ABSTRACT—This Essay analyzes judicial procedures used to determine the validity of government secrecy claims under the Freedom of Information Act (FOIA), the state secrets privilege, and the Classified Information Procedures Act (CIPA). It argues that courts apply an equally deferential approach under FOIA and the state secrets privilege, often accepting government decisions to withhold relevant information. In contrast, courts employ a more searching review in criminal cases involving CIPA, thereby meaningfully deterring excessive secrecy. Under FOIA and CIPA, Congress balanced the level of judicial scrutiny given the legitimate need for government secrecy compared with the individual interests at stake—for FOIA, an individual’s generalized right to information access, and for CIPA, an individual’s right to a fair trial. The strength of the individual interests asserted by plaintiffs in state secrets cases varies between the relatively weak FOIA interest and relatively strong CIPA interest. In some cases, the individual interest is akin to the generalized, undifferentiated right of access in FOIA, such as suits broadly challenging unlawful government practices on behalf of the public. However, in some cases, the interests at issue are nearly as weighty as the right to evidence and a fair trial protected by CIPA, such as individuals challenging their torture by executive officials. The strength of the individual interests asserted by plaintiffs in state secrets cases varies between the relatively weak FOIA interest and relatively strong CIPA interest. Where the interest is generalized, courts should be as deferential as they are in FOIA cases. But where the interest implicates fundamental liberties, courts should conduct a searching review like that mandated in CIPA. This ensures that the Executive Branch is meaningfully deterred from abusing its ability to withhold information and shifts the cost of secrecy back onto the government.

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INTRODUCTION

In the twenty-two years since the 9/11 terror attacks, litigants have brought hundreds of cases challenging the U.S. government’s abuse of its national security powers. These claims arise in a variety of contexts, including Freedom of Information Act (FOIA) suits for information access, civil litigation against the federal government and its private contractors, and criminal prosecutions where the defendant seeks to discover classified information related to the government’s investigation. In many instances, executive officials avoid producing the requested information by invoking their right to secrecy stemming from the government’s investigation. On one hand, the government must keep some information secret—the national defense would be in peril if our adversaries knew the exact location of our nuclear warheads. Still, allowing Executive Branch officials to be the sole arbiter of which information is subject to disclosure mimics

the powers of authoritarian regimes—absent any consequences, a Machiavellian executive would abuse this power to hide both information that is truly harmful and that which is politically damning. Given this conflict of interest, courts serve as the only meaningful check on excessive government secrecy. Accordingly, this Essay evaluates the judicial approaches to balancing the Executive’s national security concerns with the public’s interest in information access. This analysis begins by distinguishing between the disparate methods used under the common law and the statutorily proscribed processes.

When an individual seeks access to national security information through the courts, they face an uphill battle. In civil suits challenging illegal conduct such as bodily torture or breach of espionage contract, the government can raise the common law state secrets privilege. This evidentiary privilege acts to preclude discovery of specific pieces of information on the ground that its disclosure would present an unacceptable risk of harm to the nation’s security. Under certain circumstances, the privilege is used to dismiss the entire case without specific evidentiary objections, in effect acting as a jurisdictional bar. Once the government invokes the state secrets privilege, the judiciary may either accept the government’s claim on its face or use judicial procedures to determine and limit the applicability of the privilege, such as in camera review, ex parte proceedings, and redactions.

While the state secrets privilege is a judicially created doctrine, Congress enacted specific procedures in two other contexts for handling national security information access. First, under FOIA, individuals may assert their generalized right to request information from the federal government. Upon objection by the government, courts are instructed to review de novo executive classification determinations. Second, in criminal proceedings, Classified Information Procedures Act (CIPA) requires specific procedures for the disclosure of classified information relevant to a criminal trial. In either proceeding, courts are given explicit statutory procedures to probe the government’s claim to secrecy while balancing the government’s interest in avoiding national security harm. This Essay argues that the procedures provided in FOIA and CIPA to balance the level of judicial scrutiny with the government’s important interests are appropriate given the weight of the individual interests vindicated under the statutes—the generalized right to information in FOIA and the right to a fair trial in CIPA.

In contrast, the current judicial approach to invocations of the state secrets privilege is overly deferential to government secrecy assertions regardless of the individual interests asserted. Despite credible allegations of constitutional and other serious violations, courts in state secrets privilege
cases uphold the privilege at about the same rate as in FOIA suits. This Essay argues that Congress’s statutory approach to secrecy claims in FOIA and CIPA should inform courts’ procedural scrutiny under the state secrets privilege. Courts should tailor their analysis of the privilege’s applicability to the strength of the plaintiff’s asserted interest compared to the interests vindicated by FOIA and CIPA. The more diffuse and generalized the plaintiff’s interest, the more deferential to state secrecy the court’s role should be. When the interests are as compelling as CIPA’s, courts should impose maximum procedural scrutiny, including discovery sanctions in rare cases. This Essay builds upon existing scholarship on the abnormal judicial procedures used in national security litigation and proposes a novel framework for harmonizing these inconsistent results.

This Essay proceeds in three parts. Part I outlines the doctrinal background and procedures used under the state secrets privilege, FOIA, and CIPA. Part II highlights the problems that result from the current state secrets approach, namely executive aggrandizement and the imposition of unjustified costs on harmed individuals. Finally, Part III argues for a new judicial approach to evaluate state secrets claims that considers the strength of the competing interests. This approach strikes a meaningful balance between the government’s legitimate interest in secrecy and the public’s right to challenge illegal government conduct.

I. DOCTRINAL BACKGROUND

A. The State Secrets Privilege

The state secrets privilege is a judicially created evidentiary privilege invoked by the Executive Branch to prevent the discovery of information during civil litigation that it deems potentially detrimental to national security. Much like the scope of information shielded by its successful invocation, the precise origins of the privilege are disputed. Some scholars argue that the privilege derives from the common law crown privilege, whereas others trace the doctrine to Chief Justice John Marshall’s opinion in United States v. Burr. Many modern scholars believe that the privilege has

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constitutional roots stemming from separation of powers principles, but the Supreme Court has yet to specifically address the issue. Regardless of its origins, the modern doctrinal framework of the privilege stems from two Supreme Court opinions: *Totten v. United States* and *United States v. Reynolds*. Section I.A.1 describes the doctrinal framework of the state secrets privilege and recent decisions, while Section I.A.2 discusses judicial procedures used to test the validity of privilege assertions.

1. **Doctrinal Framework**

The state secrets privilege can be divided into two varieties: the *Totten* bar and the *Reynolds* evidentiary privilege. In *Totten v. United States*, the executor of a deceased Civil War spy’s estate brought suit to compel the government to pay its contractual obligation for the spy’s services. The government argued the state secrets privilege bars confirmation of the espionage relationship and moved to dismiss the case. The Supreme Court held that the suit must be dismissed because the “existence of a[n espionage] contract . . . is itself a fact not to be disclosed.” In other words, the very subject matter of the case, as opposed to specific evidentiary objections, required dismissal.

Since its foundation, there has been a dispute over the meaning of *Totten*. In one camp are those who believe the *Totten* bar is a categorical bar on any case where ‘‘the very subject matter of the action’ is ‘a matter of state secret.’’ On the other side are those who believe the *Totten* bar only applies to situations where (1) the plaintiff is a party to a secret agreement with the government or (2) the plaintiff sues to solicit information on a secret matter. There continues to be an ongoing debate by courts and scholars over the scope of *Totten*, and the Court has yet to resolve the issue. Regardless, once

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5 92 U.S. 105, 105–06 (1876).

6 Id.

7 Id. at 107 (emphasis added).


10 Jeppesen Dataplan, 614 F.3d at 1096 (Hawkins, J., dissenting).

11 See, e.g., Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006) (“The implicit notion in *Totten* was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached. But AT&T, the alleged spy, is not the plaintiff here. In this case, plaintiffs made no agreement with the government and are not bound by any
a court determines that the Totten bar applies, the case is dismissed.\textsuperscript{12} In this way, the Totten doctrine acts as a jurisdictional bar; whether the litigation could be accomplished using nonprivileged evidence is irrelevant.

