¹⁴⁷ agency officials have discretion to grant, deny, or revoke clearance applications based on background investigations and publicly available criteria.¹⁴⁸ There are, generally speaking, three levels of security clearance: Confidential, Secret, and Top Secret.¹⁴⁹ Notably, “constitutional officers” such as Presidents, Article III judges, and members of Congress are categorically exempt from the security clearance process and, by virtue of their offices, “are deemed to meet the standards of trustworthiness for eligibility for access to classified information.”¹⁵⁰

The clearance process has four steps: application (or preinvestigation),¹⁵¹

rather, it sought to accelerate and consolidate the existing security clearance review process and ensure that executive agencies reciprocate each other’s security clearance determinations. See Andrea Rose Carroll-Tipton, *Consolidating the Personnel Security Appeals Boards to Resolve the Tensions Between Employee Due Process and National Security*, 19 EMP. RTS. & EMP. POL’Y J. 235, 253 (2015).

143. See Exec. Order No. 9835, 3 C.F.R. 129 (Supp. 1947) (establishing a precursor to the security clearance system).
144. See Exec. Order No. 10,450, 3 C.F.R. 72 (Supp. 1953), reprinted in 5 U.S.C. § 3711 app. at 720-23 (2016) (establishing the security clearance system). Notably, this order was issued only seven weeks after the Court’s decision in *Reynolds*.
145. See Exec. Order No. 13,526, 3 C.F.R. 298 (2010), reprinted in 50 U.S.C. § 3161 app. at 593-604 (updating the security clearance system and rescinding some changes made by President Bush’s executive order on security clearance); see also Exec. Order No. 13,764, 82 Fed. Reg. 8115 (Jan. 23, 2017) (clarifying and updating select parts of the clearance system).
146. See Carroll-Tipton, *supra* note 142, at 247 (quoting Megan Dunn, Note, *You’re Fired! The Role of State Courts in the Expungement of Criminal Records for Federal Security Clearance Purposes*, 71 MO. L. REV. 495, 502 (2006)).
147. See Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990).
148. See CHRISTENSEN, *supra* note 141, at 1.
149. *Id.* at 2 (citing Exec. Order No. 13,526, § 1.2, 3 C.F.R. at 298-99). There are also two additional flavors of clearance “commonly associated with the Top Secret level”: Sensitive Compartmented Information (SCI), which refers to information involving intelligence sources and methods, and Special Access Programs (SAPs), which refers to highly sensitive policies, projects, and programs. These categories exist for classified information that has been deemed particularly vulnerable. Eligibility standards and investigative requirements for access to SCI and SAPs are higher than for other information
150. *Id.* (footnotes omitted).
151. *Id.* at 4 (“The criteria for election or appointment to these positions are specified in the U.S. Constitution, and except by constitutional amendment, no additional criteria (e.g., holding a security clearance) may be required.”).
151. The application process typically begins with an applicant completing a security questionnaire, Standard Form (SF) 86, which comes in at 136 pages perfectly blank. See *footnote continued on next page*

investigation,¹⁵² adjudication,¹⁵³ and reinvestigation.¹⁵⁴ The upshot is that the security clearance process is lengthy and exhaustive. Whether an individual qualifies under the regulation and subsequent administrative precedent, while

ELIZABETH L. NEWMAN & ELAINE L. FITCH, SECURITY CLEARANCE LAW AND PROCEDURE 17 (3d ed. 2014); U.S. Office of Pers. Mgmt., Standard Form 86, Questionnaire for National Security Positions (2016), <https://perma.cc/K3SZ-NNJ4>. The questionnaire covers the applicant’s “past employment, education, places of residence, countries visited, and names of parents and siblings.” NEWMAN & FITCH, *supra*, at 17. It also asks questions about mental health history, organizational affiliations, financial affairs, debts, alcohol and illegal drug use, and convictions. *Id.* The required disclosures are invasive but have nevertheless withstood constitutional challenge. *See id.* (citing *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786 (D.C. Cir. 1997)); *cf. Nat’l Fed’n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 287-88, 295 (D.C. Cir. 1993) (upholding use of the Department of Defense’s security clearance application form, which serves the same purpose and asks comparably searching questions as SF 86).

152. Investigations of the applicant’s background often take a couple of months. *See* CHRISTENSEN, *supra* note 141, at 9 (detailing the longest and shortest average reported wait times by agency). In response to backlogs, the Obama Administration instituted reforms. Among them was the creation of the National Background Investigations Bureau (NBIB) within the Office of Personnel Management. *See* Exec. Order No. 13,764, § 2(t), 82 Fed. Reg. 8115, 8125-27 (Jan. 23, 2017); *see also About Us*, NAT’L BACKGROUND INVESTIGATIONS BUREAU, <https://perma.cc/E3MJ-USTK> (archived Jan. 24, 2018) (describing the NBIB’s mission to “[d]eliver[] efficient and effective background investigations to safeguard the integrity and trustworthiness of the Federal workforce”). There are promising signs that the clearance process is becoming more efficient. *See* Joseph Marks, *Security Clearance Bureau Making Progress but No Timeline to End Backlog*, NEXTGOV (May 10, 2017), <https://perma.cc/6XAP-E594>.
153. Adjudication can take a year or longer to complete. *See* Loren Thompson, *One-Year Waits for Security Clearance Are Costing Washington Billions*, FORBES (May 23, 2017, 12:42 PM), <https://perma.cc/S6BW-JK5W>. Adjudication is based on a series of very precise criteria designed to capture whether the “whole person” is trustworthy. *See* 32 C.F.R. § 147.2(a) (2017). The same criteria are applied irrespective of the level of clearance sought. *See* NEWMAN & FITCH, *supra* note 151, at 131. First, “[i]n evaluating the relevance of an individual’s conduct,” the decisionmaker is directed to consider nine factors. 32 C.F.R. § 147.2(a). These are: (1) the “nature, extent, and seriousness of the conduct”; (2) the “circumstances surrounding the conduct, to include knowledgeable participation”; (3) the “frequency and recency of the conduct”; (4) the “individual’s age and maturity at the time of the conduct”; (5) the “voluntariness of participation”; (6) the “presence or absence of rehabilitation and other pertinent behavioral changes”; (7) the “motivation for the conduct”; (8) the “potential for pressure, coercion, exploitation, or duress”; and (9) the “likelihood of continuation or recurrence.” *Id.* Further, decisions must be “an overall common sense determination based upon” thirteen guidelines. *Id.* § 147.2(c). These guidelines are: (1) “allegiance to the United States”; (2) “foreign influence”; (3) “foreign preference”; (4) “sexual behavior”; (5) “personal conduct”; (6) “financial considerations”; (7) “alcohol consumption”; (8) “drug involvement”; (9) “emotional, mental, and personality disorders”; (10) “criminal conduct”; (11) “security violations”; (12) “outside activities”; and (13) “misuse of information technology systems.” *See id.* (capitalization altered). As if that were not enough, extensive precedent has developed around each of these factors and guidelines. *See generally* NEWMAN & FITCH, *supra* note 151.
154. *See* CHRISTENSEN, *supra* note 141, at 6-7.

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formally discretionary, is largely prescribed by the detailed criteria decisionmakers are required to apply. And, it turns out, the vast majority of security clearance applications that make it to the adjudication stage are granted.¹⁵⁵

But critically, an applicant is not entirely in the clear even after she is granted a security clearance. Once cleared, if she seeks access to classified information, she must “ha[ve] a need-to-know the information.”¹⁵⁶ According to the 2010 security clearance order, “Need-to-know” means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.¹⁵⁷ Such a determination in theory occurs each time a person with a security clearance seeks to access classified information. Who exactly is empowered to make this assessment is a matter of some disagreement, an issue to which I return in Part III.B.3 below.

Although silent on the substance of the security clearance system, Congress has lent its power to enforcing it where clear violations occur. In addition to the penalties built into the system itself—primarily the revocation of clearance¹⁵⁸—the statutory criminal penalties can be significant. For instance, an individual who shares with “an unauthorized person . . . any classified information” pertaining to cryptography, secure communications, or related technologies may face ten years in prison, a fine, or both.¹⁵⁹ So the stakes are fairly high when determining whether courts ought to be able to police the executive’s decisions as to whether judicial adjuncts, also empowered by statute,¹⁶⁰ are “authorized persons” within the meaning of the statutes that create criminal penalties for mishandling classified information.

