Security Blanket: The State Secrets Privilege Threat to Public Employment Rights

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Because it is so powerful and can trample legitimate claims against the government, the state secrets privilege “is not to be lightly invoked.”

Introduction

In January 2006, the Supreme Court—without comment—declined to hear an appeal by a former covert Central Intelligence Agency (CIA) officer who had accused the agency of race discrimination. Jeffrey Sterling, who is black, said his CIA supervisors denied him promotions based on his race, with one official telling him that he could not receive an assignment recruiting Iranian spies because he would draw too much attention as a “big black man speaking Farsi.” Sterling had appealed a decision by the Fourth Circuit Court of Appeals dismissing his case. The appellate court ruled that Sterling’s claim must fail because litigation would require the CIA to disclose highly classified information to defend itself. Although Sterling argued that any court considering his claim could have taken steps to protect classified information—in camera hearings, depositions at CIA headquarters, classification review of all relevant documents—the Fourth Circuit insisted that these procedures were still too risky and that the information could be leaked or revealed outright, endangering other covert agents.

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4. *Sterling*, 416 F.3d at 341 (holding that dismissal was warranted because covert agent would have to disclose nature and location of his employment in race discrimination suit).
5. *Id.* at 347.
6. *Id.* at 348 (concluding that special procedures “whatever they might be” carry inherent risks).
court did not discuss whether Sterling's claims could or should proceed with the use of any nonclassified data.\(^7\)

In a similar case, the U.S. District Court for the District of Columbia in 2004 dismissed a claim by Sibel Edmonds, a former Federal Bureau of Investigation (FBI) translator who brought a retaliation suit against the agency.\(^8\) Edmonds claimed she was fired after discovering alleged agency mishandling of documents related to the September 11, 2001, terrorist attacks.\(^9\) Then Attorney General John Ashcroft defended the lawsuit by claiming that Edmonds' case would reveal classified information damaging to national security and foreign diplomatic interests.\(^10\) The court was persuaded, ruling that Edmonds would have no alternative but to disclose privileged information if she pursued her claims—which included violations of First Amendment free speech rights.\(^11\) The U.S. Court of Appeals for the District of Columbia affirmed the dismissal of Edmonds' claim in a one-page ruling.\(^12\)

In both cases, the government used the state secrets privilege. The "state secrets privilege" is an evidentiary privilege that allows the government to block discovery of facts concerning a plaintiff's prima facie claim or the government's defense of the claim.\(^13\) The privilege, which is narrower than other privileges available to the government, originates in common law and was recognized formally in a 1953 Supreme Court case.\(^14\) The public policy behind court recognition of the privilege is to balance individual plaintiffs' rights in a host of actions against the government's interest in shielding sensitive information that could harm national military or diplomatic interests.\(^15\) The pendulum in recent years has swung too far toward government interest, with a lack of judicial review and executive accountability of agencies that invoke the privilege. Instead of being an evidentiary shield, the privilege often blocks claims in the pleading or pretrial stage—regardless of whether nonprivileged information in the same case could allow the claim to proceed. Courts

\(^7\) Id. at 345 (assuming that job duties of plaintiff and similarly situated co-workers must include sensitive data such as the recruitment of foreign espionage operatives).


\(^9\) Edmonds, 323 F. Supp. 2d at 67.

\(^10\) Id. at 75.

\(^11\) Id.

\(^12\) Edmonds v. Dep't of Justice, 161 Fed. Appx. 6 (D.C. Cir. 2005).


\(^14\) See Reynolds, 345 U.S. 1.

\(^15\) Id. at 8.
have allowed federal agencies to invoke the doctrine and essentially end actions by public employees, including plaintiffs’ claims of constitutional violations of free speech and unlawful surveillance, race and gender discrimination, and retaliation for government employee whistle-blowing.

Public employees cannot win cases, much less compel discovery, or file claims because they work for a federal agency that has, in most cases, met minimal procedural requirements for invoking the privilege. Courts quash cases that could be proven with discovery of nonclassified information. Although the privilege protects the nation’s security, many courts—without further inquiry into the issues of the cases—have allowed the privilege to undermine citizens’ rights. Government employees are forced to sacrifice their constitutional and statutory rights to be free of improper employment actions and decisions. Despite the secrets privilege’s tortured history, the courts considering the privilege have a simple remedy at hand: the state secrets privilege can be construed narrowly, after careful deliberation, using clearly defined and uniformly applied rules, and properly reviewed by the judiciary to maintain a balance against executive misuse and overuse.

This paper argues that expanding use and acceptance of minimal state secrets privilege standards is inconsistent with judicial principles that serve to balance the executive’s needs with individual rights of federal employees, and suggests alternatives that allow valid claims to move forward and protect both employees and the public good.

Part I traces the development of the privilege from a carefully defined discovery doctrine to a broadly applied shield. Part II discusses recent cases where federal courts barred the claims of agency employees based on narrow readings and incomplete applications of the state secrets privilege. Part III discusses the nation’s commitment to protecting public employees’ rights as they are particularly vulnerable to a potentially powerful employer, and how that commitment can be met with courts taking responsibility to judicially review employment decisions by all government agencies, even those that handle sensitive information. Part IV considers the challenges—and the successes—of proven alternatives that balance the government’s duty to safeguard secrets against individual rights to be secure in employment.

16. See El-Masri v. United States, No. 06-1667, 2007 WL 625130, at *13 (4th Cir. Mar. 2, 2007) (recognizing that the plaintiff “loses access to evidence that he needs to prosecute his action”).

17. See Kasza v. Browner, 133 F.3d 1159, 1168 (9th Cir. 1998) (dismissing lawsuit alleging hazardous waste at Air Force facility once state secrets privilege invoked without analysis of nonprivileged material in public records).
I. The History and Development of the State Secrets Privilege

The state secrets privilege is based on a series of legal precedents allowing the government to defend or dismiss legal cases that threaten military intelligence, foreign diplomacy, or national security.\(^\text{18}\) The state secrets privilege is just one of several recognized privileges specifically available to the government.\(^\text{19}\) Other privileges also protect government communications and information: a broader executive privilege also shields government information from discovery if disclosure would harm national interests.\(^\text{20}\) Several federal statutes require that certain government information remain confidential, even during litigation.\(^\text{21}\)