As compared to the Totten bar, the Reynolds privilege does not necessarily result in dismissal; the government asserts this privilege to prevent the discovery of specific evidence.\textsuperscript{13} The doctrine originates in \textit{United States v. Reynolds}, where the widows of civilians killed in an Air Force plane crash brought a wrongful death action against the United States under the Federal Tort Claims Act.\textsuperscript{14} The Secretary of the Air Force invoked the state secrets privilege to avoid discovery of the official accident investigation report, alleging that its disclosure would harm national security and the development of secret military equipment.\textsuperscript{15} The Court upheld the privilege claim and barred disclosure of the report.\textsuperscript{16}

To invoke the Reynolds privilege, “[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.”\textsuperscript{17} After following the requisite assertion procedure, courts must determine the appropriate level of inquiry into the allegedly privileged information to assess whether it applies and, if it upholds the privilege claim, the consequences for the litigation.\textsuperscript{18}

For the appropriate level of inquiry, Reynolds emphasized that courts must determine whether the “circumstances are appropriate for the claim of privilege” without necessarily forcing full disclosure.\textsuperscript{19} The Court in Reynolds emphasized the important balance that courts must strike: “[t]oo 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.”\textsuperscript{20} The court must determine “from all the circumstances” whether “there is a reasonable danger that compulsion of the evidence” will endanger national security.\textsuperscript{21} If

\begin{itemize}
\item \textsuperscript{12} Jeppesen Dataplan, 614 F.3d at 1078.
\item \textsuperscript{13} Id. at 1079.
\item \textsuperscript{14} United States v. Reynolds, 345 U.S. 1, 2–3 (1953).
\item \textsuperscript{15} Id. at 4–5.
\item \textsuperscript{16} Id. at 12.
\item \textsuperscript{17} Id. at 7–8.
\item \textsuperscript{19} Reynolds, 345 U.S. at 8.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Trenga, \textit{supra} note 18, at 8 (emphasis added).
\end{itemize}
so, the state secrets claim will be upheld. To make this determination, the degree of judicial probing depends on the individual’s showing of “necessity” of the requested information to the litigation. The Court left it to the discretion of individual judges to determine what level of access to the allegedly privileged information is necessary to decide if the privilege applies. Reynolds cautioned courts against “automatically requir[ing] complete disclosure to the judge,” but instead required judicial balancing of all the circumstances of a case.

Next, courts must decide how to proceed with the litigation when there is a valid invocation of the state secrets privilege. The privilege is substantively “absolute”: once the court finds that it applies to the specific piece of evidence, it cannot be overcome by an individual showing of necessity. Usually, a judge denies individuals discovery of the privileged information and the litigation proceeds without it. However, a judge may still dismiss the case if (1) the plaintiff is unable to establish a prima facie case without the privileged information, (2) the defendant is unable to establish a valid defense without it, or (3) “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” The third category bears similarity to the Totten bar, but as one court noted, the Totten bar and Reynolds evidentiary privilege form a “continuum of analysis.” This “continuum” in some cases results in the suit not being barred based on its subject matter under Totten but nevertheless dismissed because the risk of disclosing secrets is “both apparent and inevitable.”

While the state secrets privilege has existed in American jurisprudence since the founding, its invocation was relatively minimal until the 9/11 terror attacks. Since then, state secrets privilege invocations have expanded in frequency and scope. The average number of yearly state secrets privilege assertions increased nearly 375% in the years 2002–2013, as compared to

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22 Id. at 8–9.
23 Id. at 8.
24 Akremi, supra note 1, at 990.
25 Reynolds, 345 U.S. at 10. For an example of a court applying the Reynolds privilege, see Halkin v. Helms, 690 F.2d 977, 991 (D.C. Cir. 1982) (upholding Reynolds privilege over information relating to the NSA’s interception of international communications and dismissing suit because plaintiffs could not prove their case without this evidence).
26 Trenga, supra note 18, at 33 (quoting Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)).
27 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc).
28 Id. at 1083.
29 Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007).
30 Jeppesen Dataplan, 614 F.3d at 1089.
the sixty-five years between 1937 and 2001. Unsurprisingly, courts uphold the privilege in whole or in part in 82% of cases while denying it in only 18%. The bulk of the increase in privilege claims is due in large part to its assertion in private government contractor suits stemming from post-9/11 rendition programs.

In addition to this quantitative increase in the use of the privilege, there has been a qualitative change in the circumstances in which the government invokes the privilege. While traditional cases alleged tortious conduct and contractual disputes by government actors, recent cases allege “extreme and possibly criminal behavior, as well as constitutional violations, in which the government seeks to dismiss the case as part of its own defense.” In her analysis of the post-9/11 caselaw, Professor Laura Donohue concludes that the practical effect of broadly deferential judicial review of state secrets invocations has led to an immunity doctrine for private government contractors and a license for the Executive Branch to mask government wrongdoing with little accountability.

The Supreme Court case United States v. Zubaydah, decided in 2022, shows that Courts are unlikely to reverse this trend of executive deference in the near future. In Zubaydah, a foreign national sought private contractor testimony over their role in his torture at a CIA “black site” in Poland. As a result of his alleged treatment, he sustained brain damage and physical impairments, including the loss of his left eye. A declassified Senate Select Committee Report confirmed that he had been tortured pursuant to the “enhanced interrogation” techniques developed by the contractors in the suit. Further, the government contractors that Zubaydah sought to depose published a book detailing their experiences using “enhanced interrogation” techniques. They then appeared in an HBO documentary series and testified publicly in military commission hearings—all with the CIA’s permission. Despite the detailed public information about the CIA’s techniques, there was no official confirmation that it took place in Poland.

32 Id.
33 Id. at 1200–03.
35 Id. at 89–91.
37 Husayn v. Mitchell, 938 F.3d 1123, 1127 (9th Cir. 2019).
38 Id.
39 Zubaydah, 142 S. Ct. at 987 (Gorsuch, J., dissenting).
40 Id. at 965 (majority).
In 2010, lawyers representing Zubaydah brought a criminal complaint in Poland against Polish nationals who participated in his torture.\textsuperscript{41} To aid the Polish investigation, Zubaydah requested testimony from the contractors in the United States under 28 U.S.C. § 1782 requiring them to confirm Poland as the location of the black site.\textsuperscript{42} The United States intervened and sought to preclude confirmation on state secrets grounds.\textsuperscript{43} Even though the CIA had allowed the contractors on other occasions to disclose information on the black sites, the Court upheld the state secrets privilege claim. In a seeming expansion of the doctrine, the Court stated that “[s]ometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege.”\textsuperscript{44} Having not officially acknowledged the location of CIA operations, it is properly shielded from disclosure as a state secret.

In sum, the state secrets privilege doctrine, while originally meant to preclude discovery of specific pieces of secret government information, is often used by courts to dismiss otherwise meritorious cases regardless of whether the court is formally applying the \textit{Totten} bar or \textit{Reynolds} privilege. It is invoked in both civil suits against the government and civil suits against private parties that contract on behalf of the government. Without sufficient procedural safeguards, courts risk applying it in circumstances that do not warrant insulation from judicial review.

2. \textbf{Procedural Tools}

When ruling on the applicability of the state secrets privilege, courts employ various procedures depending on the stage of litigation. Each tool is aimed to determine whether “from all the circumstances” there is a “reasonable danger” that the disclosure of the information will harm national security.\textsuperscript{45} The government’s initial invocation of the privilege typically begins with the filing of an affidavit asserting the grounds for invoking the privilege.

Courts have four primary procedural tools to scrutinize government secrecy assertions: (1) in camera review, (2) redactions or summaries of privileged information, (3) the use of special masters and experts, and (4) the use of security cleared counsel. First, judges may conduct an ex parte in camera inspection of the allegedly privileged evidence, authorized by the

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 966.
\textsuperscript{44} Id. at 968.
\textsuperscript{45} United States v. Reynolds, 345 U.S. 1, 9–10 (1953).
Court in Reynolds. Courts vary in their willingness to conduct an in camera review. One authority estimates that courts conduct an in camera review of evidence in only 20% of state secrets privilege cases. Most courts decline to review the documents when they are satisfied that the government declarations show a potential danger to national security from disclosure. Some courts examine the underlying documents when the breadth of the privilege is not clear from the government’s declarations, and still, others consider in camera review mandatory before the case is dismissed. Ultimately, courts apply a high level of deference to state secrets privilege assertions and often accept the privilege claim based solely on government affidavits.

