

SECRETS AND SECURITY: OVERCLASSIFICATION AND CIVIL
LIBERTY IN ADMINISTRATIVE NATIONAL SECURITY
DECISIONS

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“The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.”¹

I. INTRODUCTION

When Ibraheim (“Abe”) Mashal, an American citizen and former Marine, attempted to board a flight from Illinois to Spokane, Washington, he was surprised to learn that he could not board the flight because he was on the Department of Homeland Security’s (“DHS”) No-Fly list² from 2010 to 2014.³ The government never told Mashal why they placed him on the No-Fly list, nor did the government give him a hearing or an opportunity to defend himself.⁴ Federal Bureau of Investigation (“FBI”) agents told him that he could get his name off the list by becoming an informant.⁵ It took a federal judge’s ruling that the process for challenging one’s placement on the No-Fly list was unconstitutional in order to remove Mashal’s name

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¹ United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

² See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1300 (D. Or. 2013); Ibraheim (Abe) Mashal, *I’m a Former Marine Who Was on the No Fly List for 4 Years—and I Still Don’t Know Why*, ACLU: SPEAK FREELY BLOG (July 1, 2016), <https://www.aclu.org/blog/speak-freely/im-former-marine-who-was-no-fly-list-4-years-and-i-still-dont-know-why>.

³ See Mashal, *supra* note 2.

⁴ See *Latif*, 969 F. Supp. 2d at 1301; Mashal, *supra* note 2.

⁵ See *Latif*, 969 F. Supp. 2d at 1300; Mashal, *supra* note 2.

from the list.⁶ The judgment also forced the government to notify people of their placement on the No-Fly list and explain why they are on it to begin with.⁷ However, there is still no requirement to provide a hearing for plaintiffs to contest their position on the list.⁸

This article discusses due process procedures relating to national security administrative decisions such as placing someone on the No-Fly list. Specifically, it focuses on whether plaintiffs who are the targets of administrative national security decisions deserve access to the classified information that the government uses in subjecting them to scrutiny and restraints.

The federal Courts of Appeals for the Ninth Circuit and the D.C. Circuit take opposing positions on this issue. The Ninth Circuit has stated that when an administrative agency makes a national security decision against an individual, the agency should provide that individual with some sense of the classified information against him.⁹ This can be done through unclassified summaries of classified information or by providing classified information to appropriately cleared counsel.¹⁰ In contrast, the D.C. Circuit has explicitly stated that the government need not reveal any classified information because doing so would infringe on the powers of the Executive.¹¹ Unfortunately, this policy creates a moral hazard because it incentivizes executive agencies to classify more information to minimize criticism and maximize power.¹² As explained in the following sections, overclassification is harmful because it clutters the classification system; infringes on due process rights; leads to reduced public oversight; and contributes to expanded executive authority.¹³ For example, in the national debate about torture, the Department of Justice (“DOJ”) classified many of the legal documents that authorized torture, therefore hampering efforts to prevent it.¹⁴

⁶ See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1140, 1161 (D. Or. 2014); *Latif, et al. v. Lynch, et al.—ACLU Challenge to Government No Fly List*, ACLU, <https://www.aclu.org/cases/latif-et-al-v-lynch-et-al-aclu-challenge-government-no-fly-list> (last updated Jan. 17, 2017) [hereinafter *ACLU Challenge to No Fly List*]; Mashal, *supra* note 2.

⁷ See *Latif*, 28 F. Supp. 3d at 1162; see *ACLU Challenge to No Fly List*, *supra* note 6.

⁸ See Notice Regarding New Redress Procedures at 2, *Mohamed v. Holder*, No. 1:11-CV-0050 (E.D. Va. Apr. 13, 2015); *ACLU Challenge to No Fly List*, *supra* note 6.

⁹ See *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 686 F.3d 965, 983, 984 (9th Cir. 2012).

¹⁰ See *id.* at 984.

¹¹ See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 319 (D.C. Cir. 2014) (quoting *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001)).

¹² See *infra* Part V(D).

¹³ See *infra* Part V(A)–(D).

¹⁴ See SCOTT HORTON, *LORDS OF SECRECY: THE NATIONAL SECURITY ELITE AND AMERICA’S STEALTH WARFARE* 181, 182 (2015).

Three existing bodies of scholarship lay the groundwork for this piece: (1) literature on the U.S. classification system; (2) literature on due process concerns as they relate to administrative decisions involving classified information; and (3) literature on the state secrets privilege and the Classified Information Procedures Act ("CIPA").

The first body of scholarship details the U.S. government's classification practices. Articles such as "Law and Policy Efforts to Balance Security, Privacy and Civil Liberties in Post-9/11 America,"¹⁵ and "Information Control in Times of Crisis: The Tools of Repression,"¹⁶ and books such as *Lords of Secrecy: The National Security Elite and America's Stealth Warfare*¹⁷ describe the history of the classification system and the problem of overclassification.¹⁸ They describe how the classification system evolved from a tool to protect national security to a tool often used to conceal information from the public.¹⁹ Scholars such as Max Weber have predicted that secrecy is a powerful tool for bureaucratic institutions, making it more likely that government organizations will overclassify in order to protect their domains.²⁰

The second body of literature consists of cases that discuss the Fifth Amendment right to procedural due process in the national security administrative law context. These cases pertain to a narrow set of executive agencies that have litigated cases relating to due process and access to classified information. Plaintiffs in such cases include: individuals on the DHS's No-Fly list; individuals and organizations that the Department of Treasury's ("Treasury Department") Office of Foreign Assets Controls ("OFAC") has designated as a "Specially Designated Global Terrorist" ("SDGT"); organizations that the Department of State ("State Department") has designated as a foreign terrorist organization ("FTO"); individuals who face immigration proceedings under the Immigration and Naturalization Service ("INS"); and foreign corporations who seek approval to invest in the United States from the Treasury Department's Committee on Foreign Investment in the United States ("CFIUS").