A. United States v. Reynolds Formally Recognize the Common Law Protection of Military and Other State Secrets

The privilege was first formally created and defined by the Supreme Court in a 1953 decision, United States v. Reynolds.\(^\text{22}\) The Reynolds Court announced how the government must use the state secrets privilege to defend itself in lawsuits.\(^\text{23}\) The widows of three civilian passengers killed in a military plane crash had sued over the deaths under the Tort Claims Act.\(^\text{24}\) The families, in a discovery request, sought information from the flight incident report that would help them prove their claims that the government was at fault.\(^\text{25}\) The secretary of the Air Force, invoking a generic “Claim of Privilege,” argued that the report included details of secret military equipment tested during the fatal flight, and invoked a common law privilege to block military secrets from discovery.\(^\text{26}\)

The Court announced steps that the government must take to protect sensitive information from plaintiff’s discovery: a formal claim of privilege is “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”\(^\text{27}\) The Court, however, stressed that the government’s privilege was “not to be lightly invoked,” and set a standard: the greater the need the plaintiff

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22. Reynolds, 345 U.S. at 7.
23. Id. at 7–8.
24. Id. at 2–3.
25. Id. at 3.
26. Id. at 6.
27. Id. at 7–8.
The Court also carved out a strong judicial role in examining the merits of the privilege invoked by stating that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” Following this line of reasoning, the Court upheld the claim of privilege over the accident report, but did not dismiss the widows’ suit. The Court remanded the case, suggesting that the cause of the aircraft crash could be determined not by mining privileged Air Force data, but through the available testimony of the surviving crew members. The case settled, but it ultimately stood as defining the state secrets privilege as an evidentiary privilege that may be invoked to shield validly sensitive evidence from discovery, but not to foreclose the suit entirely.

B. Reynolds Progeny Maintain Balance Between Plaintiff and Government Interests

Reynolds relied on war-era cases that dealt with military secrets and espionage, but subsequent cases, particularly actions over employment personnel, do not always involve such clear-cut threats. A case from the fallout of the Watergate-era presidential scandal reinforced the need to balance the government interest in preserving secrets with individual rights under the Constitution or statute. The Court found there was a “legitimate need” for the judiciary to weigh—and resolve—these competing interests.

When Watergate whistle-blower Daniel Ellsberg challenged the government’s eavesdropping on his personal correspondence, the District of Columbia Circuit Court ruled that the government must justify its defense to the charges: that the state secrets privilege prevented disclosure of names of the attorneys general who authorized electronic surveillance. In Ellsberg v. Mitchell, the appellate court, applying the

28. See id. at 7, 11 (holding the widow’s need for aircraft specifications was overcome by the testimony of surviving crew members).
29. Id. at 9–10.
30. Id. at 10.
31. Id. at 11–12.
33. Reynolds, 345 U.S. at 6–7 (relying on earlier cases where the government asserted a privilege during discovery or at trial over evidence that if disclosed would reveal specific military secrets); see also Pollen v. Ford Instrument Co., 108 F.2d 762, 763 (2d Cir. 1940); Bank Line Ltd. v. United States, 68 F. Supp. 587, 588 (S.D.N.Y. 1946).
35. Id. at 58.
36. Id. at 52.
Reynolds analysis, recognized the breadth of the state secrets privilege, but also cautioned that the privilege had “grave drawbacks” that called for the court’s care in applying it.\textsuperscript{37} Thus, the Ellsberg court followed Reynolds in applying a standard protecting only those secrets that present a “reasonable danger” if openly disclosed and outlining procedures for courts to “disentangle” sensitive information from non-privileged information, and thus allow a valid claim to go forward.\textsuperscript{38} The court ruled that the government, in seeking to block the names of attorneys general who had ordered wiretaps, had to justify its claim in as much detail as possible without undermining the privilege itself.\textsuperscript{39} This specificity was needed to keep the privilege from shielding any material not strictly necessary to protect national security.\textsuperscript{40}

Ellsberg also set standards for plaintiffs, who had to demonstrate the information sought was relevant to their case, and not merely a vehicle for getting the government to reveal secrets or settle cases under threat of their exposure.\textsuperscript{41} This case also recognized the chief arguments in favor of a broad privilege and answered them in turn.\textsuperscript{42} For instance, the government sought to block information under the “mosaic theory,” which argues that privilege should shield harmless or innocuous bits of information because they could be pieced together with other harmless or public pieces to reveal the full puzzle of a privileged secret.\textsuperscript{43} The Ellsberg court agreed, but noted nonetheless that a frequently used privilege required court scrutiny to preserve truly harmless information central to a case.\textsuperscript{44} Ellsberg also discussed proper review of documents, including a public record of the government’s declaration and indexing,\textsuperscript{45} and procedures for the court’s in camera inspection of the evidence, including a bar to the presence of plaintiff’s counsel.\textsuperscript{46}

Subsequent cases were resolved overwhelmingly in the government’s favor, but many skipped the full analysis of the principles that guided Reynolds and Ellsberg.\textsuperscript{47}

\textsuperscript{37} Id. at 58.
\textsuperscript{38} Id. at 57–58.
\textsuperscript{39} Id. at 64.
\textsuperscript{40} Id. at 57.
\textsuperscript{41} Id. at 58–59 & n.37.
\textsuperscript{42} Id. at 57.
\textsuperscript{43} Id. at 57 n.31.
\textsuperscript{44} See id. at 69 (stating that the court was “loathe to dispose of the case”).
\textsuperscript{45} See id. at 62 (explaining the correlation of sensitive materials with specific claims of privilege).
\textsuperscript{46} Id. at 61, 63.
\textsuperscript{47} See Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995) (holding that state secrets claims require “utmost deference” and are distinguished from ordinary forms of discovery); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (upholding pretrial dismissal of religious discrimination case once government made state secrets privilege claims).
II. From Reynolds to Sterling: The Growing Deference to the Executive and Diminishing Application of Reynolds

The nature of opinions in state secrets privilege cases has changed, moving from full consideration of the claims involved and the tests required of plaintiffs and government defendants to briefly worded edicts in overwhelming support of the privilege.48 Only a few cases have denied the secrets privilege, either because the court found an obvious weakness in the government’s claim or the court had a strong interest in giving plaintiffs some avenue to have their claims heard.49 The state secrets privilege, thus, now is construed more broadly than in Reynolds, with a majority of courts deeming the formal invocation as the main consideration in allowing cases to proceed.50 These rulings increasingly defer to the executive’s representation of the need for the privilege rather than assessing the validity of claim through judicial deliberations.51

Although the privilege is evidentiary, such holdings allow the government to not only block discovery, but to prematurely dismiss valid cases at the pleading stage.52 Sterling and other cases like it claim to follow Reynolds,53 but actually depart from its basic roadmap by granting far greater deference to the executive, reciting fewer of the facts, or relying simply on agency declarations rather than on the material examined by the agency in formulating its decisions.54 Reynolds and its early progeny set a precedent for executive control of classified documents in legal proceedings: that the courts should defer to government officials claiming that discoverable information