Second, courts occasionally order redactions or summaries of privileged information to minimize the amount of information withheld only to that which is properly privileged. In Latif v. Lynch, the court held that the government “must implement procedures to minimize the amount of material information withheld” through unclassified summaries or the release of classified information to security-cleared counsel. Courts have also used this procedure in a few other cases.

Third, several courts have appointed special masters or independent experts to review state secrets privilege assertions. Under Rule 53, the court may appoint a special master upon a showing that it is warranted by “some exceptional condition.” Courts in multiple cases have held that the complexity of state secrets privilege claims satisfies the Rule 53 requirement to appoint a special master. For example, in In re “Agent Orange” Product Liability Litigation, the court appointed a special master to review allegedly privileged information held by the government to determine if it can rightly

46 Id. at 10; see also El-Masri v. United States, 479 F.3d 296, 305 (4th Cir. 2007) (“In some situations, a court may conduct an in camera examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in Reynolds are fulfilled.”).
48 Trenga, supra note 18, at 28.
49 Id.
50 See Al Haramain Islamic Foundation, Inc. v. U.S. Dep’t of Treasury, 686 F.3d 965, 982 (9th Cir. 2012) (suggesting the use of unclassified summaries).
be withheld.\textsuperscript{53} Thereafter, “the government granted extraordinary access to the special master, who spent weeks in a ‘special guarded room in the Pentagon’ examining tens of thousands of documents prior to the government deciding whether any of these documents qualified for state secrets protection.”\textsuperscript{54} The size and complexity of the case justified the need for an efficient resolution of privilege claims, and the additional measures taken were likely seen as sufficient to protect against unwarranted disclosure.\textsuperscript{55}

Fourth, a handful of courts have ordered the government to grant security clearance to plaintiffs’ counsel to participate in the court’s evidentiary hearings. This is a rare procedure that rests on an uncertain legal footing, given that no formal statutory authority gives courts the power to order security clearance in civil cases.\textsuperscript{56} In \textit{Horn v. Huddle}, the court held that since no higher court had precluded the procedure during litigation, it was a lawful and appropriate measure to prevent the Executive Branch from usurping judicial authority.\textsuperscript{57} The court limited the scope of the evidence disclosed to the plaintiffs to the information “already known by the parties” that they intend to use at trial.\textsuperscript{58}

\textbf{B. The Freedom of Information Act (FOIA)}

The Freedom of Information Act was enacted in 1966 and created a presumptive right of access for any individual to obtain federal government records without any showing of need or reason for the requested information.\textsuperscript{59} The Supreme Court has noted, “[w]ithout question, [FOIA] is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”\textsuperscript{60} Through FOIA, Congress intended to balance the government’s legitimate need for privacy with the public’s interest in

\textsuperscript{53} 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (“After careful reflection, the court is satisfied that the magnitude of the case, the complexity of the anticipated discovery problems, the sheer volume of documents to be reviewed . . . the number of witnesses to be deposed, the need for a speedy processing of all discovery problems . . . all argue in favor of using a special master . . . .”).


\textsuperscript{55} See id. at 1020–21.

\textsuperscript{56} Akremi, \textit{supra} note 1, at 995–97.

\textsuperscript{57} \textit{Id}.


\textsuperscript{60} EPA v. Mink, 410 U.S. 73, 80 (1973).
information access by “providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.” This Section will proceed by outlining the doctrinal framework of FOIA requests, followed by an analysis of statutory procedures used.

1. Doctrinal Framework

To balance the public’s need for transparency against the government’s need for secrecy, Congress enumerated nine limited exceptions to the public’s right of access under FOIA. Among them is Exemption 1, also known as the “national security exemption,” which allows agencies to withhold records that are both (a) “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and (b) “in fact properly classified pursuant to such Executive order.” When a federal agency denies a FOIA request under an exemption, a court reviewing the decision must make a de novo determination of the exemption’s propriety.

Like in state secrets cases, courts have been reluctant to question executive claims to secrecy under Exemption 1. As Professor Paul Verkuil argues, the standard of review “is not ‘de novo’ or even ‘arbitrary and capricious’ in Exemption 1 cases; it is closer to ‘committed to agency discretion.’” In practice, courts “accord substantial weight” to an agency’s classification decision and uphold its decision to withhold the records “if it appears ‘logical’ or ‘plausible’” that it was properly classified. Courts have also upheld agency invocations of the “Glomar response,” in which the government neither confirms nor denies the existence of the records sought because even acknowledging their existence would endanger national security.

2. Procedural Tools

The procedures available to test secrecy assertions in FOIA claims remain largely the same as in state secrets privilege cases. First, courts have

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61 S. REP. NO. 89-813, at 38 (1965).
66 Wolf v. CIA, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (emphasis in original) (internal quotations omitted); see also Bowers v. U.S. Dep’t of Just., 930 F.2d 350, 357 (4th Cir. 1991) (upholding withholding of classified information from FBI counterintelligence files because intelligence experts provided adequate reasons for withholding).
statutory authority to conduct an in camera review of disputed records.\textsuperscript{68} Second, Congress passed the FOIA Improvement Act (FIA) in 2016, which requires consideration of partial disclosure and segregation of exempt information from nonexempt information.\textsuperscript{69} Third, at least one court has appointed a special master under Rule 53(b) to review the applicability of FOIA Exemption 1.\textsuperscript{70}

Courts have largely deferred to executive classification decisions in Exemption 1 litigation. One study estimated that greater than 80% of government decisions to withhold information under Exemption 1 are upheld without “even partial disclosure” and only 5% result in an outright win for a plaintiff.\textsuperscript{71} It further estimated that courts in 38% of cases conduct an in camera review and in 51% of cases order the production of a Vaughan index.\textsuperscript{72} These success rates and in camera review rates are remarkably close to the 82% rate of approval and 20% in camera review rate for state secrets privilege claims, suggesting similar judicial deference.\textsuperscript{73}

\textbf{C. The Classified Information Procedures Act (CIPA)}

In the criminal context, the government’s withholding of relevant information from discovery has the potential to greatly infringe on defendants’ abilities to present their defense. Although the privilege applies in criminal cases, courts and Congress have recognized and balanced government interests protected by the privilege against criminal defendants’ interests. As compared to civil cases, defendants in criminal trials have heightened constitutional guarantees—the right to discover exculpatory evidence from the prosecution,\textsuperscript{74} the right to compel the attendance of favorable witnesses,\textsuperscript{75} and the right to present exculpatory evidence to the jury,\textsuperscript{76} among others—that would be limited by excessive executive secrecy. Accordingly, when the government withholds information for national

\begin{itemize}
\item \textsuperscript{68} 5 U.S.C. § 552(a)(4)(B) ("[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . and the burden is on the agency to sustain its action.").
\item \textsuperscript{69} 5 U.S.C. § 552(a)(8)(A)(ii).
\item \textsuperscript{70} See \textit{In re U.S. Dep’t of Def.}, 848 F.2d 232, 235 (D.C. Cir. 1988).
\item \textsuperscript{71} Susan Nevelow Mart & Tom Ginsburg, \textit{Dis-Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act}, 66 ADMIN. L. REV. 725, 728 (2014); \textit{see also} Verkuil, supra note 65, at 719 (finding a 90% affirmance rate for agency withholding decisions in all FOIA cases).
\item \textsuperscript{72} Mart & Ginsburg, supra note 71, at 767 tbl.1. The \textit{Vaughan} index is an itemized list of (1) an identification of each document withheld, (2) the applicable statutory exemption for each decision to withhold, and (3) a justification for why each document falls within the exemption. \textit{Id.} at 732 n.22.
\item \textsuperscript{73} \textit{See supra} Section I.A.
\item \textsuperscript{74} Brady v. Maryland, 373 U.S. 83, 87 (1963).
\item \textsuperscript{75} U.S. CONST. amend. VI.
\item \textsuperscript{76} \textit{Id.}.
\end{itemize}
security purposes, “it must give way under some circumstances to a defendant’s right to present a meaningful defense.”\(^{77}\) The prosecution cannot be allowed to have its cake and eat it, too.