155. See NAT’L COUNTERINTELLIGENCE & SEC. CTR., OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, 2015 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 9 tbl.5 (n.d.), <https://perma.cc/6YYM-DVFE> (reporting security clearance denial rates by agency, all of which were below 10%).

156. See Exec. Order No. 13,526, § 4.1(a)(3), 3 C.F.R. 298, 314 (2010), reprinted in 50 U.S.C. § 3161 app. at 593, 599. There are limited exceptions to the need-to-know requirement for those “engaged in historical research,” those who previously occupied “senior policy-making positions to which they were appointed or designated by the President or the Vice President,” or those who themselves served as President or Vice President. *Id.* § 4.4(a), 3 C.F.R. at 310-11.

157. *Id.* § 6.1(dd), 3 C.F.R. at 324.

158. See, e.g., *id.* § 5.5(b)-(d), 3 C.F.R. at 321-22.

159. See 18 U.S.C. § 798(a) (2016) (criminalizing disclosure of specific classified information pertaining to cryptography, secure communications, secure communications technology, communications intelligence on foreign governments, or communications intelligence from foreign governments).

160. Cf. 28 U.S.C. § 2072 (2016) (empowering the Supreme Court to create “general rules of practice and procedure and rules for evidence” for federal courts); FED. R. CIV. P. 53
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B. Can Courts Review or Compel Determinations Related to Security Clearances?

The executive claims exclusive domain over security clearances. Many courts and observers disagree. But who has the right of it? Because the legal structure for security clearances is almost entirely the product of executive orders, I begin by reviewing judicial treatment of executive orders generally. I then specifically examine the coordinate branches’ past positions on judicial review of the security clearance process.

1. Trends in judicial review of executive orders

In the past decade, courts have shown themselves willing to stand in the way of executive power. As President Trump has sought to effectuate controversial travel restrictions for refugees and migrants from six majority-Muslim countries,¹⁶¹ courts have thoroughly assessed the propriety of his executive orders—even on matters conventionally considered within the executive’s power,¹⁶² and on both constitutional and statutory terms.¹⁶³ Policy differences notwithstanding, President Obama might be able to commiserate; his efforts to use executive power to create the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program were also met with searching judicial review, and the program was ultimately enjoined by the Fifth Circuit, whose judgment was affirmed by an equally divided Supreme Court.¹⁶⁴

(allowing for the appointment of special masters); FED. R. EVID. 706(a) (expert witnesses).

161. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).
162. For example, the “plenary power” doctrine, holding that the political branches have nearly unchecked power to regulate immigration without judicial oversight, has a long and storied history. See David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30-32, 55-56 (2015) (detailing the origins of the plenary power doctrine and arguing for its continued use as a means of encouraging more action by the political branches rather than relying on judicial intervention).
163. Compare, e.g., Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 572, 601 (4th Cir.) (en banc) (upholding a preliminary injunction against Executive Order 13,780, President Trump’s second iteration of the ban, based in part on the likelihood that the plaintiffs would succeed on their Establishment Clause claim), vacated as moot per curiam, 138 S. Ct. 353 (2017); with, e.g., Hawaii v. Trump, 859 F.3d 741, 779 (9th Cir.) (per curiam) (upholding a preliminary injunction against Executive Order 13,780 because it likely violated the Immigration and Nationality Act of 1965 (citing 8 U.S.C. § 1152(a)(1)(A))), vacated as moot per curiam, 138 S. Ct. 377 (2017).
164. See Texas v. United States, 809 F.3d 134, 146, 187-88 (5th Cir. 2015) (affirming a nationwide injunction entered against DAPA after the plaintiff states argued that it violated the Administrative Procedure Act), aff’d by an equally divided court, 136 S. Ct. footnote continued on next page

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Executive orders are a very powerful tool. By the stroke of her pen, a President may make policy that “implicate[s] individual rights and the structure of the federal government, thereby ‘affecting millions’ of people.”¹⁶⁵ But where does that power come from? The two formal sources of the President’s power to issue executive orders, according to the taxonomy articulated by Justice Jackson in his seminal concurrence in the *Steel Seizure* case,¹⁶⁶ are Article II of the Constitution and congressional enactments.¹⁶⁷ Although the President’s constitutional powers are scantly defined by the Constitution’s plain language,¹⁶⁸ the Supreme Court has read Article II as “authoriz[ing] presidents to issue executive orders that operate within areas exclusively subject to presidential power,” as well as to “issue executive orders that (a) operate in areas of concurrent congressional-executive authority and (b) do not contravene the ‘expressed or implied will of Congress.’”¹⁶⁹ The President’s powers under statutory law are often less ambiguous: Congress can

2271 (2016); *see also* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

165. Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2032-33 (2015) (quoting Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996)). As President Obama famously said at a cabinet meeting in 2014:

[W]e are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help that they need. I’ve got a pen, and I’ve got a phone. And I can use that pen to sign Executive Orders and take executive actions and administrative actions that move the ball forward....

Remarks Prior to a Cabinet Meeting and an Exchange with Reporters, 2014 DAILY COMP. PRES. DOC. NO. 00019, at 1 (Jan. 14, 2014), <https://perma.cc/V4LG-SUX7>; *see also* Maureen Dowling, *Obama Has a Pen and a Phone*, YOUTUBE (June 6, 2014), <https://perma.cc/3A58-N2DK>.

166. As most people who went to law school will no doubt recall, *Youngstown Sheet & Tube Co. v. Sawyer*, more commonly known as the *Steel Seizure* case, involved Supreme Court review of President Truman’s decision to seize steel manufacturing facilities in order to end a labor dispute during the Korean War. See 343 U.S. 579, 582-84 (1952). Justice Jackson, in his concurring opinion, created a now-famous tripartite taxonomy of executive power, *see id.* at 635-38 (Jackson, J., concurring in the judgment and opinion of the Court), which has largely overshadowed in importance Justice Black’s opinion for the majority, *see, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 661-62, 668-78 (1981) (embracing Justice Jackson’s approach); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (“[T]he unanimous court essentially embraced Mr. Justice Jackson’s view . . .”); Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 11-12 (1982) (“It is Justice Jackson’s famous concurring opinion in *Youngstown* that has most influenced subsequent analysis.”).

167. *See* Newland, *supra* note 165, at 2049-50 (citing *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring in the judgment and opinion of the Court)).

168. Cf., *e.g.*, U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

169. Newland, *supra* note 165, at 2049 (emphasis omitted) (quoting *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring in the judgment and opinion of the Court)).

authorize the President to issue orders necessary to execute its laws.¹⁷⁰ Commentators have also identified functional aids to the executive order power, including constitutional vagueness and exceptional procedural freedom.¹⁷¹ But with potentially sweeping consequences and unconstrained by procedural requirements, executive orders often implicate special constitutional concerns.¹⁷²

In her important empirical work on the subject, Erica Newland surveyed 152 Supreme Court and D.C. Circuit cases that turned on judicial treatment of executive orders.¹⁷³ The picture that emerged was not a tidy one. She found that instead of reliably checking executive caprice, “courts inconsistently invoke [the] checks and balances that are available to temper executive action.”¹⁷⁴ The result is a “judicial elevation of executive orders” born not of “studied esteem for the President’s greater flexibility, expertise, or role in the constitutional system,” but rather from doctrinal “disorder.”¹⁷⁵ That is, executive order jurisprudence is not a theoretically consistent doctrine, but instead a hodgepodge of cases addressing specific substantive areas of law, where uncertainty and ambiguity have resulted in ever-expanding executive power.

But from all this chaos emerge a number of trends, three of which are particularly relevant here. First, the intensity of judicial scrutiny of executive

170. *See id.* at 2031 n.15 (providing examples of statutes that instruct the executive to fill in gaps in statutory language). Less ambiguous does not necessarily mean entirely clear, however, as the Trump Administration discovered when the Ninth Circuit reviewed the second travel ban. *See Hawaii v. Trump*, 859 F.3d 741, 779 (9th Cir.) (per curiam), *vacated as moot per curiam*, 138 S. Ct. 377 (2017).

171. *See* Newland, *supra* note 165, at 2031-32 (arguing that executive orders are “formidable instruments of power in large part because they are not immediately constrained by the ‘finely wrought and exhaustively considered’ process of bicameralism and presentment, nor are they subject to the hoops and constraints of the Administrative Procedure Act” (footnotes omitted) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983))).

172. *See id.* at 2032-33, 2033 n.35 (“It is not a coincidence that many of the most important Supreme Court rulings on presidential power have involved executive orders” (alteration in original) (quoting KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 36 (2001))).