48. See Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991) (dismissing tort claim in two-page opinion that failed to distinguish records of government driver and vehicle maintenance as state secrets).
49. See Halpern v. United States, 258 F.2d 36, 43–44 (2d Cir. 1958) (stating that lawsuit over patent of classified equipment could proceed in camera if it could be carried out without risk of divulging secret information).
50. See Black, 62 F.3d at 1119 (holding that director of CIA properly asserted state secrets privilege); Zuckerbraun, 935 F.2d at 547 (deciding state secrets privilege was properly invoked by secretary of the Navy in wrongful death of sailor).
51. See Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) [hereinafter Halkin I] (explaining “[c]ourts should accord the ‘utmost deference’ to executive assertions of privilege [on] grounds of military or diplomatic secrets” (citation omitted)).
52. Compare Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (dismissing government defense contractor’s suit at pleading stage because state secrets would be inevitably revealed), with McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1022 (Fed. Cir. 2003) (dismissing defense contractor suit after discovery revealed that plaintiff’s claim could not be proven with nonprivileged evidence).
53. Sterling, 416 F.3d at 342; Zuckerbraun, 935 F.2d at 547.
will harm national security interests. These early cases, nonetheless, specifically announced that despite this deference, executive claims are never absolute, and gave varied reasons for the need for balance. Courts particularly looked to constitutional principles that protect citizens from government searches and censorship. Just as standards evolved to define and caution the government against “unreasonable” searches or allow it to regulate “impermissible” speech, it was just as necessary to put the executive on notice that along with the privilege of shielding secrets comes the responsibility to make claims in a proper manner and appropriate context.

A. Formal Invocation Becomes Dispositive in State Secrets Analysis

The formal invocation was once only a factor in applying the privilege, but now courts are ending their analysis once the privilege is formally invoked under the elements set out in Reynolds.

Reynolds began its analysis with the description of formal invocation, and instructed that once a court accepts the government’s argument, it must remove privileged material from litigation. Reynolds, however, also held that courts must then decide how the unavailable material affects the future of the case. Subsequent cases have interpreted this holding to mean that the government can stop a plaintiff’s case in its tracks if the government, rather than the court, is convinced that privileged information is central to the plaintiff’s claims.

The courts extending the privilege on formal invocation usually did not take into account whether the executive had already disseminated or admitted the facts sought by the plaintiff, whether the facts sought actually contained legitimate state secrets, or whether court procedures could protect the information from being publicly presented in a harmful manner. These courts also dismissed plaintiff claims without examining other evidence of the claim or attempting to disentangle sensitive evidence from evidence that would not be a “reasonable danger” to national security or military interests.

Courts according greater deference to the executive have engaged in another analytical departure from Reynolds: reviewing agency dec-

55. Id. at 103–04.
57. Id. at 12 (stating that utmost deference amounts to “no standard at all”).
58. Id.
59. Tilden v. Tenet, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000) (“Once the privilege is invoked, the role of the court is a limited one.”).
60. Reynolds, 345 U.S. at 10–11.
61. Id. at 11.
62. See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984) (construing doctrine to hold that a party’s need for the information is not a factor in applying properly invoked privilege).
larations instead of underlying material or evidence that can assist the court in validating the claim of privilege or disentangling nonsensitive information.63

B. “Secrets” Opinions Omit Instructive Facts

Recent cases not only give greater deference to the executive by relying more on agency declarations, but also undertake less factual analysis.64 An often-confusing part of the Reynolds analysis was the holding that the courts must examine and determine the facts, all without revealing the very thing that the executive seeks to protect.65 The case further drives such an analytical approach with its holding that secrets at the core of a plaintiff’s cases can and must be shielded, even from court inspection, and especially from public inspection.66 Of course, courts face a dilemma in explaining how they arrive at a decision without undermining that decision by revealing sensitive facts.67

In contrast, earlier cases managed to provide a needed transparency for understanding complicated analyses. In the Reynolds opinion, the Supreme Court devoted a significant portion to the facts of the case—unlike more recent cases where opinions are brief to the point of adding no additional understanding of the courts’ reasoning.68 In 1980, the Fourth Circuit, in a rehearing en banc, granted the government a state secrets privilege and dismissed a plaintiff’s claim over interference with his government contract; however, this court was most instructive in the prior opinion that had remanded the case in an attempt to save the plaintiff’s claim.69 In Farnsworth Cannon, Inc. v. Grimes, the court described facts to highlight an important distinction in the case: the formation of a contract versus the contents of a contract.70 The plaintiff sued a government employee for the tortious interference of a contract with the Department of the Navy.71 The Navy Secretary sought to block discovery of documents related to the contracts, and in effect dismiss

63. See Bowles, 950 F.2d at 156 (finding secretary of state properly invoked state secrets privilege without defining “personal determination”); see also Ellsberg, 709 F.2d at 57 n.23 (attorney general’s claim of privilege failed when court lacked “explicit representation” that he personally reviewed material he sought to protect (citing Kinoy v. Mitchell, 67 F.R.D. 1, 8–10 (S.D.N.Y. 1975))).
64. Tilden, 140 F. Supp. 2d at 626 (“It is not for a court to second-guess the assertion of privilege.”); Black, 62 F.3d at 1119 (limiting examination to government declarations); but see ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980) (reasoning that balance compels courts to examine documents allegedly covered by privilege to determine whether government has properly described them as secret).
65. Reynolds, 345 U.S. at 8.
66. See id.
67. Ellsberg, 709 F.2d at 68.
68. See, e.g., Tilden, 140 F. Supp. 2d 626; Bowles, 950 F.2d 154.
69. Farnsworth, 635 F.2d at 280–81 (Phillips, J., dissenting).
70. Id. at 268–70.
71. Id. at 268.
the tort case. The appellate court ultimately agreed with the district court action granting the defendant’s motion for summary judgment, but the initial analysis in Farnsworth explains how the plaintiff’s claim could possibly be allowed to proceed despite the unavailable Navy documents. The plaintiff contractor alleged that the defendant government employee had an affair with the plaintiff’s wife, married her after their divorce, and used his influence with the government to cancel the plaintiff’s Navy contracts. The appellate court delved into these seemingly soap opera–like facts to explain that the heart of the plaintiff’s claim rested on the conduct and motivation of the defendant employee—which the court distinguished from the contents and nature of the contracts and the secrets they might contain. Arguably this opinion is distinguishable from an opinion delving into military secrets, but a more rigorous review of the plaintiff’s claim could shed light on the court’s reason for denying or defending it.