1. **Doctrinal Framework**

   In response to these constitutional concerns in national security-related prosecutions, Congress intervened to strike a balance in 1980. Introduced by then-Senator Joe Biden, Congress enacted the Classified Information Procedures Act (CIPA) to govern the procedures used to discover information in criminal trials.\(^{78}\) CIPA’s purpose was twofold: to create procedures to enable criminal defendants’ ability to discover information relevant to their defense and to strengthen the government’s ability to protect against so-called “graymail”—a practice in which a defendant with knowledge of classified information threatens to reveal the information during the trial to deter the prosecution from proceeding.\(^{79}\) CIPA mandates a number of procedural safeguards when classified information is discoverable by either party, but does not alter the underlying substantive discovery obligations of the parties, which the Federal Rules of Criminal Procedure control.\(^{80}\)

2. **Procedural Tools**

   To combat graymail, CIPA requires defendants to give notice early in the proceeding if they intend to submit classified information as evidence.\(^{81}\) If the defendant seeks to discover or admit classified information, the government may request the court conduct an ex parte in camera hearing to determine the relevance and admissibility of the information, with an immediate interlocutory appeal option for the prosecution in the event of an adverse ruling.\(^{82}\) If the court decides the information is relevant and admissible, then the government may petition the court to allow modifications to the information disclosed if it makes a “sufficient showing.”\(^{83}\) CIPA authorizes two types of modifications: prosecutors can (1) “substitute a summary of the [classified] information” or (2) “substitute a statement admitting relevant facts that the classified information would

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\(^{77}\) United States v. Stewart, 590 F.3d 93, 131 (2d Cir. 2009).


\(^{79}\) Id. at 94, 98.


\(^{81}\) 18 U.S.C. app. 3 § 5(a).

\(^{82}\) Id. §§ 6(a), 7(a).

\(^{83}\) Id. § 4.
tend to prove.”

In any event, the court must be satisfied that the modification “will provide the defendant with substantially the same ability to make his defense” as would actual disclosure of the information. These procedures allow the government to assess ex ante the complete “price” of moving forward with the prosecution, including the possible national security costs and the benefits to the public interest of the prosecution.

Fundamentally, CIPA places the decision of whether to disclose classified information in the government’s hands. Even if the court determines that disclosure is required, the Attorney General can intervene to prohibit disclosure. Importantly, if the Attorney General prohibits disclosure, the court must dismiss the indictment unless it finds that the interests of justice would not be served by dismissal. If it decides not to dismiss the prosecution, the court is required to implement sanctions against the government that it determines appropriate, thereby shifting the cost of secrecy onto the government. Appropriate measures include, but are not limited to: (1) dismissal of specific counts that the excluded evidence bears on, (2) issuance of a finding against the government on the issues that the evidence bears on, or (3) preclusion of all or part of the testimony of a witness. These measures place a high price on the government’s decision to withhold relevant evidence and ensure the defendant’s litigation position is not disadvantaged without it.

Besides the statutory procedures specifically authorized, courts utilizing CIPA often require defense counsel to obtain a security clearance before they can view classified information. Following the granting of a security clearance, defense counsel may only review and discuss classified information at a guarded Secure Compartmented Information Facility (SCIF) maintained by the Department of Justice. Its purpose is to prevent

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84 Id. § 6(e)(1).
85 Id. § 6(e)(1).
86 See United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983) (“When the real cost to national security has been ascertained (or eliminated) by the CIPA procedure, the government can realistically weigh the nation’s interest in prosecuting against that cost and make an informed decision.”).
87 MacDougall, supra note 80, at 678.
88 18 U.S.C. app. 3 § 6(e)(1).
89 Id. § 6(e)(2).
90 MacDougall, supra note 80, at 682.
91 Id.; 18 U.S.C. app. 3 § 6(e)(2). The court may order other remedies as it sees fit. 18 U.S.C. app. 3 § 6(e)(2).
any potential national security harm arising from the disclosures to the court or defense counsel.

For the defendant, CIPA’s procedures increase the likelihood that he will gain access to relevant information for his defense and shift the cost of decisions to withhold information squarely on the government. This is in stark contrast to both the state secrets privilege and FOIA Exemption 1 cases. Under those doctrines, courts rarely order alternatives to complete disclosure despite having authority under relevant statutes and Federal Rules of Civil Procedure. In the state secrets context specifically, the plaintiff bears the full cost of secrecy. When the government is allowed to withhold information, courts rarely employ punitive measures like those authorized by CIPA.

II. PROBLEMS WITH THE STATE SECRETS PRIVILEGE APPROACH

The state secrets privilege is largely criticized as too deferential to executive officials. Courts routinely uphold its invocation without examining the evidence in camera or allowing plaintiffs to prove their case without the privileged evidence. This Part discusses the two main impacts of this overly deferential approach: (1) executive aggrandizement and (2) individual litigants bear the entire cost of secrecy, eliminating any incentive for the government to mitigate the risk of harm to individuals.

A. Executive Aggrandizement

When courts accept government invocations of the state secrets privilege without meaningful scrutiny in the face of a plaintiff’s plausible allegations of wrongdoing, they abdicate their duty to adjudicate disputes and facilitate executive aggrandizement. Congress has almost plenary control over the jurisdiction of federal courts. 94 Acting pursuant to its Article I power, Congress provides litigants rights of action to redress specified harms. 95 Congressionally conferred rights of action are essential to judicial oversight of the Executive Branch, as they allow individuals to challenge the constitutionality of executive actions that are otherwise unreviewable. 96

In the state secrets context, courts refuse to decide the merits of cases properly brought. These refusals extend the state secrets evidentiary

94 See Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992); U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
95 For example, the Federal Tort Claims Act grants private citizens the right to sue the United States in federal court for harms caused by federal employees acting in the scope of their employment. 28 U.S.C. § 1346.
privilege into a quasi-immunity doctrine for both government actors and the contractors that participate in the alleged wrongdoing. As discussed previously, the Executive Branch has increasingly relied on the state secrets privilege as a springboard to dismiss otherwise meritorious litigation rather than as a bar over specified pieces of evidence. Executive officials argue that national security matters are within the exclusive province of the Executive Branch. Therefore, the courts lack jurisdiction over any dispute that touches on matters of national security. This argument both misinterprets the Court’s state secrets jurisprudence and violates the constitutional separation of powers between three coequal branches.

Notably, the Court has interpreted the state secrets privilege, once it applies, to be absolute—“even the most compelling necessity cannot overcome the claim of privilege.” This is in contrast to other doctrines like the presidential communications privilege which are qualified and require a balancing of competing interests. Despite the state secrets privilege being absolute, courts have a constitutional duty to adjudicate the propriety of the privilege claim and limit its scope only to properly privileged evidence. To make that determination, courts are equipped with various tools, including in camera review, redactions, and ex parte hearings. Regardless of the procedures used, the court must decide whether the evidence is privileged. It may not rely on conclusory affidavits from executive officials purporting to have already determined that the evidence is privileged. In evaluating the claimed privilege, courts must show deference to executive officials, who are better equipped to assess the mosaic of information in their control and have important constitutional interests in foreign affairs and national security.