173. *See id.* at 2035.

174. *Id.*

175. *See id.* One reason for this muddled mess is courts’ willingness to “allow[] presidents to ‘aggregate’ sources of law—multiple statutes and Article II powers—to create a general gestalt of authority to issue their executive orders.” *See id.* at 2050 (citing Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005)); cf. Pozen, *supra* note 96, at 630-32 (describing this judicial deference—at least in the context of national security disputes—as a product of the “mosaic theory” requiring “deference to agencies’ perceived superiority at evaluating mosaic threats,” a “doctrinal tool of great force in national security law” that has been applied by courts “in ways that are unfalsifiable and deeply susceptible to abuse and overbreadth”).

orders seems to depend to some extent on the other branches’ positions in a dispute. On a path marked by the *Steel Seizure* case¹⁷⁶ and continuing through cases like *Dames & Moore v. Regan*,¹⁷⁷ judicial willingness to intervene has ebbed and flowed with the clarity of each of the coordinate branches’ positions. Where, for instance, Congress’s express or implied position is incompatible with that of the executive—where Justice Jackson described executive power as at its “lowest ebb”¹⁷⁸—courts are more likely to step in.¹⁷⁹

Second, judicial deference to the executive appears to hinge in part on whether the subject matter of an order is seen as one of conventional executive authority. For instance, where matters of administration of the executive branch are in question, courts are likely to defer.¹⁸⁰ The same is true, to a lesser extent, where foreign affairs powers are implicated.¹⁸¹ On the other hand,

176. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring in the judgment and opinion of the Court). The opinion emphasized the importance of considering clear expressions of congressional will and ultimately struck down President Truman’s seizure of steel mills as an improper exercise of executive power. *See id.* at 586, 588-89 (majority opinion).

177. 453 U.S. 654 (1981). In *Dames & Moore*, the Supreme Court held that the President possessed the power to force U.S. nationals’ claims against Iran out of federal courts and into mandatory binding arbitration before the Iran-U.S. Claims Tribunal. *See id.* at 659-62, 674, 678-79, 688. In so doing, the Court allowed an extremely flexible reading of congressional silence to substitute for an expression of congressional will, relying in part on “a history of congressional acquiescence in conduct of the sort engaged in by the President.” *See id.* at 678-79.

178. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring in the judgment and opinion of the Court).

179. Such a conflict was precisely the crux of the Ninth Circuit’s ruling on President Trump’s second travel ban. The court found that the plaintiffs were likely to succeed on their claim that the executive order “exceeds the restriction of [8 U.S.C.] § 1152(a)(1)(A) and the overall statutory scheme intended by Congress.” *See Hawaii v. Trump*, 859 F.3d 741, 779 (9th Cir.) (per curiam), vacated as moot per curiam, 138 S. Ct. 377 (2017). Similarly, in *Chamber of Commerce of the United States v. Reich*, the D.C. Circuit struck down an executive order issued by President Clinton aimed at protecting unionized labor. *See* 74 F.3d 1322, 1324-25, 1339 (D.C. Cir. 1996). There, the court read the executive order as directly in conflict with the National Labor Relations Act (NLRA), and the unambiguous act of Congress preempted President Clinton’s order. *See id.* at 1339; *see also* Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2016)).

180. *See, e.g.*, *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) (“An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not . . . subject to judicial review.”).

181. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress”); *see also* Newland, *supra* note 165, at 2089 (noting that “the executive has historically fared better in cases involving foreign relations . . . than in cases involving war powers and national security”). *But see* Sitaraman & Wuerth, *supra* note 16, at 1935 (arguing that the modern trend is toward

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where national security or war powers are implicated, the Constitution more clearly anticipates checks on executive power.¹⁸² In fact, in Newland’s study, cases involving national security orders were the most likely to be decided in favor of the challenger.¹⁸³

Finally, and perhaps most importantly to the present inquiry, Newland found that when reviewing executive orders, courts often highly prioritize harmony.¹⁸⁴ One of the clearest examples is *Rattigan v. Holder*, in which the D.C. Circuit adjudicated a dispute over Title VII of the Civil Rights Act of 1964 and Executive Order 12,968 (EO 12,968).¹⁸⁵ Title VII provides federal employment discrimination protections,¹⁸⁶ while EO 12,968 encourages federal employees to “report any information that raises doubts as to whether another employee’s continued eligibility for access to classified information is clearly consistent with the national security.”¹⁸⁷ The plaintiff, Wilfred Rattigan, was a security-cleared federal employee who had complained about race- and nationality-based discrimination under Title VII; shortly thereafter, he was subjected to security clearance reinvestigation under EO 12,968.¹⁸⁸ When he brought suit alleging that the reinvestigation was retaliatory, the D.C. Circuit applied the harmonization canon of statutory interpretation in an

“normalization” of foreign affairs law—that is, treating foreign affairs law like ordinary law—and away from executive exceptionalism).

182. See *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (suggesting that Congress may provide for judicial “intrusion] upon the authority of the Executive in military and national security affairs”); *Steel Seizure*, 343 U.S. at 641-45 (Jackson, J., concurring in the judgment and opinion of the Court) (explaining that the President “has no monopoly of ‘war powers,’ whatever they are”). *Reich*, discussed in note 179 above, might be taken as an example of similar logic being applied to a situation where the Constitution even more clearly anticipates coordinate checks on executive power. In *Reich*, the D.C. Circuit overturned an executive order that privileged union labor over nonunion labor for federal contracts. See 74 F.3d at 1324, 1338-39. Relying on NLRA precedent, the court eschewed harmonization and instead overturned the executive order in toto. See *id.* at 1333-34, 1338-39.
183. See Newland, *supra* note 165, at 2089-91, 2091 fig.9. Notably, however, the trend Newland describes may be a historical artifact. See *id.* at 2090 (“All of the national security and war power cases in which courts contracted executive authority were decided before 1960. While the sample size here is small, these cases counsel toward a reevaluation of more modern assertions that the judiciary historically deferred to the executive in these arenas.”).
184. See *id.* at 2063-69.
185. See 689 F.3d 764, 765 (D.C. Cir. 2012); see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)); Exec. Order No. 12,968, 3 C.F.R. 391 (1996), reprinted in 50 U.S.C. § 3161 app. at 586-90 (2015).
186. See 42 U.S.C. § 2000e-2.
187. Exec. Order No. 12,968, § 6.2(b), 3 C.F.R. at 401.
188. See *Rattigan*, 689 F.3d at 765-67.

effort to harmonize Title VII and EO 12,968.¹⁸⁹ The court “split the difference, allowing Title VII suits to proceed where reports made pursuant to [EO] 12,968 were ‘knowingly false.’”¹⁹⁰ Such a balance, the court opined, would both advance the purpose of the executive order to protect national security and retain the fundamental thrust of Title VII protections.¹⁹¹ And *Rattigan* is just the tip of the iceberg: Newland identified many more cases in which courts gave up on definitively addressing conflicts over executive orders and opted instead for a middle path.¹⁹²

While these trends are purely descriptive and cannot properly be understood as rules, they provide helpful context as we narrow our focus to precedents relating specifically to executive power and the security clearance system.

2. Judicial action and security clearance decisions

Although courts have had several occasions to speak to the reviewability of individual security clearance decisions, they have had fewer opportunities to explore their own role in the security clearance process. Thus, the question whether courts can compel the executive branch to furnish security clearances where necessary for the administration of justice has gone largely unanswered.

189. See *id.* at 770. To be sure, *Rattigan* was not particularly remarkable in its quest for harmony; rather, what was remarkable was its willingness to harmonize an act of Congress with a unilateral act of the executive. For prominent examples of the Supreme Court’s use of the harmonization canon in the context of conflicting statutes, see *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 109 (1991) (noting that “harmonizing different statutes and constraining judicial discretion in the interpretation of the laws” are “superior values” in statutory construction); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-85 (1989) (reasoning that statutes “should be construed harmoniously” where they “constitute interrelated components of the federal regulatory scheme” (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976))); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”); and *Beals v. Hale*, 45 U.S. (4 How.) 37, 51 (1846) (“[S]tatutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each . . .”).