C. The Mosaic Theory Encroaches on “Reasonable Danger” Standards

The government has advanced several major arguments for an expansive interpretation of state secrets privilege. First, the government argues that only the executive branch in the form of the intelligence community possesses the expertise and training to decide what needs to be classified. In conjunction with this argument, the government has been most successful in maintaining that the “reasonable danger” standard set out under Reynolds must acknowledge the “mosaic” theory. The mosaic theory states that small, seemingly unconnected pieces of information can become dangerous if pieced together by the nation’s enemies. Plaintiffs have countered, sometimes successfully, that the mosaic theory taken to extremes could seem to justify almost anything being privileged under the doctrine. Nonetheless, most courts have relied on the well-received mosaic theory—that state enemies are capable

72. Id. at 268–69.
73. Id. at 270–71.
74. Id. at 269.
75. Id. at 274; see also id. at 282 (Phillips, J., dissenting) (applying initial analysis that led to remand).
77. See id. at 177, 180 (agreeing that if agency director releases locations of research, then enemies of the state could deduce protected identities of individual researchers); see also David E. Pozen, Note, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L.J. 628 (2005).
78. See Muniz v. Meese, 115 F.R.D. 63, 65 (D.D.C. 1987) (rejecting arguments by the Drug Enforcement Agency (DEA) that allowing discovery of employment records in Title VII suit filed by Hispanic agents would allow anyone to “piece together” agency’s worldwide structure and capabilities); see also Pozen, supra note 77, at 660.
of piecing together even harmless bits of information revealed during a case—to uphold summary dismissals of plaintiff claims.\footnote{79. See \textit{Halkin I}, 598 F.2d at 13 (when agency officials invoked the secrets privilege, evidence plaintiffs needed to prove their case remained in the hands of the government).}

Some decisions go as far as to say that courts cannot order the disentanglement of this information from other classified information.\footnote{80. See \textit{id.} at 8 (noting that “[t]housands of bits and pieces of . . . information” is part of a classified mosaic); see also \textit{Kasza}, 133 F.3d at 1166.} For example, the District of Columbia Circuit Court, relying on the “reasonable danger” standard from \textit{Reynolds}, concluded that disclosing the mere fact that the defendant National Security Agency (NSA) had intercepted the plaintiffs’ foreign communications was enough to pose a danger to national security.\footnote{81. \textit{Halkin I}, 598 F.2d at 8–9.} The court, in \textit{Halkin v. Helms}, reached this conclusion by reasoning that if the nation’s enemies could identify which of plaintiffs’ communications were acquired by the NSA, these enemies could gather valuable information about which circuits the NSA monitors.\footnote{82. \textit{Id.} at 8.} The court further said that any information about the senders or recipients of acquired messages could allow foreign governments or organizations to deduce the “focus and concerns of our nation’s intelligence agencies.”\footnote{83. \textit{Id.} at 177.}

The Supreme Court also is willing to adopt the mosaic analysis, despite the theory’s shortcomings. In \textit{Central Intelligence Agency v. Sims}, the Court ruled that a CIA director could refuse to disclose the names of researchers on an intelligence project and their institutions.\footnote{84. \textit{Sims}, 471 U.S. at 181.} Though the case involved the government’s compliance with the Freedom of Information Act, which has rules about document disclosures separate from common evidence cases, the Court applied an analysis similar to \textit{Halkin I} and other cases using the mosaic theory as a basis for granting the state secrets privilege.\footnote{85. See generally \textit{id.}} The plaintiff had sued under the statute for access to information about an alleged brainwashing and interrogation project known as MKULTRA.\footnote{86. \textit{Id.} at 162–64.} The government argued that an observer who is knowledgeable about particular intelligence research projects could learn that the research was performed at a certain institution and thus deduce the identities of the individual researchers, which it sought to protect.\footnote{87. \textit{Id.} at 177.} The court accepted the argument without making a distinction between information that causes harm or merely imports secret information.\footnote{88. \textit{Id.} at 181.}
the case noted that the majority had reached its opinions about this capability without other supporting details or facts. 89

D. Courts Hold That Judiciary Lacks Expertise to Properly Balance Plaintiff and Government Interests

Supporters of the privilege successfully argue that the executive branch, particularly the intelligence communities, alone possess the expertise and training to decide what needs to be classified, much more so than court officials. An early case accepting this theory for a case dismissal is Department of the Navy v. Egan. 90 A Navy employee sued when he was removed from his position at a submarine servicing facility after his security clearance was revoked. 91 The plaintiff argued he was entitled to Merit Systems Protection Board review of the substantive issues underlying his revoked security clearance. 92 The Supreme Court, deferring to the Court of Appeals for the Federal Circuit’s ruling against the employee, declared that an outside, non-expert body could not reasonably review the substance of a security clearance decision or determine an acceptable margin of error in assessing the potential risk of granting a clearance to the wrong person. 93

This theory has continued in a line of cases that may ultimately affect public employees in sensitive positions. In 2005, the District of Columbia Appeals Court held that a “top secret” security clearance is a discretionary function of the executive branch and involves the complex area of foreign relations and national security. 94 The plaintiff in Bennett v. Chertoff also had a Title VII action against the Transportation Security Administration (TSA) and Department of Defense (DoD), which had determined she was unsuitable for federal employment independent of the security clearance revocation. 95 The court, considering pretrial discovery issues, held that employment actions based on denial of security clearance are not subject to judicial review, including under Title VII. 96

The Tilden case presented a one-sided concern when dismissing the case in whole at the possibility of privileged information. 97 The Tilden court said that the nation’s security was too important to entrust to a plaintiff’s lawyer’s good faith, especially if obligation to a client could interfere with a pledge of secrecy, or a protective order. 98 The court

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89. Id. at 193–194.
91. Id. at 525.
92. Id. at 522; 5 U.S.C. §§ 7513(d), 7532(a), (c)(3).
93. Egan, 484 U.S. at 530–33.
94. See Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005).
95. Id.
96. Id.
97. Tilden, 140 F. Supp. 2d at 627.
98. Id. at 626 (quoting Ellsberg, 709 F.2d at 61).
made no similar analysis regarding the potential harm of an executive officer asserting a privilege to protect an agency from embarrassment or exposure of wrongdoing.99

*Sterling*—in its analysis of court expertise in determining privileged state secrets—turned to the concept of “graymail.”100 *Sterling* reasoned that “graymail,” a practice where plaintiffs purposely file suits that involve classified information in order to induce the government to settle a case out of fear that litigation will expose state secrets, is yet another challenge to the judiciary’s ability to disentangle sensitive information.101

Thus, executive branch officials receive a level of deference in court opinions not granted to plaintiffs, their counsel, judges and court personnel charged with adjudicating these cases.