97 Id. at 1939–40; see also supra Part I.A.
98 Frost, supra note 96, at 1957–63.
101 See Zubaydah, 142 S. Ct. at 967 (internal quotations omitted) (citing Reynolds, 345 U.S. at 8) (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”).
102 Id.; Id. at 973 (Thomas, J., concurring).
103 Alexander Hamilton, Letters of Pacificus No. 1 (June 29, 1793), reprinted in 4 THE WORKS OF ALEXANDER HAMILTON 432, 437 (Henry Cabot Lodge ed., 1904) (“It appears to be connected with that department in various capacities:—As the organ of intercourse between the nation and foreign nations; as the interpreter of the national treaties, in those cases in which the judiciary is not competent—that is, between government and government; as the power, which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force.”); see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936) (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by
At its core, however, the state secrets privilege is exactly what it purports to be—an evidentiary privilege. It applies against the production of specific pieces of evidence “only where necessary to achieve [its] purpose” and should be recognized “only within the narrowest limits defined by principle.” The current trend of dismissing suits solely because the subject matters presents an “unacceptable risk” of disclosing state secrets therefore expands the nature of the privilege and ignores the Court’s proclamation that it is courts themselves—not the Executive Branch—who must make privilege determinations.

Moreover, too much judicial deference in state secrets determinations risks upsetting the constitutional separation of powers among the three coequal branches. The Executive is solely responsible for certain decisions regarding foreign affairs, such as recognizing foreign nations, but must share responsibility in others with Congress, such as treaty making. Article I grants Congress alone the power to declare war, raise armies, maintain a navy, and fund foreign activities. It also grants Congress the ability to regulate the federal courts and grant them jurisdiction to decide cases implicating foreign affairs, including against the Executive Branch.

Congress constrains executive power through the spending power and holding oversight hearings. Congress may also grant jurisdiction to the federal judiciary for individuals to challenge the legality of executive action. In this way, the two branches coordinate to police executive misconduct. The constitutional system is designed to balance the competing interests of the Executive, the Congress, and the judiciary, and to implement checks and balances to prevent the overreach of any one branch. Of course, the judiciary has long exercised discretion to abstain to hear cases

104 Zubaydah, 142 S. Ct. at 994 n.12 (Gorsuch, J., dissenting) (internal quotations omitted) (citing Fisher v. United States, 425 U.S. 391, 403 (1976)).

105 Zivotofsky, 576 U.S. 1, 28 (2015) (holding that the president has the exclusive power to recognize a foreign sovereign).

106 See, e.g., Medellin v. Texas, 552 U.S. 491, 526 (2008) (“[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress . . . .”).

107 Zubaydah, 142 S. Ct. at 990 (Gorsuch, J., dissenting); U.S. CONST. art. I, § 8.

108 Zubaydah, 142 S. Ct. at 990 (Gorsuch, J., dissenting).

109 Frost, supra note 96, at 1952–53.

110 Id. at 1953. Congress granted broad federal question jurisdiction to the federal courts in 28 U.S.C. § 1331. Id. at 1955.

111 Id. at 1953.
that are legally within their jurisdiction. But Congress’s determination that the judiciary is competent to decide matters within its jurisdictional grant suggests that courts should only do so when competing constitutional interests require otherwise. In the state secrets context, judicial abstention has expanded from its limited scope as an evidentiary privilege to a nonjusticiability doctrine without sufficient constitutional justification.

Dissenting in Zubaydah, Justice Gorsuch admonished the Court’s deferential posture as allowing the judiciary to abdicate its duty to scrutinize the government’s decision to withhold information. Justice Gorsuch noted that “courts generally must respect as well the ancient rule that the public enjoys a right to ‘every man’s evidence.’” Accordingly, “when the Executive seeks to withhold every man’s evidence from a judicial proceeding . . . that claim must be carefully assessed against the competing powers Articles I and III have vested in Congress and the Judiciary.” The Executive Branch has legitimate and weighty constitutional interests at stake in invoking the privilege. Yet, as Justice Gorsuch argues, the ultimate decision on whether information is properly withheld belongs to the judiciary and courts should consider that “it is a ‘very serious thing’ to allow any party to withhold relevant evidence.” By giving “utmost deference” to state secrets claims without meaningful judicial assessment, courts “facilitate the loss of liberty and due process.” “In this country, no one stands above the law; not even the President may deflect evidentiary inquiries just because they may prove inconvenient or embarrassing.”

The result of the deferential posture of state secrets jurisprudence is a tilt in the separation of powers toward the Executive Branch. It insulates broad categories of executive activity from judicial review. For example, plaintiffs have failed to challenge the CIA’s extraordinary rendition program. Absent judicial scrutiny, the only check on the Executive Branch

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112 Id. at 1956; David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L. REV. 543, 574 (1985); but see Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71, 74–75 (1984) (arguing that judicial abstention is inconsistent with the constitutional separation of powers).
113 See Redish, supra note 112, at 72.
115 Id. at 991 (citing 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 2965 (1905)).
116 Id. at 991.
117 Id. at 992 (citing United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694)).
118 Id. at 994.
119 Id. at 991.
120 See, e.g., El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007) (dismissing plaintiff’s suit challenging the constitutionality of the extraordinary rendition program because the very existence of the program is a state secret).
is congressional oversight—a check which is notably inadequate in the national security context.\textsuperscript{121}

\textbf{B. Secrecy Costs Are Borne Entirely by Harmed Individuals}

In his vehement dissent, Justice Gorsuch stated that there “has always been something of a ‘hydraulic pressure inherent within each of the separate Branches’ to test ‘the outer limits of its power.’”\textsuperscript{122} Armed with loosely administered classification standards and a judiciary that extends “utmost deference” to executive claims to secrecy, executive officials face little cost, incentivizing disregard for potential risks when operating in the national security arena.\textsuperscript{123}

The American legal system is built on the assumption that consequences shape conduct. Legal regulation aims to increase or decrease activities by shifting corresponding costs.\textsuperscript{124} In criminal law, the cost of a lengthy jail sentence deters would-be criminals from engaging in prohibited conduct. In tort law, the cost of potentially crushing damages incentivizes individuals to take care and avoid activities that tend to harm others. In other words, the law shifts the cost of harmful conduct onto the actor who engaged in the harmful activity, thereby influencing that actor’s ex ante cost-benefit analysis of whether to risk engaging in the prohibited conduct. Absent any redistribution of costs, actors engage in conduct with the lowest expected cost to themselves.\textsuperscript{125}

The existing framework for evaluating state secrets cases imposes almost no corresponding cost on the government for its decision to withhold information, incentivizing government actors to abuse their ability to hide politically damaging information.\textsuperscript{126} It is clear that the government benefits from withholding information.\textsuperscript{127} It is also true that the public, in turn,

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\textsuperscript{121} See Heidi Kitrosser, Congressional Oversight of National Security Activities: Improving Information Funnels, 29 CARDOZO L. REV. 1049, 1060–61 (2008) (concluding that executive officials do not necessarily comply with congressional information-sharing directives and that when they do comply, the disclosures may not be meaningful enough for oversight).

\textsuperscript{122} Zubaydah, 142 S. Ct. at 994 (Gorsuch, J. dissenting) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

\textsuperscript{123} See id.


\textsuperscript{125} See id. at 241–42.

\textsuperscript{126} See, e.g., Fuchs, supra note 59, at 148 (“Without any such checks, it is easy to understand how secrecy can grow within an executive branch with a penchant for keeping secrets.”).

\textsuperscript{127} Margaret B. Kwoka, The Procedural Exceptionalism of National Security Secrecy, 97 B.U.L. REV. 103, 163 (2017) (noting that the government avoids embarrassing American international standing and hides illicit or questionable conduct by invoking the state secrets privilege).
\end{flushright}
benefits from the legitimate withholding of national security information. If our adversaries knew the exact details of our foreign intelligence-gathering activities, they would change their tactics thereby hampering the U.S. government’s ability to mitigate future threats. Even when justified, however, government secrecy imposes costs on the public and individual litigants.

When information is kept secret, the public is denied the ability to hold their elected representatives accountable for their decisions—a cornerstone of representative democracy. The cost is necessarily diffuse: each member of the public bears the equal cost of being uninformed. To reduce the public cost borne from excessive government secrecy, FOIA was enacted to create a presumption of access to government records. Individuals are empowered to vindicate their common interest in oversight by exercising their right of access under FOIA. The right of access is presumptive and the enumerated exceptions are crafted narrowly to balance the legitimate public benefits that accrue from secrecy while minimizing the costs.