¹⁵ Ron Wyden et al., *Law and Policy Efforts to Balance Security, Privacy and Civil Liberties in Post-9/11 America*, 17 STAN. L. & POL'Y REV. 331 (2006).

¹⁶ Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451 (2004).

¹⁷ HORTON, *supra* note 14.

¹⁸ See HORTON, *supra* note 14, at 193; Wells, *supra* note 16, at 456; Wyden et al., *supra* note 15, at 346.

¹⁹ See HORTON, *supra* note 14, at 193; Wells, *supra* note 16, at 451; Wyden et al., *supra* note 15, at 346.

²⁰ See HORTON, *supra* note 14, at 52.

Finally, the third body of scholarship discusses CIPA and the common law doctrine of the “State Secrets Privilege.”

Based on the existing procedures for handling classified information in the civil and criminal context as discussed in the three existing bodies of scholarship, I propose common law procedures for handling classified information in the administrative law context. These procedures would balance the plaintiff’s due process rights while also protecting U.S. national security interests.

Part II provides an overview of the classification system and describes the extent of overclassification in the American national security system. Part III reviews due process law and identifies that in the national security administrative law context, plaintiffs are entitled to notice, an opportunity to be heard, and access to the unclassified evidence against them. Part IV discusses a circuit split between the Ninth Circuit and the D.C. Circuit as to what standards satisfy due process when classified information is involved. As explained, the Ninth Circuit suggests that plaintiffs should have some access to the classified information that the government uses against them while the D.C. Circuit protects such information from public disclosure, thereby encouraging classification. Part V describes the danger of excessive classification. Part VI suggests that courts should continue to develop common law around balancing due process with protecting classified information and outlines potential procedures. Part VII concludes.

II. THE CLASSIFICATION SYSTEM

The classified information system protects critical national security information. However, this system has grown exponentially and we do not know how effective it is in protecting national security. There are many explanations for the expansion of the classification system, including ease of classification, the incentive to classify information, use of the system to cover up embarrassing or harmful information, and lack of meaningful oversight.

A. *The Goal: Protection of National Security Secrets*

The executive branch created the classification system to protect national security.²¹ Maintaining national security remains a top national priority and secrecy is necessary to achieve this goal.²² The

²¹ See Wells, *supra* note 16, at 456–57.

²² See Steven Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, 48 HARV.

government needs to protect critical information such as the names of classified intelligence sources, details about military operations, or the design of military technology.²³ Leaking such information to the public harms U.S. interests. For example, relations between the U.S. and international allies worsened because former Central Intelligence Agency (“CIA”) employee Edward Snowden leaked classified information regarding the U.S. National Security Agency’s (“NSA”) Personal Record Information System Methodology (“PRISM”) program.²⁴ The PRISM program entailed spying on U.S. citizens and allies alike, something that U.S. allies did not know about.²⁵ Steffen Seibert, spokesman for German Chancellor Angela Merkel, spoke of the damaged trust between the United States and its ally, Germany: “The monitoring of friends—this is unacceptable. It can’t be tolerated We are no longer in the Cold War.”²⁶

The executive branch has been at the forefront of creating and furthering executive privilege. President Franklin Roosevelt created the first classification system to protect information related to military installations and equipment.²⁷ Thereafter, President Harry Truman strengthened the classification system in three ways. First, he extended classification to any information pertaining to national security, not just military information.²⁸ Second, Truman’s Executive Order 10,290 also allowed information to be classified during peacetime as well as during wartime.²⁹ Finally, Truman expanded authority to classify information beyond military officers to civilian government employees.³⁰ Executive agencies then had the right to classify information.³¹

Information may be classified at the “confidential,” “secret,” and

C.R.-C.L.L. REV. 511, 513 (2013).

²³ See *id.*

²⁴ See *Obama Faces Grilling From European Leaders Over Spying Programs . . . As Germans and Italians say PRISM Would be Illegal in EU Countries*, DAILY MAIL (June 11, 2013), <http://www.dailymail.co.uk/news/article-2339355/Obama-faces-grilling-European-leaders-spying-programs—Germans-Italians-say-PRISM-illegal-EU-countries.html>.

²⁵ See *id.*; see also Timothy B. Lee, *Here’s Everything We Know About PRISM to Date*, WASH. POST (June 12, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/> (describing how PRISM is designed to target foreign information, but may accidentally collect information in the United States).

²⁶ “No Longer in the Cold War”: Merkel Infuriated by U.S. Spying, SPIEGEL (July 1, 2013), <http://www.spiegel.de/international/world/merkel-furious-at-us-spying-and-eu-to-check-offices-for-bugs-a-908859.html>.

²⁷ See Rachel S. Holzer, Note, *National Security Versus Defense Counsel’s “Need to Know”*: An Objective Standard for Resolving the Tension, 73 FORDHAM L. REV. 1941, 1946 (2005).

²⁸ See *id.*

²⁹ See Wells, *supra* note 16, at 456.