E. Recent Cases: The Security Blanket of *Sterling* and *Edmonds*

As the courts moved away from the rigorous analysis of *Reynolds* and its immediate progeny, recent cases such as *Sterling* highlight the impact of national security concerns on discrimination claims and other employment actions.102 In these cases, the courts halt plaintiff’s litigation at the outset because the government deems certain facts to be secrets and to be central to the plaintiff employee’s case.103 From there, the court reasoned that the plaintiffs could not create any risk to national security, regardless of how strong their claims of individual rights violations.104

In this decade, government employees suing law enforcement and intelligence agencies such as the CIA and the FBI have asserted basic constitutional rights with little success.105 Once their employers asserted a state secrets privilege, the courts took few steps to save the claims.106 Instead, the courts based their rulings against the plaintiffs on an analysis heavily weighted to the government employer—a departure from the care used in deciding civil rights violations against other employees. For instance, in race and gender discrimination cases against the CIA, the courts “chose” the necessary evil of safeguarding the potential, rather than assured, release of sensitive information.107 The plaintiff employees mainly sought government

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99. *Id.*
100. *Sterling*, 416 F.3d at 344.
101. *See id.* (implying that if courts risked the release of sensitive information, then plaintiffs would have increased incentives for graymail suits).
102. *See id.*
103. *Id.* at 348.
104. *Id.*
105. *See, e.g.*, *Tilden*, 140 F. Supp. 2d at 627 (dismissing gender discrimination claim against the CIA in a briefly worded opinion).
106. *Id.*
107. *Id.*
records related to job performance and supervisor decision making, and accordingly presented methods the courts could have used to permit discovery of this pertinent material. In comparison to the rigor Reynolds employed balancing the need to protect secret military weapons information and giving grieving widows their day in court, Sterling took few steps to consider how the judiciary might ever uncover discrimination in an agency such as the CIA. Considering that Jeffrey Sterling’s case indeed turned on how his employers regarded and assessed his job performance as a covert agent presumably involved in activities meant to be secret, the court asserted that CIA employment decisions are inherently sensitive, and dismissed the case. The Sterling court’s point about the risk of delving into the promotions, assignments, and comparative duties of secret agents is well-taken, but the court never discussed the safeguards posed by the plaintiff. Such considerations are legally available and in keeping with the basic instruction of Reynolds. If courts proceed in departing from a holistic analysis of the state secrets privilege, cases such as Sterling—in resting on the natural conclusion that any fact about espionage, the military, or homeland security must be shielded to the detriment of the plaintiff—will skip the task of balancing rights and decline to investigate or consider viable alternatives for safeguarding secrets in such unique cases. Thus, entire categories of plaintiffs are never able to challenge certain government agencies’ violations of important rights.

In viewing the cases that departed from Reynolds, the analysis, rather than the holding, is more instructive. The analysis of other legal claims, from torts to contract interference to free speech and search and seizure violations, demonstrates the increasingly negative implications for public employees bringing claims against their government employers.

With the sum of changes in state secrets analysis, public employees, who ordinarily would be protected from discrimination or retaliation, cannot win cases, compel discovery, or file claims because they work for a federal agency that need only meet procedural requirements in invoking the privilege. Concerns for these employees will only increase as the executive’s willingness to use this shield

108. Id. at 626; Sterling, 416 F.3d. at 342.
110. See Sterling, 416 F.3d at 346, 348 (holding that “litigation centering around a covert agent’s assignments, evaluations, and colleagues” directly threatens the revealing of state secrets).
111. Id. at 347.
112. Reynolds, 345 U.S. at 9–11.
113. See Sterling, 416 F.3d. at 348 (opining that, in fact, any special procedures would increase the opportunity for leaks).
is increasing, and even reaching back into other contexts and other
times.114

III. The Duty to Ensure Employment Rights and
Judicially Review Employment Decisions

A. Ensuring the Rights of Public Employees

Opinions in major discrimination cases demonstrate the relevant
value attached to public employee rights in two ways: (a) courts recog-
nize the employers’ added power as an agent of the government and
(b) courts recognize, in rulings on evidence questions, the advantage
that an employer, especially a government employer, has in the posses-
sion of documents and records that are relevant, and often crucial, to
plaintiff’s employment actions.

The U.S. Constitution, Congress, state and local statutes, and the
common law share a considerable history of protecting public employee
rights from government employer abuses. For example, the Civil Ser-
vice Reform Act (CSRA) made major changes in the federal civil service,
reaffirming the nation’s commitment to equal opportunity and freedom
from unfair personnel actions.115 Since the CSRA’s enactment, these
principles have been incorporated into the protections of Title VII of the
Civil Rights Act of 1964, the Equal Pay Act, and other employee antibias
laws.116

Most of these protections, because of the state action doctrine, are
rooted firmly in the Constitution and in some cases unavailable to pri-
vately employed workers. For instance, the Constitution limits the au-
thority of a public employer to test employees for drugs.117 Also, the
Fourth Amendment imposes a standard of reasonableness on public
employers who want to justify warrantless intrusions on employees’
private spaces and personal belongings in the workplace.118 Thus, con-
trary to employment “at-will” principles followed by the majority of
private employers, public employees receive specific due process rights

114. In 2001, President George W. Bush signed Executive Order No. 13233, allowing
former presidents, and the offspring and descendants of former presidents, to invoke
the state secrets privilege to shield records from past tenures. The order specifically cited
which held that a former president could assert executive privilege. The case, however,
applied to a 1978 law limited to communications concerning how a president shaped
policies and made decisions, rather than the broad application sought in the order. Exec.
post-accident drug tests were reasonable under the Fourth Amendment because the safe
operation of trains was enough to justify the invasion of individual privacy rights); see
also Capua v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986) (holding that mass,
unannounced testing without suspicion violated constitutional protections).
as long as the government’s immediate interest in firing the employee does not outweigh the employee’s interest in a fair hearing. The Court in Cleveland Board of Education v. Loudermill, as other courts have, reasoned that public employees should be able to use the due process clause—which generally protects any citizen from arbitrary government actions—as a shield against unfair actions by their government employers. In contrast, private employees lack procedural rights unless they bargain for them in individual or collective agreements with the employer.

In First Amendment cases, the public employee gets similar treatment, with courts noting their judicial duty to balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

Courts likewise should fully weigh the balance between executive evidentiary privileges and individual employee rights. In looking at the relative value we attach to the rights and the privilege, the rights are clearly, progressively articulated by Congress, the courts, and the framers, compared to the increasingly vague secrets doctrine. The timing of many employment discrimination cases shows that these values also embody important legal, political, and social history of the United States. Current doctrine can be clouded by the uncertainty and fear of terrorism threats from abroad, but a nation cannot stand united by tearing down the bedrock principles that make this society strong and envied.