In contrast, when discoverable information is withheld from individual litigants during a civil or criminal proceeding, the individual bears a personal and disproportionate cost of government secrecy. In state secrets cases, the plaintiff is denied redress regardless of the severity of the alleged conduct—whether they allege the government’s breach of a contract or commission of an egregious constitutional violation. Even when private actors assist the government in tortious or illegal conduct, the state secrets privilege again acts to prevent the individual from securing redress and ensures the costs are borne entirely by the harmed individual. Only when a plaintiff, despite their inability to access relevant information, can persuade the court that their need for the information outweighs the potential harm to national security will the cost be shifted back to the government. In the rare situation when a court orders disclosure, the litigation proceeds until the government likely settles the case to avoid embarrassment and compensates the victim for their harm. In this way, the cost is redistributed back onto the government, who is incentivized to prevent similar situations in the future.

128 Id.
129 Id.
130 See supra Part I.
131 The only exception would be if the litigation was allowed to continue and the plaintiff could make their case without the privileged evidence. As discussed earlier, this is rare. See supra Section I.A.
In the criminal context, if the prosecution could withhold information without any corresponding cost, then it would be more likely to bring charges, all else equal. The government would face no cost to its national security and obtain the maximum political benefit from bringing the prosecution. The individual would bear the entire cost in the form of an inadequate ability to mount a defense. In contrast to the state secrets privilege, the procedural innovations of CIPA operate to shift the cost of secrecy onto the government in criminal prosecutions. If the information is deemed necessary to the defense, the government retains the ultimate decision of whether to disclose the information or not.

Crucially, however, the government is disadvantaged in the litigation when they invoke secrecy—the prosecution must be dismissed or other sanctions are implemented. CIPA’s regulatory scheme forces the government to internalize the full cost of its conduct, including the potential harm to national security caused by the disclosure of classified information during trial. Only when the government’s ex ante cost-benefit analysis determines that the public benefit of the prosecution to the administration of justice is worth the public cost of potentially exposing national security information will the prosecution go forward. In other words, CIPA shifts the cost burden onto the government, thereby influencing the government’s conduct.

When withholding information in suits involving FOIA or the state secrets privilege, the government is incentivized to only consider the benefits of secrecy to itself. And those benefits are quite substantial. Through the state secrets privilege, the government has avoided litigating the merits of constitutional issues such as the NSA surveillance program, paying damages for its tortious accidents, and being held accountable for employment discrimination. The privilege effectively immunizes unconstitutional, illegal, and even criminal activity from redress, leaving harmed individuals to bear the cost of secrecy. The costs to the government are minimal, if any, and are levied almost exclusively through the political process. For example, the Bush administration faced congressional scrutiny after it was discovered that the CIA destroyed videotapes of its “enhanced interrogation techniques.” Subsequent Senate hearings exposed a plethora

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133 Kwoka, supra note 127, at 164.
134 Id.
135 MacDougall, supra note 80, at 678.
137 See United States v. Reynolds, 345 U.S. 1, 11 (1953).
of illegal torture practices by the CIA, culminating in President Obama’s
decision to prohibit the controversial practice. The government faced
costly political embarrassment while the public benefited from the
information and held the government accountable through ordinary political
means. Yet, even in this rare instance when the political process alone shifted
the cost back onto the government, the individuals subject to the unlawful
torture received no personal redress.

The existing state secrets procedural framework fails to deter unlawful
conduct by government actors and their contractors. The low likelihood of
political costs to the government is insufficient to motivate the government
to minimize harm to individuals. In many cases, the government can invoke
the privilege without turning over any information to the court to justify their
need for secrecy. Even when the individual has made a significant showing
using publicly available information, the alleged harm is a significant
constitutional violation, and there are no alternative avenues for redress,
courts have astonishingly dismissed the proceedings—the harmed
individuals are left to bear the entire cost from the government’s harmful
conduct.

III. FRAMEWORK FOR REFORM

Despite the reality that individuals have been forced to bear the cost of
government secrecy, courts have been reluctant to redress the wrong out of
deference to executive secrecy. Unsurprisingly, there is consensus that some
government secrecy in the national security context is necessary. Notably,
courts often cite their relative lack of expertise in national security and
inability to assess the true impact of any individual disclosure when choosing
to preserve such secrecy. Judges are reluctant to probe too deeply into
matters they might see as political questions committed to the Executive
Branch’s discretion.

Moreover, there are strong competing interests among the branches of
government at stake when the Executive acts pursuant to their foreign affairs
and national security powers. The Executive Branch has broad power to act
in the interest of national security, military affairs, and foreign relations,
which may occasionally grant the President some ability to act without prior

140 See Statement on the Senate Select Committee on Intelligence Study of the Central Intelligence
Agency’s Detention and Interrogation Program, 2 PUB. PAPERS 1596–97 (Dec. 9, 2014).
141 See, e.g., Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (“Judges, moreover, lack the
expertise necessary to second-guess such agency opinions in the typical national security FOIA case.”).
142 Fuchs, supra note 59, at 158.
congressional authorization. While the Executive has important interests at stake in national security litigation, both Congress and the judiciary have competing constitutional interests that must be respected. For one, Congress has almost plenary power to control the jurisdiction of the federal courts. It can create federal rights enforceable in court as long as the subject matter fits within constitutional limits. Given these competing constitutional interests at stake in national security litigation, a balance must be struck between executive secrecy and the enforcement of individual rights.

The current procedural framework for testing the validity of the state secrets privilege fails to meaningfully impose the cost of secrecy onto the government or respect the constitutional separation of powers. Courts vary widely in their willingness to question claims to secrecy. The existing judicial inquiry purports to consider the individual need for the allegedly privileged evidence even though in most cases the evidence is critical to the case. Rather than focusing on the individual plaintiff’s need for the information, this Essay proposes that courts should balance the competing individual interests alleged against the Executive’s claimed interests to determine which procedures to use. The more significant the individual interests alleged—balanced with the Executive’s interest in national security—the more costly the procedures imposed on the government to scrutinize the withholding of information should be.

To contextualize the inquiry, courts should consider where along the spectrum the individual interest alleged in a given state secrets case is compared to the balance recognized by Congress in FOIA and CIPA. In enacting those statutes, Congress appropriately balanced the procedural scrutiny in each respective context given the individual interests asserted. This approach is consistent with the Court’s balancing approach in

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143 See Amy L. Stein, A Statutory National Security President, 70 FLA. L. REV. 1183, 1205–06 (2018). The constitutional nature of the state secrets privilege as inherent in the separation of powers, while not directly confirmed by the Court, has been affirmed by some courts of appeals. See Arar v. Ashcroft, 585 F.3d 559, 581 n.14 (2d Cir. 2009); El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007); In re United States, 872 F.2d 472, 482 (D.C. Cir. 1989). This is consistent with Supreme Court precedent in the executive privilege context. See United States v. Nixon, 418 U.S. 683, 711 (1974) (suggesting in dicta that national security concerns may be sufficient to justify an absolute executive privilege rooted in the constitution).


145 Frost, supra note 96, at 1951–52.

separation of powers issues\textsuperscript{147} and ensures that the government will be meaningfully deterred from using the privilege to cover up wrongdoing.

Accordingly, this Part proceeds with (a) an analysis of the interests asserted by FOIA and CIPA litigants followed by (b) a description of the suggested judicial approach for state secrets privilege cases.

\textbf{A. Congressional Interests Asserted under FOIA and CIPA}

While both FOIA and CIPA relate to individual rights of access to government information, they impose very different costs on the government for its decision to withhold information. As discussed previously, FOIA formally requires courts to conduct a de novo review of executive classification decisions and authorizes courts to conduct in camera reviews, order redactions, and order substitutes of the information.\textsuperscript{148} Courts have wide discretion on the procedures employed to make their determination and overwhelmingly fail to conduct the required de novo review.\textsuperscript{149} CIPA, on the other hand, requires that certain litigation disadvantages be placed on the government if it chooses to withhold information necessary to an individual’s defense.\textsuperscript{150} The different approaches taken by Congress are justified based on the balance between the individual interests as vindicated by the statutes and the executive interest in national security.