³⁰ See *id.*

³¹ See Holzer, *supra* note 27, at 1946.

“top secret” levels.³² Confidential information is defined as information that may “damage” national security; secret information is defined as information that may cause “serious damage” to national security; and top secret information is defined as information that may cause “exceptionally grave damage” to national security.³³ Documents are classified based on the highest level of classified information present in the document.³⁴ For example, if a document has unclassified, confidential, and top secret information, the document will be labeled top secret.³⁵

The government vets individuals’ backgrounds and grants security clearances to those who are deemed to pose no national security risk. These individuals then have access to classified documents based on their corresponding security clearance and their need to know the classified information.³⁶

Though there exists no single law that prohibits disclosing classified information,³⁷ the government treats revealing classified information or the mishandling of it as a criminal offense per the Espionage Act.³⁸ The Espionage Act has been enforced in many cases including several high-profile examples. For example, the former CIA Director, General David Petraeus, pled guilty to a misdemeanor charge of mishandling classified information.³⁹ Petraeus brought home notebooks that contained “the identities of covert officers, war strategy, intelligence capabilities and mechanisms, diplomatic discussions, quotes and deliberative discussions from high-level National Security Council meetings, and defendant David Howell Petraeus’s discussions with the President of the United States of America.”⁴⁰ The DOJ placed Petraeus on probation for two years and

³² *Id.* at 1947.

³³ Alex Rossmiller, *Adjudicating Classified Information*, 85 ST. JOHN’S L. REV. 1275, 1301 (2011).

³⁴ *See id.* at 1302.

³⁵ *See id.*

³⁶ *See id.* at 1301, 1302.

³⁷ *See* Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMPL. RTS. & EMPLOY. POL’Y J. 51, 96 n.279 (2012).

³⁸ *See* Ann E. Marimow, *Ex-State Department Adviser Stephen J. Kim Sentenced to 13 Months in Leak Case*, WASH. POST (Apr. 2, 2014), https://www.washingtonpost.com/world/national-security/ex-state-dept-adviser-stephen-j-kim-sentenced-to-13-months-in-leak-case/2014/04/02/f877be54-b9dd-11e3-96ae-f2c36d2b1245_story.html.

³⁹ *See* Adam Goldman, *How David Petraeus Avoided Felony Charges and Possible Prison Time*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/world/national-security/how-david-petraeus-avoided-felony-charges-and-possible-prison-time/2016/01/25/d77628dc-bfab-11e5-83d4-42e3bceea902_story.html.

⁴⁰ Bill Chappell, *Petraeus Sentenced to 2 Years’ Probation, Fine for Sharing Classified Info*, NPR: TWO-WAY (Apr. 23, 2015), <http://www.npr.org/sections/thetwo-way/2015/04/23/401672264/gen-david-petraeus-will-be-sentenced-thursday-over-secret-notebooks>.

imposed a \$100,000 fine;⁴¹ however, the former Director avoided jail time and felony charges.⁴²

Petraeus' sentence was lenient—often, leaking classified information involves a federal charge and jail time.⁴³ For example, the DOJ prosecuted John Kiriakou for disclosing the names of covert intelligence officers to journalists;⁴⁴ Kiriakou was sentenced to thirty months in jail.⁴⁵ In a second instance, the State Department prosecuted Stephen J. Kim, a former State Department official and North Korea expert, for leaking a classified report to Fox News reporter James Rosen.⁴⁶ Kim was sentenced to thirteen months in prison.⁴⁷

The classification system was meant to protect national security and as such, there are usually severe consequences for disclosing classified information.

B. Rampant Overclassification

For decades, U.S. government officials and commissions have admitted that overclassification constitutes a major problem that is only getting worse. In 1956, a Department of Defense report claimed that “overclassification has reached serious proportions.”⁴⁸ The 1970 Defense Science Board Task Force on Secrecy stated that classified scientific and technical information could be decreased as much as ninety percent.⁴⁹ The Task Force recommended that the government classify information for a maximum of five years.⁵⁰ In 1994, the Joint Security Commission reported that the classification system “has grown out of control” and that “the classification system is not trusted on the inside any more than it is trusted on the outside. Insiders do

⁴¹ See *id.*

⁴² See *id.*; see also Goldman, *supra* note 39 (noting that Petraeus was ultimately only charged with a misdemeanor).

⁴³ See Goldman, *supra* note 39.

⁴⁴ See Justin Jouvenal, *Former CIA Officer John Kiriakou is Sentenced to 30 Months in Prison for Leaks*, WASH. POST (Jan. 25, 2013), https://www.washingtonpost.com/local/former-cia-officer-john-kiriakou-sentenced-to-30-months-in-prison-for-leaks/2013/01/25/49ea0cc0-6704-11e2-9e1b-07db1d2ccd5b_story.html.

⁴⁵ See *id.*

⁴⁶ See Ann E. Marimow & Carol D. Leonnig, *Government Can Brief Judge on Security Risks of Releasing Classified Information*, WASH. POST (Oct. 30, 2013), http://www.washingtonpost.com/local/crime/government-can-brief-judge-on-security-risks-of-releasing-classified-information/2013/10/30/bc958b2a-4186-11e3-8b74-d89d714ca4dd_story.html.

⁴⁷ See Marimow, *supra* note 38.

⁴⁸ See Rossmiller, *supra* note 33, at 1294.

⁴⁹ See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 404 (2009).