190. See Newland, *supra* note 165, at 2065 (quoting *Rattigan*, 689 F.3d at 770).

191. See *Rattigan*, 689 F.3d at 770-71.

192. See Newland, *supra* note 165, at 2066-67 n.164 (collecting sources). Examples include *Harris v. United States*, 19 F.3d 1090 (5th Cir. 1994), which held that an executive order was not implicitly overruled by later statutes because the order and the statutes could be read to “operate concurrently” without direct conflict, *id.* at 1095, and *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004), which held that “[t]he test used to determine whether a statute has been repealed”—a presumption against implied repeals and in favor of harmonization where possible—is also used for an executive order,” *id.* at 1199 (quoting *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 829 (D. Minn. 1994), *aff’d on other grounds*, 124 F.3d 904 (8th Cir. 1997)).

We are left to posit the answer to this question from what thin and often indeterminate precedent exists.

We begin with two important Supreme Court cases on judicial review of security clearance decisions, both decided during the Court’s 1987 Term. In *Department of the Navy v. Egan*, Thomas Egan’s security clearance was denied on the basis of past criminal convictions.¹⁹³ Without a security clearance, Egan “was not eligible for the job for which he had been hired,” and because reassignment was impossible, he was placed on leave and ultimately fired.¹⁹⁴ He challenged his termination with the Merit Systems Protection Board (MSPB), alleging that his firing was contrary to statute and, after exhausting his administrative remedies, he wound up in the Federal Circuit.¹⁹⁵ The court of appeals sided with Egan on the issue of jurisdiction, concluding that it could properly review a security clearance determination,¹⁹⁶ but the Supreme Court reversed.¹⁹⁷ Reasoning that the constitutional doctrine of separation of powers demands deference, that the government has a “compelling interest” in withholding national security information from unauthorized persons,¹⁹⁸ and that “no one has a ‘right’ to a security clearance,” the Court declined to intervene.¹⁹⁹ Citing “reasons . . . too obvious to call for enlarged discussion,”²⁰⁰ the *Egan* Court held that “broad discretion to determine who may have access” to classified information “must be committed to . . . the agency responsible.”²⁰¹ A Courts, it reasoned, are merely “outside nonexpert bod[ies]” incompetent to “review the substance of [an agency’s security clearance] judgment.”²⁰² A common reading of *Egan*, then, is that the judiciary has almost no role in reviewing security clearance determinations.²⁰³

193. 484 U.S. 518, 520-21 (1988).

194. *Id.* at 522.

195. *See id.* at 522-25.

196. *See id.* at 525.

197. *See id.* at 526-30, 534.

198. *See id.* at 527-28 (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam)).

199. *Id.* at 529 (alteration in original) (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)).

200. *Id.*

201. *Id.*

202. *See, e.g.*, James A. Baker, *Essay, Intelligence Oversight*, 45 HARV. J. ON LEGIS. 199, 202 & n.5, 203 (2008). *But see* Louis Fisher, *Judicial Interpretations of Egan* 1-2 (The Law Library of Congress, LL File No. 2010-003499, 2009), <https://perma.cc/JWN2-X4K9> (describing *Egan* as “creat[ing] confusion and misconceptions in the lower courts and in subsequent Supreme Court rulings”). Instead of signaling a sweeping plenary power for the executive in matters of security clearance decisionmaking, Louis Fisher argues, the case was decided on the narrow question whether Congress empowered the MSPB to review security clearance determinations under the Civil Service Reform Act. *Id.* at 4-7, 10; *see* Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. II, § 204(a), 92 Stat. 1111,

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A few months after *Egan*, the Court announced its ruling in *Webster v. Doe*.²⁰³ The anonymous plaintiff in *Webster* challenged the CIA’s decision to fire him when his security clearance was revoked on the grounds that he was gay.²⁰⁴ Among other claims, the plaintiff alleged that his constitutional rights had been abridged by his summary termination.²⁰⁵ Acting with apparent distaste for doctrinal clarity, the Court ignored its recent *Egan* ruling altogether. Writing for the majority, Chief Justice Rehnquist gave few hints as to whether he expected the plaintiff would succeed in challenging the termination. Nevertheless the Court held that the plaintiff’s constitutional claims could properly be reviewed—even if ultimately dismissed—by the district court.²⁰⁶ Deflecting the CIA’s protests that further review would necessarily “entail extensive ‘rummaging around’ in the Agency’s affairs to the detriment of national security,”²⁰⁷ the Court encouraged the district court to carefully control the discovery process to balance the plaintiff’s need for access against the “extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.”²⁰⁸ In short, although the Court did not address its earlier ruling in *Egan* forbidding direct review of security clearance decisions, it endorsed a sort of collateral attack: When plaintiffs allege that constitutionally problematic standards have been applied in the clearance process, courts can and must review those claims.

Lower courts have strained to reconcile the seemingly contradictory approaches of *Egan* and *Webster*. In *National Federation of Federal Employees v. Greenberg*, the D.C. Circuit offered a solution that smoothed some of *Egan*’s sharpest edges.²⁰⁹ In *Greenberg*, civilian employees of the Department of Defense challenged the use of a security clearance reinvestigation questionnaire that asked questions about lifetime criminal, credit, mental health, and drug histories, as well as organizational memberships.²¹⁰ The plaintiffs alleged

1134-37 (codified as amended at 5 U.S.C. §§ 7501-7504, 7511-7515, 7521 (2016)); *see also* 5 U.S.C. § 7513(d) (providing employees a right to appeal to the MSPB but remaining silent as to judicial review). Fisher’s view is fairly persuasive but not widely accepted. *See Demetri Blaisdell, Note, Title VII Challenges to Security Clearance Referrals: Rattigan Points the Way*, 4 COLUM. J. RACE & L. 177, 179, 183-84 (2014) (describing Fisher’s work as an example of the “scant literature” criticizing *Egan* and labeling it the “minority view” (capitalization altered)).

203. 486 U.S. 592 (1988).

204. *See id.* at 594-95.

205. *See id.* at 596.

206. *See id.* at 603-05.

207. *See id.* at 604 (quoting Transcript of Oral Argument at 8-13, *Webster*, 486 U.S. 592 (No. 86-1294), 1988 U.S. Trans. LEXIS 123).

208. *Id.*

209. 983 F.2d 286 (D.C. Cir. 1993).

210. *See id.* at 287-88.

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that being compelled to divulge such information was a violation of their constitutional rights to privacy.²¹¹ The government argued that jurisdiction was barred by *Egan*.²¹² The D.C. Circuit disagreed, citing *Webster* for the proposition that “not . . . all security-clearance decisions are immune from judicial review.”²¹³ The court further distinguished *Egan* on the basis that it concerned the substance of “a particular employee’s security clearance,” whereas the *Greenberg* court had to consider “the constitutionality of the methods used to” make security clearance decisions.²¹⁴ “To stretch *Egan* to cover this case,” the court wrote, “would be to endorse untenable, and far-reaching, restrictions on judicial review of governmental actions.”²¹⁵ The court went on:

All questions of government are ultimately questions of ends and means. The end may be legitimate, its accomplishment may be entrusted solely to the President, yet the judiciary still may properly scrutinize the manner in which the objective is to be achieved. . . . The government may have considerable leeway to determine what information it needs from employees holding security clearances and how to go about getting it. But a large measure of discretion gives rise to judicial deference, not immunity from judicial review of constitutional claims.²¹⁶

The court then cited a panoply of similar cases in which courts had scrutinized the security clearance *process* rather than *individual decisions*.²¹⁷ Nevertheless,

211. *See id.* at 288-89.

212. *See id.* at 289.

213. *Id.* (citing *Webster*, 486 U.S. at 601-05).

214. *See id.* at 290 (emphasis added). This distinction was endorsed once more in a recent concurrence by Judge Tatel of the D.C. Circuit. *See Gill v. U.S. Dep’t of Justice*, 875 F.3d 677, 682 (D.C. Cir. 2017) (Tatel, J., concurring). Although the panel agreed that the case should be dismissed on other grounds, *see id.* at 680-82 (per curiam), Judge Tatel wrote separately to take issue with the government’s arguments that (1) the court did not have jurisdiction, under *Egan*, to review constitutional claims that could be brought under Title VII; and (2) even if it did have jurisdiction over some constitutional claims, equal protection challenges are “especially likely to implicate *Egan*” and are thus barred, *see id.* at 682-84 (Tatel, J., concurring). Judge Tatel quickly disposed of the first argument. *See id.* at 683. But more striking for the purposes of this Note was his treatment of the second argument:

[N]ot every equal protection challenge will involve reviewing “discretionary judgments regarding a particular employee’s security clearance.” Some, as in *Greenberg*, will “relate to the constitutionality of the methods used” to make that decision. Indeed, the Third Circuit has “read *Egan* and *Webster* together as holding that Article III courts have jurisdiction to hear constitutional claims arising from the clearance revocation *process*, even though the merits of that revocation cannot be reviewed.”