Plaintiffs in FOIA litigation assert an undifferentiated interest in government transparency. The Court itself has noted that “[w]hen disclosure [under FOIA] touches certain areas defined in the exemptions . . . the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it.”\textsuperscript{151} In fact, FOIA was enacted to break from the previous model under the Administrative Procedure Act,

\textsuperscript{147} See, e.g., United States v. Nixon, 418 U.S. 683, 711 (“In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035 (2020) (“[I]n assessing whether a subpoena directed at the President’s personal information is ‘related to, and in furtherance of, a legitimate task of the Congress,’ courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the ‘unique position’ of the President.” (citations omitted)).

\textsuperscript{148} See supra Part I.

\textsuperscript{149} See, e.g., Paulina Perlin, Defense and Deference: Empirically Assessing Judicial Review of Freedom of Information Act’s National Security Exemption, 11 HARV. NAT’L SEC. J. 257, 263 (2020) (“Put more simply, the empirical evidence suggests that the judiciary is not seriously interrogating the executive’s in-court assertions, essentially allowing the government to bypass FOIA with scant justification.”).

\textsuperscript{150} See 18 U.S.C. app. 5 § 6(e)(2).

\textsuperscript{151} Nat’l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172 (2004) (“As a general rule, if the information is subject to disclosure, it belongs to all.”); EPA v. Mink, 410 U.S. 73, 80 (1973) (noting that FOIA creates a “judicially enforceable public right”).

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which required individual requesters to be “properly and directly concerned” with the information sought.\textsuperscript{152} Accordingly, courts do not consider the individual plaintiff’s need for the information, and litigation centers solely on whether the information is properly exempt.\textsuperscript{153} If so, its disclosure is absolutely barred—no individualized showing of harm is sufficient to overcome the agency’s decision.\textsuperscript{154} Still, even in the face of the generalized interests represented by a FOIA request, Congress has provided a route for disclosure and equipped the judiciary with procedures to determine if an exemption applies.

Yet, the statutory balance achieved by FOIA is tilted toward the Executive in the national security context. While the government bears the burden of establishing that records properly fit within an exemption, FOIA does not require an in camera review of Exemption 1 claims.\textsuperscript{155} Rather, it suggests that government affidavits alone are, at least in some cases, sufficient to satisfy the de novo review standard. Further, Exemption 1 allows information to be withheld as long as it fits within an executive order authorizing information “to be kept secret in the interest of national defense or foreign policy.”\textsuperscript{156} FOIA does not create an independent statutory standard for determining when information should be kept secret. The Executive retains the latitude under FOIA to define for itself the appropriate circumstances for classifying information so long as it is “in the interest of national defense or foreign policy,” a seemingly low bar.\textsuperscript{157} An executive interested in hiding information need only broaden the scope of the classification order to encompass records it seeks to withhold. FOIA provides no basis to challenge the classification order itself.

Congressional deference to the Executive in FOIA is justified when compared with the generalized interest in government oversight asserted by FOIA plaintiffs. They have no individualized need for information and will suffer no greater harm than the general public when information is kept secret. On balance, generalized interests do not warrant a heavy judicial

\textsuperscript{152} Margaret B. Kwoka, First-Person FOIA, 127 Yale L.J. 2204, 2256 (2018) (citation omitted).

\textsuperscript{153} See Nat’l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 171–72 (2004) (“[W]hen documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.”); Halpern v. FBI, 181 F.3d 279, 287 (2d Cir. 1999).

\textsuperscript{154} See Halpern, 181 F.3d at 287 (noting that the primary question in FOIA litigation is “whether the information withheld properly falls within the scope of the exemptions.”).

\textsuperscript{155} 5 U.S.C. § 552(a)(4)(B) (“[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . .” (emphasis added)).

\textsuperscript{156} Id. § 552(b)(1).

\textsuperscript{157} Id. § 552(b)(1)(A).
probing that risks intruding upon the Executive’s weighty interests in national security and foreign affairs. There are also limited remedies available in FOIA suits: either information is, in whole or in part, disclosed or not. Whereas in other contexts, the conflict is not directly about access to information, but about compensating past harm—as in most state secrets cases—or preventing future harm—as in CIPA. Both of these classes of suits can be accomplished without actual information disclosure, whether through settlement, dismissal of criminal charges, or otherwise.

To be sure, there is widespread criticism that judicial evaluations of Exemption 1 cases fail to meet the de novo standard of review mandated by Congress. Despite the divergence, the judicial approach is useful as a floor with which to measure scrutiny in other contexts where the plaintiff asserts weightier, more individualized interests than mere access to information that would go otherwise unaddressed. In Figure 1, the approximate weight of FOIA’s generalized interests and the low procedural bar imposed by courts is roughly estimated. At the other end of the spectrum are the constitutional interests claimed by defendants in criminal trials.

In criminal prosecutions, CIPA was enacted to protect defendants’ fundamental due process interests at stake when information relevant to their defense is withheld. To strike an appropriate balance between defendants’ interests and the government’s interest, CIPA provides that the government ultimately gets to decide whether to disclose the classified information relevant to the defense. But, crucially, CIPA’s key innovation is that courts must impose a litigation disadvantage on the prosecution when it does so. In contrast to the permissive in camera review of FOIA, CIPA provides that courts “shall dismiss the indictment” or “shall order such other action” that the court determines appropriate when the government withholds information. To decide how serious a disadvantage to impose, courts almost always exercise their discretion to examine the evidence in camera.

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158 In the executive privilege context, the Court noted that generalized assertions of harm are insufficient to overcome weighty competing constitutional interests. United States v. Nixon, 418 U.S. 683, 711–13 (1974).
159 See, e.g., Perlin, supra note 149, at 275–76, 307 (“[D]espite congressional efforts to establish de novo review for nondisclosure under FOIA, courts largely rubberstamp the government’s Exemption 1 assertions.”).
160 See Stillman v. Dep’t of Def., 209 F. Supp. 2d 185, 223 n.24 (D.D.C. 2002) (“The balance of a statutory interest, under for example the Freedom of Information Act, against the compelling interest in controlling access to sensitive information, is a very different question than the balance between equally compelling constitutional interests.”).
161 MacDougall, supra note 80, at 670.
162 18 U.S.C. app. 3 § 6(e) (1)-(2).
163 Id. (emphasis added).
164 MacDougall, supra note 80, at 679.
These procedures protect the due process rights at stake for the defendant by ensuring they are left in an equivalent position had they been given the information needed. Further, these procedures work to shift the entire cost of secrecy back onto the government. Knowing that courts will prevent it from benefiting from both withholding the potentially damaging information and bringing the prosecution, the government will be incentivized to strike the appropriate balance between secrecy and transparency given the mosaic of information in its possession. The government will minimize its decisions to withhold information to situations that actually present a risk to national security given that excessive withholdings will almost certainly cause the government to lose its case.

In comparison to FOIA and CIPA, plaintiffs in civil litigation involving the state secrets privilege assert a wide range of individual interests. In some cases, plaintiffs allege breach of contract\textsuperscript{165} or discrimination.\textsuperscript{166} In other cases, though, individuals allege unlawful detention\textsuperscript{167} or grave bodily torture\textsuperscript{168} in violation of constitutional guarantees. These interests are weightier and more individualized than the generalized interest in information access asserted under FOIA—the individual bringing suit has suffered a concrete and particularized harm and has been forced to disproportionately bear the cost of government secrecy. In one instance, the D.C. Circuit opined that the “balance of a statutory interest, under for example [FOIA], against the compelling [government interest], is a very different question than the balance between equally compelling constitutional interests.”\textsuperscript{169} Yet, these interests are less weighty than constitutional rights in criminal proceedings protected by CIPA because they seek to prevent future harm, i.e., imposition of criminal sanctions through unfair proceedings. Whereas civil suits over the state secrets privilege are almost always seeking damages for past harm suffered, such as CIA torture.