⁵⁰ See *id.*

not trust it to protect information that needs protection. Outsiders do not trust it to release information that does not need protection.”⁵¹

The volume of classified information has only skyrocketed under both the Bush and Obama Administrations. The Bush Administration increased the number of executive agencies and people that could classify information, such as the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency, and the Secretary of Agriculture,⁵² thereby expanding the scope of classified information.⁵³ In 2000, the government classified approximately 11.2 million documents and in 2001, approximately 8.7 million documents,⁵⁴ and by 2004, this figure had risen to 15.6 million.⁵⁵ In 2004, the former Under Secretary of Defense for Intelligence and the former Information Security Oversight Office Director stated that almost fifty percent of documents that were classified were overclassified.⁵⁶ Even former Defense Secretary Donald Rumsfeld agreed that information remains unnecessarily classified, stating: “[T]here are things that get classified that ought not to be classified.”⁵⁷

The Obama Administration took steps to combat overclassification, though the number of classified documents continues to rise exponentially.⁵⁸ Through Executive Order 13,526,⁵⁹ Obama directed government officials not to classify documents if there were doubts about the importance of classifying.⁶⁰ Obama also stated that no document could be classified indefinitely and directed the Public Interest Declassification Board to develop recommendations to curb overclassification.⁶¹ Despite these efforts, the number of classified documents has grown. In 2008, the government classified twenty-

⁵¹ *Id.* at 405.

⁵² See MINORITY STAFF OF COMM. ON GOV. REFORM, U.S. HOUSE OF REP., 108TH CONG., *SECRECY IN THE BUSH ADMINISTRATION* 48 (2004), <https://www.fas.org/sgp/library/waxman.pdf>.

⁵³ See Holzer, *supra* note 27, at 1947.

⁵⁴ See Nate Jones, *Document Friday: 54,651,765 U.S. Documents Classified in FY 2009*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Apr. 16, 2010), <https://nsarchive.wordpress.com/2010/04/16/document-friday-the-information-security-oversight-offices-report-to-the-president/>.

⁵⁵ See *id.*

⁵⁶ See Aftergood, *supra* note 49, at 403.

⁵⁷ See *id.*; *DoD News Briefing—Secretary Rumsfeld*, U.S. DEP'T DEF. (Sept. 12, 2001), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1619>.

⁵⁸ See Elizabeth Goitein, *A Starting Point for Curbing Government Secrecy*, BRENNAN CTR. FOR JUST. (Jan. 6, 2013), <https://www.brennancenter.org/analysis/starting-point-curbing-government-secrecy>.

⁵⁹ Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010).

⁶⁰ See *id.* at 707, 709; see Goitein, *supra* note 58.

⁶¹ See Goitein, *supra* note 58.

three million documents.⁶² By 2012, the executive branch classified ninety-five million documents.⁶³ Overclassification remains a major problem.

C. Explanations for Overclassification

Overclassification remains a problem for four reasons: (1) the ease of classifying information; (2) the incentive to classify information; (3) the government's tendency to use the classification system to cover up embarrassing or harmful information; and (4) the lack of meaningful oversight.

First, thousands of individuals have the authority to classify information and can do so easily. In 2014, an estimated 4.5 million people held security clearances⁶⁴ and approximately 1.5 million people held top secret security clearances.⁶⁵ Employees of executive agencies with the appropriate clearances can instantaneously classify information by submitting it into the electronic classification system.⁶⁶ This means that any of the millions of Americans who have security clearances can easily classify information.⁶⁷ There exists no review process to oversee classification.⁶⁸

Second, anyone who produces intelligence has an incentive to classify work products because the higher the classification, the more

⁶² See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 259 (2010).

⁶³ See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 575 & n.301 (2013).

⁶⁴ See Eric Katz, *Number of Security Clearance Holders Drops 12 Percent*, DEFENSE ONE (Apr. 28, 2015), <http://www.defenseone.com/business/2015/04/number-security-clearance-holders-drops-12-percent/111268/>.

⁶⁵ See Brian Fung, *5.1 Million Americans Have Security Clearances. That's More Than the Entire Population of Norway*, WASH. POST (Mar. 24, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/03/24/5-1-million-americans-have-security-clearances-thats-more-than-the-entire-population-of-norway/>.

⁶⁶ See Rossmiller, *supra* note 33, at 1302–03; see generally David C. Mayer, Note, *Reviewing National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims*, 85 CORNELL L. REV. 786, 793–95 (2000) (discussing classification systems and appropriate levels of clearance).

⁶⁷ See Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1434–35 (2015) (“[B]ecause of a two-tiered system for designating classified information, the total number of individuals with authority to classify records is incredibly high. . . . [A]nyone with authorization to access classified materials . . . can designate as classified new records that incorporate, paraphrase, or restate information that was originally classified.”); see also *A Look at The Washington Post's 'Top Secret America'*, N.Y. TIMES (July 19, 2010), <https://atwar.blogs.nytimes.com/2010/07/19/a-look-at-the-washington-posts-top-secret-america/> (noting that in 2010, an estimated 854,000 people held top secret security clearances).