Id. at 684 (citations omitted) (first quoting *Greenberg*, 983 F.2d at 290; then quoting *El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 183 (3d Cir. 2010)).

215. *Greenberg*, 983 F.2d at 290.

216. *Id.*

217. *See id.* (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1402-04 (9th Cir. 1990); *Jamil v. Sec’y, Dep’t of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990); *U.S. Info. Agency v. Krc*, 905 F.2d 389, 398-99 (D.C. Cir. 1990); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d

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after asserting jurisdiction, the *Greenberg* court ultimately sided with the government on the merits.²¹⁸

In addition to the collateral and procedural exceptions to the broad reading of *Egan* offered in *Webster* and *Greenberg*, *Rattigan* further hints at how difficult tensions between the security clearance structure and other laws might be resolved. As explained above, *Rattigan* involved a Title VII employment discrimination claim against the Federal Bureau of Investigation for allegedly retaliatory reports of fabricated security concerns that led to a security clearance reinvestigation.²¹⁹ Without directly confronting the apparent conflict between *Egan* and *Webster*,²²⁰ the D.C. Circuit found harmony. Explicitly balancing the government’s legitimate interest in accurate security clearance decisions against individual litigants’ right to sue under Title VII, the court landed on a middle alternative: It would scrutinize allegedly retaliatory reports only to determine whether they were “knowingly false.”²²¹ The court’s reasoning reflected each of the three general trends discussed above—it took note of Congress’s position as embodied in the language of Title VII,²²² weighed the relative expertise of the executive in the realm of national security,²²³ and strove above all else to harmonize the colliding policies.²²⁴

But questions arising from state secrets privilege adjudications are often somewhat different from those addressed directly in *Egan*, *Webster*, *Greenberg*, and *Rattigan*. Instead of seeking to *review* security clearance decisions, courts adjudicating state secrets more often seek to *facilitate* them. Such situations arise particularly frequently when courts wish to share pieces of allegedly privileged information with litigants’ counsel, special masters, or expert witnesses in the interest of effectively adjudicating a state secrets privilege assertion.²²⁵ In *Horn v. Huddle*, for instance, then-Chief Judge Lamberth sought

563, 570-81 (9th Cir. 1990), *overruled in part by* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014); Doe v. Cheney, 885 F.2d 898, 909-10 (D.C. Cir. 1989); Harmon v. Thornburgh, 878 F.2d 484, 491-92 (D.C. Cir. 1989); and Hill v. Dep’t of Air Force, 844 F.2d 1407, 1411-12 (10th Cir. 1988)).

218. *See id.* at 295.

219. *See Rattigan v. Holder*, 689 F.3d 764, 765-66 (D.C. Cir. 2012); *see also supra* notes 185-91 and accompanying text.

220. Indeed, the *Rattigan* court did not even cite *Webster*.

221. *See Rattigan*, 689 F.3d at 770-71, 773.

222. *See id.* at 771 (dismissing one possible resolution of the case because it would have resulted in “Congress’s purpose in enacting Title VII . . . be[ing] frustrated”).

223. *See id.* (assessing the executive agency’s relative “competence” and “expertise” and concluding that they bore “little relevance” to resolving disputes like that presented).

224. *See id.* (construing the statute and executive order in a way that “would create no conflict” between them).

225. *See supra* Part II.B.

to give the plaintiff a meaningful “opportunity to argue that [the disputed] information [was] not a state secret.”²²⁶ To do so, the court ordered expedited security clearances be granted to eligible plaintiffs’ counsel so that they could access information critical to their clients’ case.²²⁷ But would the court’s effort to expedite and compel the security clearance process withstand the scrutiny of a reviewing court? We did not learn the answer in *Horn*, as the case settled before an appeal could be heard.²²⁸

While the security clearance cases reviewed in this Subpart are not precisely on point, they suggest three reasons *Egan*’s apparently sweeping preclusion of judicial review for security clearance-related disputes should probably not be read as a total bar against judicial involvement. First, because *Horn* implicated a plaintiff’s constitutional rights—the right to effective representation—a broad reading of the *Webster* exception for constitutional cases might apply.²²⁹ That is, if the plaintiff’s counsel is denied a security clearance because the government considers the litigation in its adjudication of his application, the process would itself constitute a possible abridgement of the plaintiff’s due process or other constitutional rights and would therefore be vulnerable to collateral challenge under *Webster*.

Second, as in *Greenberg*—the constitutional challenge to the security clearance questionnaire—and the many precedents it invokes, the appropriate standard would likely distinguish between a court intervening in the general *process* on one hand and specific review of *individual decisions* on the other.²³⁰ It may be important to a reviewing court that *Horn* sought not to review or influence the substance of an individual security clearance decision but merely to compel the prioritization of an application the executive would have eventually processed anyway.²³¹

Third, as in *Rattigan*—the Title VII dispute involving racial discrimination and clearance revocation—if the reviewing court wasn’t satisfied with the *Webster* and *Greenberg* analysis, it could look to the positions of the coordinate

226. *Horn I*, 636 F. Supp. 2d 10, 18 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010); *see also supra* text accompanying notes 134-36.

227. *See Horn II*, 647 F. Supp. 2d 55, 66 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010).

228. *See Horn v. Brown*, No. 09-533, 2010 WL 2160013, at *1 (D.C. Cir. Apr. 26, 2010) (mem.) (dismissing the appeal); *Horn III*, 699 F. Supp. 2d 236, 237-38 (D.D.C. 2010) (vacating its earlier opinions in light of the settlement).

229. Cf. *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (“[W]e believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.”).

230. *See Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993); *see also Gill v. U.S. Dep't of Justice*, 875 F.3d 677, 682 (2017) (Tatel, J., concurring); *supra* note 214.

231. And the criteria for granting security clearances are well developed and detailed, rendering the process somewhat less discretionary than one might assume. *See supra* notes 151-55 and accompanying text.

branches and, if necessary, harmonize them. The case for judicial action in *Horn* is perhaps even stronger than in *Rattigan* because Congress has more explicitly delegated authority directly to the judiciary to compel security clearances through CIPA.²³² At least in criminal adjudications, Congress granted federal judges the power to order the expedited furnishing of security clearances to qualified counsel.²³³ And as discussed above, some courts have seen it appropriate to extend CIPA-like authority into certain civil matters.²³⁴ Moreover, the judicial branch also spoke at least obliquely to the issue in *Reynolds* itself.²³⁵ By giving the judiciary the power to check the “caprice of executive officers,” the Supreme Court took a stand on the judiciary’s role in adjudicating secrets, making clear that the executive’s authority is not unassailable.²³⁶ Ultimately, a reviewing court could harmonize the policy objectives of the security clearance executive order, relevant statutes, and *Reynolds*. It might emphasize that it is not changing the rules, but rather is simply ensuring that the executive orders are being read to comport with CIPA and *Reynolds*. A principled court of appeals could have thus upheld the compelled expedited security clearance ordered by then-Chief Judge Lamberth in *Horn*.

Perhaps counterintuitively, the case for judicial power to compel security clearances for expert witnesses and special masters is weaker due to Congress’s complete silence on the matter. But such compulsions are decidedly less likely to come up. A court seeking a special master or expert in a national security case is likely to consider at least some individuals who already hold security clearances. And a court worried about overstepping its authority may prefer to appoint one of those individuals rather than requiring the executive to grant a clearance to someone else.

3. Judicial action and “need-to-know” determinations

Even where the special master, expert witness, or litigants’ counsel is already security cleared, the need-to-know requirement presents another hurdle to the smooth adjudication of state secrets privilege claims. That is, even once cleared, a person seeking to access classified information must demonstrate a need to know the information.²³⁷ This requirement became

232. See *supra* notes 127-33 and accompanying text.

233. See *supra* notes 127-31 and accompanying text.

234. See MacDougall, *supra* note 129, at 672-73; *supra* notes 132-33.

235. See *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

236. See *id.*

237. See Exec. Order No. 13,526, § 4.1(a)(3), 3 C.F.R. 298, 314 (2010), reprinted in 50 U.S.C. § 3161 app. at 593, 599. For a discussion of limited exceptions to the need-to-know requirement, see *id.* § 4.4(a), 3 C.F.R. at 317; and note 156 above.