Figure 1 below roughly plots the strength of the individual interests asserted under CIPA and FOIA as compared to the relative procedural costs imposed on the government. FOIA is the most deferential and CIPA is the least deferential. The state secrets privilege is asserted in cases reflecting a wide range of individual interests between these two ends of the spectrum. The procedural cost, however, is nearly identical to the judicial approach in FOIA, as evidenced by similar in camera review and approval rates.\textsuperscript{170}

\textsuperscript{165} Totten v. United States, 92 U.S. 105, 105–06 (1876).
\textsuperscript{166} Sterling v. Tenet, 416 F.3d 338, 341 (4th Cir. 2005).
\textsuperscript{167} Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).
\textsuperscript{168} United States v. Zubaydah, 142 S. Ct. 959, 987 (2022) (Gorsuch, J., dissenting).
\textsuperscript{169} Stillman v. Dep’t of Def., 209 F. Supp. 2d 185, 223 n.24 (D.C. Cir. 2002).
\textsuperscript{170} See supra Part I.
Accordingly, this Essay argues that the procedural approaches authorized by Congress in FOIA and CIPA serve as bookends with which courts can calibrate the appropriate level of judicial scrutiny in a given state secrets case.

**FIGURE 1: EXISTING FRAMEWORK**

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<tr>
<th>Procedural Cost Imposed on Government</th>
<th>Strength of Individual Interest</th>
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<td>FOIA</td>
<td>State Secrets Privilege</td>
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<td>CIPA</td>
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**B. Proposed Approach**

Given the array of interests asserted in national security litigation, this Essay proposes that courts should explicitly weigh the importance of the compelling interests asserted by plaintiffs in their decisions over which procedures to use to determine the appropriateness of government claims to secrecy. The current judicial approach subjects state secrets privilege assertions and FOIA Exemption 1 cases to nearly the same level of procedural scrutiny. This approach does not respect the strength of the competing constitutional interests of Congress and the Judiciary.\(^{171}\)

Instead, courts should consider the congressionally defined benchmarks in FOIA and CIPA as the floor and ceiling of the competing interests asserted by plaintiffs, as demonstrated in Figure 2. In civil litigation involving the state secrets privilege, the interests asserted in some cases lie closer to the generalized oversight interest in FOIA such as an ordinary breach of contract claim. In this case, courts should follow a deferential approach similar to that of FOIA. If, on the other hand, litigation involves grave constitutional violations such as torture, courts should exert scrutiny similar to that of CIPA and pursue all available procedures. This approach ensures that the due process balance is respected, costs are proportionately shifted onto the government, and the risk of erroneous disclosure is only taken when there

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\(^{171}\) See supra Part II.
are sufficiently compelling interests at stake. Figure 2 presents a rough visual example of this new approach. While the state secrets privilege is plotted as reflecting an intermediate strength of the individual interests asserted, in reality, it varies greatly between the two extremes depending on each individual case.

**Figure 2: Proposed Framework**

If the interests asserted lie closer to the compelling constitutional guarantees protected by CIPA, then courts should not lightly accept government claims to secrecy. They should instead conduct an in camera review in most cases to verify that the government is not covering up misconduct. Further, consistent with statutory authorizations in both FOIA and CIPA, courts in state secrets cases should consider if summaries or redacted versions can substitute for full disclosure. Security-cleared counsel, special masters, and other confidential procedures are also tools available to effectuate CIPA’s constitutional guarantees. Finally, if the court is not satisfied with the government’s justification, it can move for Rule 37 discovery sanctions against the government for refusing to turn over the information. Like the litigation disadvantages imposed on the government in CIPA, discovery sanctions can be used by courts to establish relevant facts against the government or, in sufficiently justifiable cases, enter a default judgment against the government.\(^{172}\) Like in CIPA, this leaves the disclosure

\(^{172}\) While there are not many reported decisions involving CIPA, one example shows its force. In *United States v. Clegg*, Eugene Clegg was charged with illegally exporting weapons and sought to discover classified documents he believed would prove that he acted in good faith reliance on statements from U.S. officials that made him believe he was lawfully transporting weapons. 846 F.2d 1221, 1222 (9th Cir. 1988). The Ninth Circuit refused to allow the government to substitute nonclassified information
decision in the government’s hands, striking an appropriate balance and preventing truly harmful information from disclosure.

This approach would harmonize the state secrets privilege with the procedural calibration recognized by Congress in both FOIA and CIPA, rather than the current approach of treating most state secrets cases similarly to FOIA cases. Of course, there is a chance that the court orders the disclosure of information that should properly be kept secret. However, the Executive Branch still retains the ability to prevent disclosure as it does under CIPA: it may suffer a litigation disadvantage and continue to press forward or it may simply settle the matter. The government may be forced to bear the cost in cases where information really is properly privileged. But this is a reasonable balance. Under the current doctrine, harmed individuals bear the entire cost of courts’ reluctance in cases where the privilege is improperly upheld. The balancing approach will simply result in the government fairly compensating harmed individuals and altering its behavior to avoid illegality, thereby shifting some of the cost onto the public.

One example of what this approach would look like is *Horn v. Huddle*. The case originated as a *Bivens* suit against two CIA officials in which a former agent alleged that the CIA violated his Fourth Amendment rights. The government asserted the state secrets privilege to prevent disclosure of the CIA’s Inspector General reports. The privilege was originally upheld based on government affidavits asserting that it contained classified information concerning the identity of CIA agents. Yet, during the litigation, it was revealed that the CIA’s claim was false—the agent’s covert status had been lifted years before. With little justification, the DOJ continued to argue for the applicability of the state secrets privilege and sought to reclassify the material that had been previously declassified. While not explicitly considering the strength of the individual interest

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for use at trial because it was relevant and admissible for his defense. *Id.* at 1224. It appears that after failing to argue for substituted information, the government dismissed the prosecution. This is likely because prosecutors knew that if they proceeded with the case and chose not to disclose the information, central facts of the case would be found against the government.

173 For example, in *Reynolds*, the Court refused to conduct an in camera review of the requested official report. Years later, it was discovered that there were no state secrets revealed in the report and the government was simply trying to cover up its own negligence that resulted in three deaths. Kwoka, *supra* note 133, at 118, 146.


176 *Id.*

177 *Id.* at 176–77.

178 *Id.* at 179.
asserted, the court took into account the suspect nature of the government’s basis for invoking secrecy when deciding the appropriately probative procedures to use. The court conducted an in camera review, ordered the government to grant security clearances to the plaintiff’s counsel, and requested justifications for every redaction in the report. The court meaningfully scrutinized the government’s secrecy claims and imposed costly procedures to test their continued invocation of the privilege. Realizing it could not rely on the privilege to hide misconduct, the government settled the case shortly thereafter for $3 million.

Though the Horn case is a particularly egregious example of government abuse of the state secrets privilege, it provides an important illustration. Horn highlights how courts can ratchet up available procedures to shift the cost of secrecy onto the government the more dubious its claim to secrecy is. The ultimate result is simply that the government is incentivized to compensate individuals for the harm it created by violating the plaintiff’s rights.

CONCLUSION

The American public benefits from the government’s ability to shield national security information from view. Yet these benefits come at a cost. The public is denied its right to oversee government activity, as authorized through FOIA. Worse yet, individuals are deprived of their rights to redress harm suffered at the hands of executive officials asserting the state secrets privilege. As it currently operates, the state secrets privilege fails to meaningfully deter government misconduct. Given the real harms that might follow from revelation, this Essay proposes that a balance be struck between the compelling interests asserted by individuals in litigation involving the state secrets privilege and the government’s interest in national security. Using FOIA and CIPA as congressional guideposts, courts should evaluate the strength of the individual interest as compared to the interests vindicated by FOIA and CIPA when deciding the appropriate procedural cost to impose on the government. This approach will reasonably deter executive aggrandizement and respect the constitutional roles of Congress and the judiciary. This approach does not alter the nature of the privilege—once it is properly invoked, it is absolute—but merely increases the scrutiny applied to determine if it is properly invoked.

179 Id. at 181.
180 Id. at 182.