⁶⁸ See, e.g., Elizabeth Goitein, *The Government is Classifying Too Many Documents*, NATION (July 7, 2016), <https://www.thenation.com/article/the-government-is-classifying-too-many-documents/> (“[C]lassification decisions normally go unreviewed and agencies do not punish officials for classifying too much.”).

well-perceived the information. According to former Defense Intelligence Agency (“DIA”) analyst Alex Rossmiller, he and his colleagues understood that policymakers would dismiss unclassified analysis, assuming that information was not valuable if it did not come from a classified source.⁶⁹ Similarly, the *9/11 Commission Report* stated that 9/11 intelligence analysts specifically sought to be published in the classified publications that went to policymakers, such as the President’s Daily Brief.⁷⁰ Thus, even if information was based on public sources, the resulting analysis would still be classified as top secret in order to increase its influence.⁷¹ In fact, there are examples of top secret reports that are based on public information. For one, as discussed earlier, the Obama Administration prosecuted Stephen J. Kim, a State Department employee, for discussing a top secret report with a Fox News reporter.⁷² The report stated that North Korea would respond to United Nations’ sanctions for nuclear weapons testing with further nuclear tests.⁷³ Yet neither the report nor the story seemed to have any controversial evidence or findings; in fact, one State Department official⁷⁴ described the report as a “nothing burger.”⁷⁵

Bureaucracies also encourage classification because of risk aversion. There is no risk to classifying information but there is a risk in failing to classify sensitive information. For example, the 2016 Hillary Clinton email controversy encourages classification because nearly two thousand of her thirty thousand released emails have been retrospectively classified as confidential.⁷⁶ This sends the message that if there are doubts about whether a document should be classified, it is safer to err on the side of classification and avoid

⁶⁹ See Rossmiller, *supra* note 33, at 1303.

⁷⁰ See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 90 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

⁷¹ See Rossmiller, *supra* note 33, at 1303.

⁷² See Marimow, *supra* note 38.

⁷³ See *id.*

⁷⁴ See Peter Maass, *Destroyed by the Espionage Act*, INTERCEPT (Feb. 18, 2015), <https://theintercept.com/2015/02/18/destroyed-by-the-espionage-act/>.

⁷⁵ Peter Maass, *Petraeus Plea Deal Reveals Two-Tier Justice System for Leaks*, INTERCEPT (Mar. 3, 2015), <https://theintercept.com/2015/03/03/petraeus-plea-deal-reveals-two-tier-justice-system-leaks/>.

⁷⁶ See Alicia Parlapiano, *What We Know about the Investigation into Hillary Clinton’s Private Email Server*, N.Y. TIMES, <http://www.nytimes.com/interactive/2016/05/27/us/politics/what-we-know-about-hillary-clintons-private-email-server.html> (last updated Oct. 28, 2016) (discussing the significance of these emails in the 2016 election; for example, although the investigation into Hillary Clinton’s emails has not yet brought charges, it brought renewed attention and criticism to the idea of “classification” as close as one week before the 2016 election).

discipline for not classifying enough. Furthermore, disclosing classified information has severe ramifications that may include loss of one's security clearance, loss of employment, and even criminal prosecution.⁷⁷ The severity of these consequences encourages people to err on the side of classification.⁷⁸ There is also no punishment for classifying a document and no scrutiny when an agency increases the number of classified documents or prevents a document from being disclosed to the public.⁷⁹ Thus, there are many incentives to classify and risks to limiting classification.

Third, overclassification is rampant because government agencies have an incentive to classify information that could potentially damage the agency's reputation or political interests. Preeminent sociologist Max Weber argued that bureaucracies seek power and see secrecy as instrumental to bureaucratic preservation and power expansion.⁸⁰ Weber theorized that bureaucracies hoard information and unnecessarily err on the side of secrecy as a way to maintain their information monopoly over other government agencies.⁸¹ Weber observed that when faced with a parliamentary inquiry, bureaucracies make every effort to thwart information gathering.⁸²

Applying Weber's theories predicts that bureaucracies will embrace the classification system. In addition to using the classification system for legitimate purposes, bureaucracies are likely to use the system to cover up mistakes in order to prevent criticism and protect their bureaucratic turf.⁸³

As Weber's theory predicts, evidence about the U.S. classification system shows overclassification and an effort to use the classification system to hide harmful organizational information. Even President Nixon's former Solicitor General, Erwin Griswold, wrote: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."⁸⁴

One example of such classification is the assessments of

⁷⁷ See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 150 (2006).

⁷⁸ See *id.*

⁷⁹ See *id.* at 148.

⁸⁰ See FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H. H. Gerth & C. Wright Mills eds., trans., 1946) [hereinafter FROM MAX WEBER].

⁸¹ See Aftergood, *supra* note 49, at 402–03.

⁸² See FROM MAX WEBER, *supra* note 80, at 233–34.

⁸³ See *id.* at 233.

⁸⁴ Rossmiller, *supra* note 33, at 1295.

Guantanamo Bay inmates. Many of these assessments concluded that the detainees were not enemy combatants and there was no recorded reason as to why these individuals were even brought to Guantanamo Bay.⁸⁵ Yet, one likely reason that it classified these assessments was so that the government did not have to justify why these individuals were ever brought to Guantanamo Bay.⁸⁶

Fourth, there is little oversight and accountability of overclassification from the legislative and judicial branches. Congress has limited opportunity to check the classifying power of the Executive even though Congress regulates the Intelligence Community.⁸⁷

Though Congress statutorily has access to classified information, in practice, Congress' oversight role remains reactive. "The National Security Act of 1947, as amended, states that, 'The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States'"⁸⁸ Specifically, the Senate Select Committee on Intelligence ("SSCI") and the House Permanent Select Committee on Intelligence ("HPSCI") are responsible for regulating intelligence programs and appropriating and authorizing funds.⁸⁹ But despite this authority, Congress cannot classify information and Congress primarily receives intelligence through briefings, which are most often initiated at the request of congressional committees, individual members, or staff.⁹⁰ If agencies are not forthcoming about intelligence programs that are classified, Congress has no way to know about these programs.⁹¹ If Congress does not know about these programs, Congress cannot effectively regulate them.