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even stricter under President Obama’s Executive Order 13,526 (EO 13,526) updating the security clearance system.²³⁸ The previous version of the order defined “need-to-know” as “a determination made by *an authorized holder of classified information* that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.”²³⁹ In other words, a “need-to-know” determination had two elements: (1) it had to have been made by someone who properly possessed classified information; and (2) a recipient needed to demonstrate that the information was necessary for a “lawful and authorized governmental function.”

EO 13,526 retained the same basic structure. But instead of allowing a “need-to-know” determination to be made by any “authorized holder,” the new order added a new requirement: Determinations must now come from “*within the executive branch*.”²⁴⁰ This subtle change matters a great deal to arguments about judicial innovations in state secrets adjudication. Federal judges, as constitutional officers, are exempt from the security clearance process.²⁴¹ They also often possess—and are authorized to possess—classified materials. Under the previous order, then, a judge in such a position may have been empowered to make determinations as to whether others—including security-cleared special masters or expert witnesses—“needed to know.”

Perhaps EO 13,526’s tightening of the standard is best understood as an attempt to head courts off at the pass; it would not do, after all, to maintain an executive-created security clearance framework that by its own language granted judges the ability to circumvent executive roadblocks to judicial innovation. The government articulated its argument in as many words even before the language was officially changed in 2009, asserting in *Al-Haramain Islamic Foundation v. Bush*²⁴²:

[U]nder applicable Executive Orders, even if a person is found to be “suitable” to receive access to classified information after an investigation of their background and, thus, is granted a “security clearance,” the agency that originates the

238. Exec. Order No. 13,526, 3 C.F.R. 298.

239. See Exec. Order No. 12,968, § 1.1(h), 3 C.F.R. 391, 392 (1996), reprinted in 50 U.S.C. § 3161 app. at 586, 586 (2015) (emphasis added); see also *infra* text accompanying note 261.

240. See Exec. Order No. 13,526, § 6.1(dd), 3 C.F.R. at 324 (emphasis added).

241. See CHRISTENSEN, *supra* note 141, at 4 (noting that “Supreme Court Justices” as well as “other constitutional officers” do not need security clearances); *see also* U.S. CONST. art. III, § 1 (granting Congress the power to create inferior federal courts and referring to judges of those inferior courts).

242. 451 F. Supp. 2d 1215 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).

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information at issue must make a separate “need-to-know” determination that actually grants access to classified information.²⁴³

In *Al-Haramain* the relevant agency had determined that plaintiffs seeking to challenge government action did not possess the requisite need to know the contents of classified evidence involved in the case.²⁴⁴

A number of courts have faced the question whether they had power to assess the need to know since EO 13,526 took effect.²⁴⁵ Most have concluded that they must have the power to influence need-to-know determinations.²⁴⁶ *Stillman v. Department of Defense* provides a rigorous theoretical defense for

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- 243. Defendants’ Notice of Motion and Motion for a Stay Pending Appeal and for Certification of an Interlocutory Appeal at 12, *Al-Haramain Islamic Found. v. Bush (In re NSA Telecomms. Records Litig.)*, No. 3:07-cv-00109-VRW (N.D. Cal. Jan. 19, 2009).
 - 244. See Lee Tien, *Litigating the State Secrets Privilege*, 42 CASE W. RES. J. INT’L L. 675, 689 (2010).
 - 245. Although it predates EO 13,526, perhaps the highest-profile decision came in the prosecution of Vice President Dick Cheney’s chief of staff I. Lewis “Scooter” Libby for leaking classified state secrets. *United States v. Libby*, 429 F. Supp. 2d 18 (D.D.C.), modified, 429 F. Supp. 2d 46 (D.D.C. 2006). Judge Walton of the District Court for the District of Columbia was tasked with determining whether classified evidence could properly be withheld from the defense under CIPA, and while the substance of the dispute is largely immaterial for purposes of this Note, the court asserted its authority to decide the need-to-know issue, requiring the government to “explain[] why the defense, based upon appropriate classification guidelines,” does not have a need to know. *Id.* at 20-22, 25. The court ultimately amended its initial position that some ex parte submissions were categorically inappropriate in a later opinion, but it did so without abrogating its logic on the need-to-know determination. See *United States v. Libby*, 429 F. Supp. 2d 46, 48 (D.D.C. 2006) (amending the earlier opinion to allow the government to make “filings it deems appropriate, necessary, and permissible under [CIPA],” which would then be reviewed by the court after submission rather than preemptively barred).
 - 246. A couple of examples serve to illustrate the point. In *United States v. Amawi*, a postconviction dispute over classified evidence, then-Chief Judge Carr of the Northern District of Ohio was unequivocal:

I am confident that I . . . can adequately evaluate the need of [the defendant’s] attorneys to have access to—to know—the substance of the classified information the government has disclosed to me.

In light of what I know about the defendant’s circumstances, perception of the case and strategy and tactics, I am absolutely confident that his attorneys did not and do not need to have access to the classified information the government has made known to me.

See No. 3:06CR719, 2009 WL 961143, at *1 (N.D. Ohio Apr. 7, 2009). Although the court rejected the defendant’s contention that his attorneys needed to know the disputed classified information, it made the assessment all the same. *See id.* Likewise, in *United States v. Moalin*, a decision on a motion for a new trial, the Northern District of California “reviewed [classified] materials submitted under seal.” *See* No. 10cr4246 JM, 2013 WL 6079518, at *1, *9 (S.D. Cal. Nov. 18, 2013). That court too ultimately concluded that the disputed “materials were not helpful to the defense” and thus declined to order their production. *See id.* at *9-10. Courts thus appear confident in their ability to lawfully assess the need to know.

judicial involvement.²⁴⁷ Danny Stillman was a former employee of the Los Alamos National Laboratory.²⁴⁸ After his retirement, Stillman authored a book about his work entitled *Inside China’s Nuclear Weapons*.²⁴⁹ In accordance with employment-related nondisclosure agreements, Stillman submitted the manuscript to the government for prepublication review to determine whether it contained classified information.²⁵⁰ During this review, the Department of Defense classified the manuscript and forbade its release.²⁵¹ Stillman sued, claiming that his First Amendment rights had been violated.²⁵² But because of the Department’s classification decision, Stillman’s attorney was unable to access the manuscript that was at the center of the litigation.²⁵³ Although otherwise qualified, Stillman’s counsel was denied access because he lacked the requisite need to know the information contained in the manuscript—by the Department’s assessment, adjudicating the lawsuit was not in itself “a government function.”²⁵⁴ Further, the government argued that subjecting its decision to judicial scrutiny would violate *Egan*.²⁵⁵

The District Court for the District of Columbia disagreed forcefully. Invoking language reminiscent of *Marbury v. Madison*, the court staked a claim to its proper role in assessing, and if necessary vindicating, the plaintiff’s constitutional rights.²⁵⁶ Further, the district court distinguished disputes like the one with which it was faced—in which a negative need-to-know determination is made based on an assessment whether the requesting party was assisting in “a government function”²⁵⁷—from cases like *Egan* in which access to classified information is denied on the basis of bona fide national

247. 209 F. Supp. 2d 185 (D.D.C. 2002), *rev’d on other grounds sub nom.* Stillman v. CIA, 319 F.3d 546 (D.C. Cir. 2003). Although reversed on other grounds, *see infra* note 264 and accompanying text, the case continues to offer persuasive authority. *See, e.g.*, Pollard v. U.S. Parole Comm’n, No. 15-cv-9131 (KBF), 2016 WL 3167229, at *7 (S.D.N.Y. June 6, 2016) (“[T]he district court’s decision in *Stillman v. Department of Defense* was ultimately reversed Nonetheless, the district court’s analysis in *Stillman* offers some guidance.” (citation omitted)).

248. *Stillman*, 209 F. Supp. 2d at 188.

249. *Id.*

250. *Id.*

251. *See id.*

252. *Id.* at 188-89.

253. *Id.* at 189.

254. *See id.* at 192.

255. *See id.* at 193, 198.

256. *See id.* at 195 (“This case presents a conflict among interests of constitutional dimension, and it is emphatically the province and duty of this Court to resolve this conflict.”); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

257. *See Stillman*, 209 F. Supp. 2d at 192.

security concerns.²⁵⁸ That is, while a government decision to deny access “based on [its] assessment of the sensitivity of [disputed] information to national security” is owed deference, a denial based on an assessment that the information was not necessary to perform a government function “as required by the Executive Order’s definition of ‘need to know’” is “neither compelling nor deserv[ing of] deference.”²⁵⁹ Because under EO 13,526 and its predecessors alike the fundamental considerations of the need-to-know determination have nothing to do with the trustworthiness of the recipient but rather rest on whether an applicant requires classified information for a “lawful and authorized government function,”²⁶⁰ the court held that it did not owe deference to the government’s need-to-know determinations.