Title VII is a comprehensive response to employee discrimination, the statute allowing the federal courts, along with the Equal Employment Opportunity Commission, to review adverse hirings, firings, promotions, and retaliations. Federal employees are treated separately, yet the principles are parallel. The special role of public

119. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985) (holding that a “tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his [version of events]).
120. Id.
121. See Bishop v. Wood, 426 U.S. 341, 344–45 (1976) (holding that public employees, even those without a property interest in employment, have a protected liberty interest in continued pursuit of their occupations).
123. See El-Masri, 2007 WL 625130, at *5 (explaining that Reynolds leaves the judiciary “firmly in control” of deciding whether executive’s assertion of claim is valid).
125. Id. §§ 2000e–2000e-16.
126. See West v. Gibson, 527 U.S. 212, 218–19 (1999) (holding “[e]lection 717’s general purpose is to remedy discrimination in federal employment . . . by encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government
employees in furthering the public good is articulated in cases that protect them from government intrusion despite being in the government’s employ. This role is evident in the public policy rationales for protecting employees.\textsuperscript{127}

Undermining these protections for public employees ironically would increase the authority of the government to use public employees to violate the law, and shield the government from the scrutiny that only a diligent, watchful public employee can provide. Detecting and fighting threats depend on expert, securely staffed agencies with employees unafraid to do their jobs and hold their coworkers and employers accountable for misdeeds and mismanagement.

B. Evidentiary Guarantees for Public Employees

The employment context of the state secrets privilege raises important evidentiary concerns for plaintiffs seeking to preserve their claims against the government. For instance, discovery is an important procedure in an employment action because the employer has much of the relevant information. In \textit{Zubulake v. UBS Warburg LLC}, the district court ordered an employer to produce all relevant e-mails at its own expense, which the employer estimated to be about $175,000.00, not counting employee time.\textsuperscript{128} Courts also recognize that cases turn on these discoverable documents.\textsuperscript{129} Others make specific rulings on personnel records, ruling them discoverable despite the confidences they contain.\textsuperscript{130}

For example, in \textit{Pleasants v. Allbaugh}, the District of Columbia District Court held that a FEMA employee suing over race discrimination should get similar access.\textsuperscript{131} Among the information sought was whether other employees were assigned extra duties, received upgraded positions, or received promotions to upper level positions, and whether

\textsuperscript{127. See Brown v. Geo. Servs. Admin., 425 U.S. 820, 829–30 (1976) (holding that section 717(a) of the Civil Rights Act of 1964 requires that personnel actions against “federal employees and applicants for federal employment ‘shall be made free from any discrimination based on race, color, religion, sex, or national origin’” (quoting 42 U.S.C. § 2000e-16(a))).}

\textsuperscript{128. 216 F.R.D. 280 (S.D.N.Y. 2003).}

\textsuperscript{129. See Weinstock v. Columbia Univ., No. 95 Civ. 0569, 1996 U.S. Dist. LEXIS 16779, at *24 (S.D.N.Y. 1996) (finding that a professor denied tenure could not prove a discrimination case or counter the university’s defense-proffered reasons for denial of tenure without disclosure of the requested materials).}

\textsuperscript{130. See Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (holding that the heart of the employee’s claim was a comparison between her qualifications and job performance and those of other employees, and granting employee the right to the information).}

\textsuperscript{131. 208 F.R.D. 7, 12–13 (D.D.C. 2002).}
others had complained of racial discrimination within the employee’s division. The court did limit the information the employee sought, as required by a federal privacy law.

Courts also have found summary judgments particularly inappropriate in discrimination cases. The Eleventh Circuit in 1987 held that “summary judgment is not a proper vehicle for resolving claims of employment discrimination [because they] often turn on an employer’s motivation and intent,” issues of fact. Employees are often left without direct evidence of discrimination, and thus can and must rely on motivation and intent being proven through circumstantial evidence. This type of evidence, and the burden-shifting that was dictated by the court, created a task squarely for the jury.

C. Duty and Right of Judicial Review

As with employment protections, the authority for judicial review is found in the Constitution. Court cases have reinforced this justification throughout history, despite current reluctance to impose higher standards on executive agencies. The hesitation seen in state secrets privilege challenges clearly conflicts with the framers’ intent, and, in many cases, the ultimate rights of individuals are not fully or independently balanced against state action. Key arguments for the courts assuming this traditionally held task can be gleaned from some cases.

The judicial role is essential to fundamental rules of fairness, preserving the rule of law, and checking the power of unelected agencies. In Webster v. Doe, the Supreme Court granted limited review of a case of a CIA agent fired over sexual orientation. The Supreme Court found that although a statute precluded judicial review of the CIA’s decision over security clearances and hiring, no statute could interfere with the judiciary’s review of the employee’s constitutional rights. The Court reasoned that Congress would have to be clear in any intent to block judicial review of constitutional claims. Courts have stated

132. See id. (ruling that The Privacy Act, 5 U.S.C. § 552a, did not prevent discovery but required a protective order).
133. See id. at 13–15 (employee’s motion was denied to the extent it sought discovery of certain individual details, performance evaluations, information about lower level positions, racial discrimination suits outside the employee’s division, and selection of the division chief).
136. See Hayden v. First Nat’l Bank of Mt. Pleasant, 595 F.2d 994, 997 (5th Cir. 1979) (finding that in employment discrimination cases the use of summary judgment is “especially questionable”).
137. See Marbury v. Madison, 5 U.S. 137, 170 (1803) (defining judicial review as the natural province of courts).
139. Id. at 603 (referencing 5 U.S.C. § 706).
140. See id. (holding that 5 U.S.C. § 102(c) may not be read “to exclude review of constitutional claims”); see also Johnson v. Robison, 415 U.S. 361, 373 (1974).
that such “heightened showing” requirements protect citizens who would challenge a federal statute that denies their day in court over constitutional claims.  

Some circuit courts are even more adamant that the Constitution itself requires review, regardless of any law. The District of Columbia Circuit considered the scenario of a president who has unlimited and judicially “unreviewable” constitutional power to determine which executive branch employees will be given access to the nation’s secrets—adding that “[n]o one would suggest the government therefore could, despite the Fourth Amendment, conduct random searches without warrants in the hope of uncovering information about employees seeking security clearances.”