For example, the NSA and the Director of National Intelligence ("DNI") briefed "only a few congressional leaders and select members of the Intelligence committees" about the NSA's domestic spying

⁸⁵ See Elizabeth Goitein, *Keeping Public Documents Secret*, BRENNAN CTR. FOR JUST. (Apr. 28, 2011), <https://www.brennancenter.org/blog/keeping-public-documents-secret>.

⁸⁶ See *id.*

⁸⁷ See INFO. SECURITY OVERSIGHT OFFICE, EXECUTIVE BRANCH CLASSIFIED NATIONAL SECURITY INFORMATION AND CONGRESS 2 (2007), <http://www.archives.gov/declassification/pidb/meetings/06-22-07-carpenter.pdf>.

⁸⁸ *Id.*

⁸⁹ See ALFRED CUMMING, CONG. RESEARCH SERV., R40136, CONGRESS AS A CONSUMER OF INTELLIGENCE INFORMATION 1 & n.2 (2010); Eric Rosenbach & Aki Peritz, *Congressional Oversight of the Intelligence Community*, BELFER CTR. FOR SCIENCE & INT'L AFF. (July 2009), http://belfercenter.ksg.harvard.edu/publication/19146/congressional_oversight_of_the_intelligence_community.htm.

⁹⁰ See CUMMING, *supra* note 89, at 10.

⁹¹ See Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U.L. REV. 335, 352 (2005).

programs.⁹² This prevented Congress from regulating these programs because few knew they existed.⁹³ Senator Ron Wyden also wrote about how information concerning the use of the Patriot Act is often classified, preventing the public and Congress from knowing and regulating how the government collects information.⁹⁴

Intelligence agencies can also withhold classified information from Congress even though members of Congress and their staffers request information and have appropriate clearances to see the information. For example, the White House allowed the CIA to redact large sections of the report it provided to the SSCI regarding the CIA's torture of individuals and the effectiveness of the these programs.⁹⁵ When the White House allows the CIA to withhold information from the Committee that regulates it, it undermines congressional authority to hold the CIA accountable.

Logistically, Congress also faces a number of challenges that hampers the regulation of classified programs difficult. For example, though the offices and hearing rooms of the SSCI and the HPSCI meet security standards for discussing classified information, the rest of congressional spaces do not.⁹⁶ Congressional representatives must travel to secure facilities in order to access classified information.⁹⁷ This makes it difficult for members of Congress who are not on these committees to access, and in turn, regulate programs protected by classified information. This logistical difficulty may explain why in the fall of 2002, on the eve of the Iraq War vote, only six senators and few members of Congress logged into the secure facility to read the classified National Intelligence Estimate ("NIE") about Iraq's weapons of mass destruction.⁹⁸

Congress has attempted to legislate around overclassification. In criminal cases, Congress designed CIPA to balance a defendant's

⁹² William Bendix & Paul J. Quirk, *Secrecy and Negligence: How Congress Lost Control of Domestic Surveillance*, BROOKINGS INST. (Mar. 2, 2015), <http://www.brookings.edu/research/papers/2015/03/02-secrecy-negligence-congres-surveillance-bendix-quirk>.

⁹³ *See id.*

⁹⁴ *See* Wyden et al., *supra* note 15, at 349.

⁹⁵ *See* Connie Bruck, *The Inside War: To Expose Torture, Dianne Feinstein Fought the C.I.A.—and the White House*, NEW YORKER (June 22, 2015), <http://www.newyorker.com/magazine/2015/06/22/the-inside-war>.

⁹⁶ *See* U.S. DEP'T OF DEFENSE, MANUAL 5105.21, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF PERSONNEL SECURITY, INDUSTRIAL SECURITY, AND SPECIAL ACTIVITIES 50 (2012), http://www.dtic.mil/whs/directives/corres/pdf/510521m_vol3.pdf.

⁹⁷ *See* Wyden et al., *supra* note 15, at 350 n.135.

⁹⁸ *See* John Walcott, *What Donald Rumsfeld Knew We Didn't Know about Iraq*, POLITICO (Jan. 24, 2016), <http://www.politico.com/magazine/story/2016/01/iraq-war-wmds-donald-rumsfeld-new-report-213530>.

right to a fair trial with the government's need to protect classified information.⁹⁹ CIPA came out of situations in which the prosecutor had to choose between revealing classified information or dropping charges against the defendant who would discuss the classified material.¹⁰⁰ CIPA attempts to balance the government's desire to prosecute with its desire for secrecy.¹⁰¹

CIPA allows both sides to provide advanced disclosure of any intent to disclose classified information¹⁰² and identify the relevant classified information at issue.¹⁰³ Courts can then review the material in question and hold pre-trial CIPA hearings to determine the relevance and admissibility of the classified information as well as limit disclosure to attorneys who have appropriate security clearances.¹⁰⁴ These measures can be done *ex parte* and *in camera*.¹⁰⁵ This means that the government can submit a written statement to the court explaining the national security importance of the materials in question and conduct a private hearing to prevent disclosing sensitive information.¹⁰⁶ If the court determines that certain evidence is necessary, CIPA allows "the government to redact classified information from documents provided to the defendant, substitute an unclassified summary, or substitute a statement admitting relevant facts that the classified information would tend to prove."¹⁰⁷ If the government cannot or will not provide the necessary information, the judge can issue sanctions including case dismissal.¹⁰⁸