An amicus brief in *Stillman* articulated an alternative rationale for courts’ involvement. First, even if courts owed deference to the government’s assessment of the need to know, the government remained bound to the terms of the executive order—which required the party seeking classified information to show she needed it for “a lawful and authorized governmental function.”²⁶¹ And even if the government also deserved unquestioning deference in assessing what constituted such a function, in *Stillman* the government had already assessed the court’s proceeding as a “lawful and authorized governmental function” by making the need-to-know determination inherent in granting *its own attorneys* access to the disputed materials.²⁶² Any way the government characterized it, then, the court’s order to release information to Stillman’s counsel was consistent with the definition of “need to know” articulated in the executive order. And, the argument went, the same should logically be true in any case where the government grants its own attorneys—or perhaps even the judge—access to classified information.²⁶³

Admittedly, the disputed information in *Stillman* never made it to plaintiff’s counsel. The district court’s decision was appealed and reversed by the D.C. Circuit on the ground that the court had improperly reached a

258. *See id.* at 195 (“A denial of access based on this determination presents a very different question than a denial of access based on the predicted risk to national security caused by release of the information.”); *see also id.* at 208 (“The ‘predictive judgment’ about an individual’s risk to national security with which the Court in *Egan* was so concerned, and the Article II implications that follow, does not accurately describe the judgment that the [Department of Defense] and the CIA claim to have made in this case.” (quoting *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988))).

259. *See id.* at 197.

260. *See supra* text accompanying notes 239-40.

261. *See Stillman*, 209 F. Supp. 2d at 189, 229 (quoting Exec. Order No. 12,968, § 1.1(g), 3 C.F.R. 391, 392 (1996), reprinted in 50 U.S.C. § 3161 app. at 586, 586 (2015)).

262. *See id.* at 229.

263. *See id.* at 229-30.

constitutional question when it ought to have disposed of the case on nonconstitutional grounds.²⁶⁴ Indeed, on remand, the district court determined for itself that the information in the book was properly classified, rendering the nondisclosure agreement controlling and ending the dispute.²⁶⁵ The court’s well-reasoned analysis of the need-to-know determination issue escaped review unscathed, however, and stands as persuasive authority.

More recently, Judge Forrest of the Southern District of New York faced a similar question in *Pollard v. United States Parole Commission*.²⁶⁶ *Pollard* concerned Navy intelligence specialist Jonathan Pollard, who in 1986 pleaded guilty to conspiring to deliver national defense information to a foreign government after leaking classified documents to Israel.²⁶⁷ Pollard was sentenced to life in prison with the possibility of parole after thirty years.²⁶⁸ But when he successfully qualified for parole, the U.S. Parole Commission imposed special parole conditions—to remain free, Pollard would have to submit to extensive monitoring and random searches of any computers he used as well as to GPS surveillance.²⁶⁹ He challenged the parole conditions, first in administrative proceedings and then in federal district court.²⁷⁰ But when classified evidence from the original proceeding was implicated, the government asserted that the attorneys involved in the parole dispute did not need to know it.²⁷¹ Writing to Judge Forrest, then-U.S. Attorney Preet Bharara asserted that “the Government has denied that request because it has determined that Petitioner’s counsel do not have the requisite ‘need to know’ the information.”²⁷² The letter went on to explain:

[T]he grant of access to classified information requires the Executive Branch to make a favorable determination that an individual is trustworthy for access to classified information, and also separately to determine “within the executive branch” that an individual has a demonstrated “need-to-know,[”] in that the

264. See *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (“The district court abused its discretion by unnecessarily deciding that a plaintiff has a first amendment right for his attorney to receive access to classified information where such access is needed to assist the court in resolving the plaintiff’s challenge to the classification. . . . [T]he district court would never have to reach the constitutional question if it could determine without the aid of plaintiff’s counsel whether the disputed portions of the manuscript were properly classified.”).

265. See *Stillman v. CIA*, 517 F. Supp. 2d 32, 39-40 (D.D.C. 2007).

266. No. 15-cv-9131 (KBF), 2016 WL 3167229 (S.D.N.Y. June 6, 2016).

267. See *id.* at *1.

268. See *id.*

269. *Id.*

270. See *id.* at *2.

271. See *id.* at *2, *5-6.

272. See Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to Judge Katherine B. Forrest, U.S. Dist. Court for the S. Dist. of N.Y. 2 (May 10, 2016) (on file with author).

individual “requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.”²⁷³

Judge Forrest was not impressed. Like the court in *Stillman*, she distinguished between executive branch assessments of trustworthiness, which deserve the utmost deference, and assessments of the need to know, which deserve decidedly less.²⁷⁴ Confronting the government’s separation of powers argument, the court concluded that “the Constitutional and practical considerations that counsel so strongly in favor of judicial non-interference when the question is whether an individual can be trusted are less forceful when the question is whether a trusted individual needs to know certain information.”²⁷⁵ The government was ultimately allowed to file its brief ex parte as it had requested, but for each filing it had to “includ[e] an ex parte declaration or affidavit from an intelligence community official describing why Pollard’s counsel does not need to know the information contained in the filing.”²⁷⁶ And the court made clear that it would retain final authority to decide “whether all or some portion of it should [be] provided to the defendant.”²⁷⁷

4. Balancing state secrets review with appropriate respect for the classification and security clearance system

The law requires courts judging invocations of the state secrets privilege to play an active role in assessing the evidence before them. In some complex cases, that might well involve appointing an expert witness or special master, or even bringing in security-cleared litigants’ counsel to participate in sensitive evidentiary proceedings.²⁷⁸ But so too does the law demand that respect be paid to executive determinations of security clearance eligibility.²⁷⁹

There is a workable standard that can balance these competing demands. The rationales offered by the courts in *Stillman* and *Pollard*, which follow the general trends of judicial review of executive orders outlined in Erica Newland’s work,²⁸⁰ are instructive. First, they take into account the positions

273. *Id.* (quoting Exec. Order No. 13,526, § 6.1(dd), 3 C.F.R. 298, 324 (2010), reprinted in 50 U.S.C. § 3161 app. at 593, 603).

274. See *Pollard*, 2016 WL 3167229, at *6.

275. *Id.*

276. *Id.* at *8.

277. *Id.* (alteration in original) (quoting United States v. Libby, 429 F. Supp. 2d 18, 25 (D.D.C.), modified in other part, 429 F. Supp. 2d 46 (D.D.C. 2006)).

278. *Reynolds* arguably even compels use of some combination of these tools where necessary to maintain “[j]udicial control over the evidence.” See *United States v. Reynolds*, 345 U.S. 1, 9 (1953).

279. See *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

280. See *supra* Part III.B.1.

of the coordinate branches.²⁸¹ Second, they assess exhaustively the *type* of power being exercised by the executive branch. Only after carefully bracketing any claim to authority over substantive security clearance decisions, as demanded by *Egan*, were the courts comfortable reviewing the more clearly defined question whether a particular person needed to know classified information.²⁸² Third, each court attempted to harmonize the conflicting positions of the coordinate branches by leaving space for later compromise. That is, even as the courts asserted their power to assess the need to know, they aimed both to uphold the purpose of the executive order on security clearance and to “appropriately defer[] to Executive expertise” without simply “rubber stamp[ing]” executive determinations.²⁸³

The argument for courts’ involvement in need-to-know determinations grows even stronger in the state secrets context than it was in *Stillman* and *Pollard*. It is long settled that courts may review disputed evidence during privilege adjudications where they are not convinced by “all the circumstances of the case . . . that there is a reasonable danger that compulsion of the evidence will expose” state secrets.²⁸⁴ In order to render such review effective where disputed evidence is complex or beyond judicial competence to unilaterally assess, some courts have involved expert witnesses, special masters, and in some cases even litigants’ counsel.²⁸⁵ Moreover, Congress has on several occasions signaled its preference for checks on executive power when it comes to issues of purported state secrets.²⁸⁶ If the government could frustrate a