In *National Federation of Federal Employees v. Greenberg*, after several espionage scandals, the department investigated civilian employees who held “secret” security clearances. The department asked employees to complete questionnaires regarding their backgrounds, and threatened the employees with the loss of clearances and referrals to law enforcement authorities. The civilians sued, seeking an injunction on the use of the questions, claiming violations of rights of privacy and self-incrimination. The district court granted an injunction against the department’s inquiry and the department appealed. The appellate court vacated the injunction, finding that the allegations by the citizens were likely to fail because the Fifth Amendment did not apply to questionnaires that were not part of a criminal prosecution. Despite this outcome against the employees, the court held that issues of substance—the constitutionality of the government’s methods in gathering information—required the court to disregard the government’s argument that *Egan* applied, barring the court from considering the plaintiffs’ constitutional case to begin with. The appellate court, however, in its own words refused to “endorse untenable, and far-reaching, restrictions on judicial review of governmental actions.”

The case is instructive because it reveals that such courts could follow the same reasoning to hold that government activity, such as unconstitutional searches and seizures, are immune from judicial

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143. *Id.* at 290.
144. *Id.* at 287.
145. *Id.*
146. *Id.* at 287–88.
147. *Id.* at 288.
148. *Id.* at 293.
149. *Id.* at 290.
150. *Id.*
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 the court added that much of the “discretion gives rise to judicial deference, not immunity from . . . review of constitutional claims.” Furthermore, in several cases, courts have declined a blanket ruling that certain government actions always are exempt from judicial review.

IV. Solutions: Balancing Individual Rights and Government Duty

Similarly, plaintiffs facing claims of state secrets privilege argue that no government evidentiary privilege is absolute. Broader privileges allow courts to conduct in-camera inspections to decide what information should be released in the interests of justice for individuals despite the government’s claims. Courts will order documents submitted for in-camera review, keep parts that are discoverable, and redact parts it finds to be privileged or shield them with protective orders.

This view is important as courts, once accepting the privilege, also must consider whether and how a case will proceed without the excluded evidence. Courts applying the state secrets privilege to employment cases can and should look to alternatives to blanket dismissals of employee claims. The privilege itself has and can be construed narrowly, after careful deliberation, using clearly defined and uniformly applied rules. The judiciary can properly maintain a balance against executive misuse and overuse by using procedures to protect sensitive data, which include in-camera review and redacted claims. Some courts have allowed plaintiff cases to proceed, specifically identifying viable safeguards.

A. Higher Scrutiny of Privilege Declarations

The judiciary should increase standards for executive branch invocation of the privilege. The state secrets privilege is a judicially created privilege that implies a measure of responsibility. Courts are

151. Id.
152. Id.
154. Nixon, 418 U.S. at 706 n.16.
155. Zagel, supra note 13, at 885–86.
156. Fallon, supra note 54, at 110.
160. Halpern, 258 F.2d at 41; see also In re United States, 872 F.2d at 478 (discussing bench trials, protective orders, seals, and other mechanisms that may be employed to protect sensitive information).
ending litigation at a point where there should be further inquiry as to whether the judiciary, or even the legislature, actually agrees with the executive that the information is truly classified. New cases can consider the higher standard for proper invocation of national security privilege, which goes beyond accepting the executive’s formal declaration.\textsuperscript{161} The \textit{In re United States} court considered whether the government could invoke the state secrets privilege even before responding to the plaintiff’s complaint and discovery requests.\textsuperscript{162} The answer was “no.”\textsuperscript{163} The plaintiffs were targets of an FBI plan that falsely named them as government informants.\textsuperscript{164} The government, as in other contrary cases, argued that state secrets were at the core of both the plaintiff’s proof and its defense.\textsuperscript{165} Reviewing a twenty-eight page classified declaration, the court declared the \textit{Reynolds} guidelines “substantially intact,” and held that “[m]ere compliance with the formal requirements . . . is not enough.”\textsuperscript{166} It warned against the judiciary “inappropriately” abandoning its role in assessing the validity of the secrets privilege claim.\textsuperscript{167} The court also recognized important arguments against this role and addressed them. In response to the mosaic theory of protecting innocuous information that if pieced together with other data constitutes a secret, the court said it would protect information that could be harmful especially if disclosed to a “‘sophisticated intelligence analyst.’”\textsuperscript{168} In contrast to arguments that the modern, complex world requires the broadest definition of secret, even beyond that offered by \textit{Reynolds},\textsuperscript{169} the \textit{In re United States} court said secrets should include threats to diplomatic relations and espionage tactics.\textsuperscript{170} The court also recognized that only state secrets at the core of plaintiff’s claim would require the claim’s dismissal.\textsuperscript{171} The court had the foresight to caution against the government’s “unilateral assertion” that privilege was at the core of the claim.\textsuperscript{172}

\textbf{B. Disentangling Nonsensitive Information}

Courts can, whenever possible, assure that sensitive information is disentangled from nonsensitive information to allow for its release, and

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161. \textit{Ellsberg}, 709 F.2d at 58. \\
162. 872 F.2d at 474. \\
163. \textit{Id}. \\
164. \textit{Id}. \\
165. \textit{Id}. \\
166. \textit{Id}. at 475. \\
167. \textit{Id}. \\
168. \textit{Id}. \\
169. 345 U.S. at 11. \\
170. 872 F.2d at 475. \\
171. \textit{Id}. at 476. \\
172. \textit{Id}. at 477 (holding writ of mandamus is extraordinary and drastic remedy).
\end{flushleft}
preserve cases.\textsuperscript{173} Courts can acknowledge deference to executive experts in national security, but nonetheless resolve classification issues.\textsuperscript{174} 

\textit{Ellsberg} and \textit{In re United States} made it clear that because of the privilege’s broad reach, sensitive information must be disentangled from non-sensitive information.\textsuperscript{175} Some lower courts have made the attempt to map out such an analysis, only to have an appellate court ultimately accept the government’s invocation of the secrets doctrine.\textsuperscript{176} For example, courts can separate allegedly “classified” information that is already in the public realm or simply not germane to the plaintiff’s case.\textsuperscript{177} The U.S. District Court for the Northern District of California rejected a Justice Department bid to use the state secrets privilege to “categorically” dismiss an Internet-monitoring case in which a private company helped the government mine data from customer transactions.\textsuperscript{178} The district court held that the department had “opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.”\textsuperscript{179} In this case, the government admitted monitoring communications where officials had reason to believe that one party was a member of or affiliated with Al Qaeda.\textsuperscript{180} The court concluded that this disclosure about the possible methods of surveillance prevented the government from asserting that the state secrets privilege should shield any court inquiry into AT&T’s conduct.\textsuperscript{181} The court reasoned that this inquiry would not necessarily help an actual or potential terrorist or otherwise harm national security.\textsuperscript{182} 