Though courts have the power to review classified materials as necessary, courts generally defer to the Executive about issues related to national security and foreign affairs. For example, the Supreme Court decided to establish the state secrets privilege in the landmark case *United States v. Reynolds*,¹⁰⁹ without reviewing the allegedly-privileged accident reports at the heart of the case.¹¹⁰ In this case, three widows brought a wrongful death action against the

⁹⁹ See EDWARD C. LIU & TODD GARVEY, CONG. RESEARCH SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT 1 (2012).

¹⁰⁰ See Holzer, *supra* note 27, at 1954.

¹⁰¹ See Rossmiller, *supra* note 33, at 1279.

¹⁰² See *id.* at 1280.

¹⁰³ See LIU & GARVEY, *supra* note 99, at 3, 4.

¹⁰⁴ See *id.* at 3.

¹⁰⁵ See Rossmiller, *supra* note 33, at 1280.

¹⁰⁶ See *id.* at 1317.

¹⁰⁷ See *id.* at 1280.

¹⁰⁸ See *id.*

¹⁰⁹ *United States v. Reynolds*, 345 U.S. 1 (1953).

¹¹⁰ See *id.* at 7–8, 10–11.

government on behalf of their husbands.¹¹¹ The husbands had died in an airplane crash while serving as civilian observers on an Air Force mission to test electronic equipment.¹¹² The widows requested copies of accident reports but the government claimed that the reports contained state secrets and thus were privileged documents.¹¹³ The Supreme Court ruled that the reports should not be revealed because releasing the reports would expose military matters.¹¹⁴ This case demonstrated the Supreme Court's deference to the executive branch because the Supreme Court never reviewed the accident reports to ascertain whether the reports contained sensitive information.¹¹⁵ The totality of the circumstances convinced the Court that revealing the information would harm national security.¹¹⁶ In nearly two-thirds of the cases in which the government invoked the state secrets privilege, courts did not review the materials at the heart of the privilege before reaching a decision.¹¹⁷

Courts generally do not interfere in matters of national security because they believe that they are not positioned to have all the accurate evidence that the Executive has to make a decision; executives should not be judged because they often must weigh complex policy issues and make decisions rapidly; and the Executive, as an elected official, is accountable to the public and acts in accordance with public interests and is checked by public sentiments.¹¹⁸ In *Chicago & Southern Air Lines v. Waterman Steamship Corporation*,¹¹⁹ the Supreme Court gave the reasons for deferring to the President:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full

¹¹¹ See *id.* at 2–3.

¹¹² See *id.* at 3.

¹¹³ See *id.* at 3–4.

¹¹⁴ See *id.* at 10, 11.

¹¹⁵ See *id.*

¹¹⁶ See Rossmiller, *supra* note 33, at 1318.

¹¹⁷ See *id.*

¹¹⁸ See Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 830 (2013).

¹¹⁹ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹²⁰

Because of this deference, courts often do not utilize their power to review classified information. The Supreme Court noted: “[T]he protection of classified information must be committed to the broad discretion of the agency responsible”¹²¹ Judge David B. Sentelle of the D.C. Circuit commented:

We made that determination informed by the historically recognized proposition that under the separation of powers created by the United States Constitution, the [e]xecutive [b]ranch has control and responsibility over access to classified information and has “compelling interest” in withholding national security information from unauthorized persons in the course of executive business.”¹²²

Judge Sentelle also wrote: “In the context of another statutory scheme involving classified information, we noted the courts are often ill-suited to determine the sensitivity of classified information.”¹²³

Thus, though the classification system is meant to protect national security, the system has grown exponentially without any check on growth or assessment of effectiveness.

III. DUE PROCESS: THE OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER

This Part will briefly outline general due process law, due process standards in the administrative law context, and the due process standard in national security administrative law cases. Modern due

¹²⁰ *Id.* at 111 (citations omitted).

¹²¹ *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

¹²² *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (quoting *Egan*, 484 U.S. at 527).

¹²³ *People’s Mojahedin Org. of Iran*, 327 F.3d at 1242 (citing *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)).

process law centers around *Mathews v. Eldridge*,¹²⁴ which held that the government must give individuals notice of impending administrative decisions and an opportunity to respond.¹²⁵ Both the Ninth Circuit and the D.C. Circuit have determined that in the national security administrative context, due process requires notice of an impending government deprivation, an opportunity to respond, and access to the unclassified evidence against the plaintiff.¹²⁶

The Fifth Amendment of the U.S. Constitution prohibits states from depriving individuals of “life, liberty, or property, without due process of law[.]”¹²⁷ The Supreme Court has long interpreted this clause as having both a substantive and a procedural component.¹²⁸ The Supreme Court stated that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹²⁹ Courts, including the D.C. Circuit, have held that “due process is flexible and calls for such procedural protections as the particular situation demands.”¹³⁰

In the seminal case of *Mathews v. Eldridge*, the United States Supreme Court established a three-factor balancing test to determine the “specific dictates of due process” in the context of administrative decisions.¹³¹ In *Mathews*, the government denied an individual’s Social Security benefits without giving the individual an evidentiary hearing regarding the loss of such benefits.¹³² The Court decided that this process did not violate the plaintiff’s due process rights.¹³³ Due process requires that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it,”¹³⁴ but due process does not require an evidentiary hearing.¹³⁵

¹²⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹²⁵ *See id.* at 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951)).