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281. By all accounts, there was little in the way of clear preference-signaling from Congress to review. Nevertheless, the courts took thorough account of relevant judicial precedent on the common law privilege. *See, e.g., Pollard*, 2016 WL 3167229, at *6-8 (collecting judicial perspectives on need-to-know disputes).
282. *See id.* at *6; *Stillman v. Dep’t of Def.*, 209 F. Supp. 2d 185, 195-97 (D.D.C. 2002), *rev’d on other grounds sub nom. Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003).
283. *Pollard*, 2016 WL 3167229, at *8; *see also Stillman*, 209 F. Supp. 2d at 197.
284. *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *see also id.* at 9-10 (“Judicial control over the evidence . . . cannot be abdicated to the caprice of executive officers.”); *see supra* Part II.A.
285. *See supra* Part II.B.
286. *See, e.g., United States v. Jin*, 791 F. Supp. 2d 612, 618 (N.D. Ill. 2011) (noting that “CIPA ‘does not confer on the government a privilege to refrain from disclosing classified information’ but instead endorses and codifies the ‘common-law privilege against disclosure of state secrets,’ presumably including the standard set out in *Reynolds* (quoting *United States v. Abu-Jihad*, 630 F.3d 102, 140 (2d Cir. 2010)); *Al-Haramain Islamic Found. v. Bush* (*In re NSA Telecomms. Records Litig.*), 564 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) (noting that by passing the Foreign Intelligence Surveillance Act, “Congress intended for the executive branch to relinquish its near-total control over whether the fact of unlawful surveillance could be protected as a secret” (citing H.R. REP. NO. 95-1283, pt. 1, at 21 (1978))); *see also* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1813

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court’s ability to review state secrets privilege assertions related to complex or highly technical evidence simply by claiming that those in a position to assist the court do not possess a need to know the allegedly secret information, the *Reynolds* requirements would be impossible to meet. Such a standard would inevitably result in “[j]udicial control over the evidence . . . be[ing] abdicated to the caprice of executive officers” in violation of *Reynolds*.²⁸⁷

That result would also violate common sense. As a quasi-constitutional doctrine,²⁸⁸ the state secrets privilege’s allocation of final review authority to the judiciary should carry more weight than the classification system, itself a product only of executive order. This intuition is reinforced by the numbers: One recent study found that the state secrets privilege has been invoked in only 308 cases as of late 2014,²⁸⁹ while the designation of information as “classified” has been applied to as many as a trillion pages of documents.²⁹⁰ Because state

(2015)). The implications of the passage of IRTPA in 2004, discussed briefly at note 142 above, are less clear. IRTPA’s whistleblower protection provision requires:

Agency personnel with authority over personnel security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee’s security clearance or access determination in retaliation for

....

(D) if the actions do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, any disclosure in conjunction with

(i) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation

50 U.S.C. § 3341(j)(1). The Act explicitly defines “access determinations” to include need-to-know-determinations. *See id.* § 3341(a)(9). The actual implications of this whistleblower provision for the instant discussion are unclear, however, in part because Congress included language explicitly disclaiming the Act’s effect on judicial review. *See id.* § 3341(j)(6) (“Nothing in this section shall be construed to permit or require judicial review of any . . . agency action under this section . . .”).

287. *See Reynolds*, 345 U.S. at 9-10.

288. *See supra* note 76 and accompanying text.

289. *See Cassman, supra* note 9, at 1187-88.

290. *See Peter Galison, Removing Knowledge*, 31 CRITICAL INQUIRY 229, 230-31 (2004) (“Some suspect as many as a trillion pages are classified ([the equivalent of] 200 Libraries of Congress). That may be too many. . . . [But] however one calculates, the number of classification actions is increasing dramatically both as a result of a boosted defense, intelligence, and weapons lab budget and because we are living in a climate of augmented secrecy.”); *see also* Ann Koppuzha, *Secrets and Security: Overclassification and Civil Liberty in Administrative National Security Decisions*, 80 ALB. L. REV. 501, 507-09 (2016-2017) (detailing a “rampant” problem of overclassification that “skyrocketed” during the Bush and Obama Administrations). The problem of overclassification has even been the subject of congressional action. *See Reducing Over-Classification Act*, Pub. L. No. 111-258, 124 Stat. 2648 (2010) (codified as amended in scattered sections of 6 and 50 U.S.C.). Although the law enacted by Congress has produced only middling results, *see* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT NO. 13-40, AUDIT OF THE DEPARTMENT OF JUSTICE’S IMPLEMENTATION OF AND COMPLIANCE

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secrets are a much smaller subset of classified information, surely their adjudication pursuant to Supreme Court precedent with quasi-constitutional origins must take priority over disputes related to security clearances and classification.

Going forward, a reviewing court confronted with a complex state secrets privilege invocation and executive refusal to release relevant evidence to judicial adjuncts for want of a need to know should carefully balance the competing demands explicated here. In doing so, it should first look to the position of the coordinate branches—especially Congress, though the judiciary’s perspectives might also be instructive for judicial doctrines like the state secrets privilege. Second, it should assess the type of review litigants are requesting. Although it should avoid upsetting careful executive decisionmaking on individuals’ substantive eligibility for security clearances, it should not hesitate in making determinations about cleared individuals’ need to know classified information in relation to court proceedings. Finally, it should emphasize harmony; the executive orders establishing the security clearance structure set forth workable standards for assessing the need to know, and the court ought to apply those standards carefully.

If the executive is allowed to unilaterally veto effective judicial review of state secrets, the delicate balancing demanded by *Reynolds* would be confounded. Courts are properly positioned to—and sometimes must—act on issues related to security clearance when adjudicating state secrets privilege assertions.

Conclusion

The interactions between the state secrets privilege and the security clearance system are complex and understudied. But they have serious implications for litigants seeking to vindicate their rights opposite the U.S. government or its contractors. As the frequency of state secrets privilege invocations has increased drastically in recent years and as national security issues have become more complicated, courts’ need for the assistance of special masters, expert witnesses, and cleared counsel has only increased. If litigants’ constitutional rights are to be guaranteed, courts must be unafraid to resolve the tension between the security clearance system and the state secrets privilege.

WITH CERTAIN CLASSIFICATION REQUIREMENTS, at ii (2013), <https://perma.cc/67AN-LEL2> (finding the Department of Justice’s implementation of the 2010 law to be lacking), that it was enacted at all suggests congressional power to freely modify the classification decisionmaking process, further underscoring the relative weight that should be given to purely executive classification decisions when in conflict with the quasi-constitutional state secrets privilege adjudication process.

To aid in this task, I have sought to sketch the history and processes of both the state secrets privilege and the security clearance system. An untidy picture of conflicting priorities and powers emerges. While the state secrets privilege doctrine clearly contemplates a primary role for the courts, the executive-created security clearance structure largely does not. And recent changes to the need-to-know decisionmaking process embodied in President Obama’s EO 13,526 have only intensified the conflict. Meanwhile, courts have balked, dodging the question wherever possible.

By reviewing how similar conflicts between the coordinate branches have been resolved in the past, I have begun the task of elucidating the proper role of courts. Drawing from precedents and a vast literature, I have analyzed the underexamined question whether all security clearance-related decisions are created equal for purposes of judicial review or whether courts ought to be able to scrutinize some clearance-related decisions implicated in state secrets adjudications. Ultimately, I have articulated an unremarkable role for the courts: They ought to harmonize deference to the executive where legitimately sensitive information squarely within executive expertise is at question while more thoroughly scrutinizing claims where readily justiciable standards apply.

Precedent and policy considerations counsel in favor of judges’ involvement in need-to-know decisionmaking, especially where the executive seeks to use it as a veto in adversarial proceedings. But whether courts have the formal power to assess litigants’ need to know under the doctrine does not fully address practical and political realities. In many cases where this dispute has arisen, the government has mounted strong resistance.²⁹¹ Whether delaying the litigation process or overtly disputing the courts’ authority, the executive branch has powerful tools at its disposal to undermine or weaken the judiciary’s proper role.²⁹²

Ultimately, I seek not to predict the result of the inevitable, and no doubt intended,²⁹³ competition between the coordinate branches. I seek only to provide an argument—based on state secrets and security clearance doctrines, historical practice, and the most basic conventions of the U.S. system—that justice, indeed, needs to know.

291. See, e.g., Tien, *supra* note 244, at 689-92.

292. It is unclear, for instance, whether the executive could simply shift its resistance efforts to reinvestigating and revoking security clearances for individuals to whom courts seek to disclose classified information. Such a decision would, after all, be a substantive security clearance judgment possibly shielded by *Egan*, unless courts read *Webster* to apply. *But see Fisher*, *supra* note 202, at 27 (arguing for a narrow reading of *Egan*).

293. Cf. THE FEDERALIST NO. 51 (James Madison), *supra* note 16, at 321-22.