Public employees who have evidentiary burdens such as in discrimination claims rely on this review as a threshold, because, otherwise, courts would have no recourse but to dismiss cases for failure to state a claim.\textsuperscript{183} Although evidentiary burdens for adverse employment action shift back and forth under the \textit{McDonnell Douglas} framework, the plaintiff usually bears “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.”\textsuperscript{184} Thus, courts should assist plaintiffs in the disentanglement of

\begin{addendum}
\item 173. \textit{Ellsberg}, 709 F.2d at 57.
\item 174. \textit{Id.} at 58.
\item 175. \textit{Ellsberg}, 709 F.2d at 58; \textit{In re United States}, 872 F.2d at 474.
\item 176. See ACLU v. Nat’l Sec. Agency/Central Sec. Serv., 467 F.3d 590 (6th Cir. 2006) (granting government’s stay of injunction despite district court’s ruling that secrets privilege did not apply because plaintiff’s claim neither relied on nor requested classified information).
\item 177. See Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006).
\item 178. \textit{Id.} at 989–90.
\item 179. \textit{Id.} at 996.
\item 180. \textit{Id.} at 987.
\item 181. \textit{Id.} at 996.
\item 182. \textit{Id.}
\item 184. \textit{Id.} at 143 (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).
\end{addendum}
nonsensitive data to reach valid claims that do not compromise government secrets.

C. Applying In Camera Review

Courts can make efficient and effective use of in camera review and redactions of classified information in deciding the merits of a plaintiff’s claim. *Ellsberg* held that in camera review of privileged material is obligatory.185 Following this precedent, the court in *Jabara v. Webster* approved the use of in camera material to settle the claim, remanding the case to district court.186 The Court in *United States v. Zolin* authorized in camera review despite reservations that a blanket in camera review rule could “permit opponents of the privilege to engage in groundless fishing expeditions.”187 The *Zolin* court ruled that in appropriate circumstances, the in camera review of an alleged attorney-client privilege could be used to determine whether the communications fell within a crime-fraud exception.188

Some courts have held that a trial judge must conduct an in camera review of privileged communications when a party has established a reasonable probability that the privileged communications contain information that is necessary to the case.189 Courts also answered concerns about the mosaic theory, arguing the possibility of keeping state secrets from being implied. The Seventh Circuit, in *ACLU v. Brown*, held that the plaintiffs’ need for information in discovery “compels” courts to conduct in camera review of the documents the government seeks to protect, determining “whether the records are properly classified [as] ‘secret.’”190

The standards for in-camera review are procedural, but should include substantive review as well. Courts could consider the history of tribunals that have been created and sustained to deal with specialty cases. Another more efficient avenue involves the “indexing” of secret information, introduced in the Freedom of Information Act (FOIA) case *Vaughn v. Rosen*.191 The appellate court outlined procedures for in camera review of sensitive cases.192 “A *Vaughn* Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.”193 This detailed affidavit allows the judiciary to evaluate the facts behind the privilege sought.194 The District

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185. 709 F.2d at 59 n.37.
186. 691 F.2d 272, 280 (6th Cir. 1982).
188. Id. at 572.
189. Id. at 574.
190. 619 F.2d 1170, 1173 (7th Cir. 1980).
192. Id. at 826–28.
193. Citizens Comm’n on Human Rights v. FDA, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995).
194. *Vaughn*, 484 F.2d at 826.
of Columbia Circuit Court procedure, under the FOIA case, requires agencies to prepare an itemized index, correlating each piece of privileged information with a specific FOIA exemption and a justification. This index became standard use in most FOIA cases.

Although plaintiffs get no opportunity to challenge redactions or agency rationale for withholding information, the index is a recognized alternative to agencies submitting classified material to the court in camera. Indexing also frees courts from the burden of reviewing full documents, but still allows them to decide whether an agency's claim of privilege is factually appropriate.

Some previous cases provide further protections of secrets by holding that they can be done in the midst of litigation—without involving attorneys, media, or anyone else who would endanger the widespread release of such information. In Stillman v. Department of Defense, the district court opined that it should determine whether it can, consistent with the protection of the plaintiff's First Amendment rights to speak and to publish,—and with the appropriate degree of deference owed to the executive branch concerning classification decisions—resolve the classification issue without the assistance of plaintiff's counsel.

The district court had considered the First Amendment claim of a former Los Alamos laboratory employee whose book on China's nuclear weapons program was censored by the Central Intelligence Agency and other government agencies. The court of appeals held that the district court, on remand, should "inspect the manuscript and consider any pleadings and declarations filed by the Government, as well as any materials filed by Stillman, who describe[d] himself [as] an 'expert in classification and declassification.'" The Stillman court reasoned that such steps were necessary to protect citizen rights, saying, "[t]his Court will not allow the government to cloak its violations of the plaintiff's First Amendment rights in a blanket of national security."

Conclusion

The state secrets privilege is a powerful tool of the executive to prevent disclosures of sensitive facts, and courts should therefore apply a balanced analysis to this privilege. Blanket dismissals of public

195. Id. at 827.
196. Id.
197. Id.
198. Id.
200. Id. at 188.
201. Stillman, 319 F.3d at 548–49.
202. Stillman, 209 F. Supp. 2d at 231; but see Stillman, 319 F.3d at 548 (reversing and remanding on the ground that properly classified information would preclude Stillman's First Amendment right to publish).
employee discrimination claims in the face of their employer’s invocation of the state secrets privilege threaten to erode important rights under the Constitution and statute because the judiciary has backed away from its function as reviewer of an important privilege that can be easily abused by the executive.

As the privilege gains greater judicial recognition, courts are willing to apply it in more situations, and with less justification from the government. Now, courts allow “state secrets” arguments to overcome even basic claims, dismissing cases based on an argument that any facts necessary to establish the claim are sensitive. Courts should not delegate the decision-making responsibility in such cases to the government. Instead, courts should approach each “state secrets” invocation with skepticism for both sides’ motives, and examine the evidence with a presumption toward disclosure, with a proper analysis of what evidence could and should remain secret.

Courts are able to protect sensitive government information from disclosure through a host of remedies including narrowly constructed standards for reviewing agency invocations and procedural measures such as in-camera review. Courts can and should determine whether they can resolve classification issues. Previous cases have held that such review can be done in the midst of litigation, without involving attorneys, media, or anyone else who would endanger the widespread release of such information. Public employees who have the high evidentiary burdens required by discrimination claims rely on this judicial review. Without such review, plaintiffs face the dismissal of otherwise valid cases for failure to state a claim.