¹²⁶ *See, e.g.,* *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 686 F.3d 965, 1001 (9th Cir. 2012); *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 227 (D.C. Cir. 2010).

¹²⁷ U.S. CONST. amend. V.

¹²⁸ *See generally* David H. Armistead, Note, *Substantive Due Process Limits on Public Officials’ Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 773–74 (1995) (discussing due process and liberty interests with both procedural and substantive protections).

¹²⁹ *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹³⁰ *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 317 (D.C. Cir. 2014) (quoting *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 205 (D.C. Cir. 2001)).

¹³¹ *See Mathews*, 424 U.S. at 334–35.

¹³² *See id.* at 323–25.

¹³³ *See id.* at 349.

¹³⁴ *See id.* at 348–49 (alteration in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951)).

¹³⁵ *See Mathews*, 424 U.S. at 339–40.

In order to determine due process in specific situations, a court must balance the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹³⁶

In administrative cases involving classified information, both the D.C. Circuit and the Ninth Circuit agree that due process requires the right to notice, access to the unclassified support upon which administrative agencies made their decisions, and the opportunity for plaintiffs to rebut unclassified support.¹³⁷ The following two cases highlight each Circuit's respective position.

In *People's Mojahedin Organization of Iran v. Department of State ("PMOI III")*, the Secretary of State redesignated the People's Mojahedin Organization of Iran ("PMOI") as an FTO under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").¹³⁸ After redesignating the PMOI as an FTO, the Secretary provided the PMOI with a redacted "administrative summary of [the Department of] State's review of the record"¹³⁹ The Secretary also informally met with the PMOI in 2008, gave the organization an opportunity to supplement the record,¹⁴⁰ and notified the organization of its designation one day prior to publishing the decision in the Federal Register.¹⁴¹ However, the Secretary did not provide the unclassified material that she relied on until after the decision was made.¹⁴² The D.C. Circuit found that this violated due process because the State Department was required to give unclassified portions of the record to the PMOI, identify the most valuable information sources, offer an opportunity to rebut evidence, and provide notice of the decision *before* the designation became final.¹⁴³

¹³⁶ See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 317–18 (D.C. Cir. 2014) (quoting *Mathews*, 424 U.S. at 335).

¹³⁷ See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 1001 (9th Cir. 2012); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 227 (D.C. Cir. 2010).

¹³⁸ See *People's Mojahedin Org. of Iran*, 613 F.3d at 222.

¹³⁹ *Id.* at 226.

¹⁴⁰ See *id.* at 227–28.

¹⁴¹ See *id.* at 226.

¹⁴² See *id.*

¹⁴³ See *id.* at 227.

Similarly, *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury*, stated that OFAC should have provided plaintiffs not only with the unclassified record, but also with a statement of reasons that explained OFAC's designation of Al Haramain as an FTO.¹⁴⁴ In *Al Haramain*, OFAC suspected plaintiff Al Haramain Islamic Foundation, Oregon ("AHIF-Oregon") of supporting terrorism and thus labeled AHIF as a SDGT and froze its assets.¹⁴⁵ In analyzing due process, the court weighed the first *Mathews* factor—the party's private property interest in the loss of all its assets—with the third *Mathews* factor—the government's interest in national security.¹⁴⁶ The court ruled that the Treasury Department's actions violated AHIF-Oregon's private property interest because it failed to provide notice and an adequate opportunity to respond.¹⁴⁷ This was because OFAC deprived the organization of its ability to use funds for any purpose and kept the organization guessing about the reasons for the investigation without demonstrating that its failure to provide reasons for its investigation promoted national security.¹⁴⁸ This meant the risk of erroneous deprivation was high even though the government has an urgent and critical interest in national security.¹⁴⁹ Instead, the court suggested that OFAC should have provided an unclassified summary of the evidence against AHIF-Oregon or provided the classified evidence to an attorney with the appropriate clearance.¹⁵⁰ Seven months after freezing AHIF-Oregon's assets, OFAC provided notice concerning one of three possible reasons for its actions, an effort that the court labeled as "significantly untimely and incomplete[.]"¹⁵¹

Thus, both the Ninth Circuit and the D.C. Circuit agree that basic due process requires notice, an opportunity to be heard, and access to unclassified evidence.

IV. DIFFERING APPROACHES OF THE D.C. CIRCUIT AND THE NINTH CIRCUIT

Although both the D.C. Circuit and the Ninth Circuit agree that notice, an opportunity to be heard, and access to unclassified evidence

¹⁴⁴ *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 1001 (9th Cir. 2012).

¹⁴⁵ *See id.* at 970.

¹⁴⁶ *See id.* at 979–80.

¹⁴⁷ *See id.* at 984–85.

¹⁴⁸ *See id.* at 985–86.

¹⁴⁹ *See id.* at 986.

¹⁵⁰ *See id.* at 983.

¹⁵¹ *Id.* at 986.

is required to fulfill due process standards, these courts have opposing views regarding access to classified information. The D.C. Circuit has stated that executive agencies do not have to provide classified information to plaintiffs because doing so would encroach on the power of the Executive.¹⁵² In contrast, the Ninth Circuit and several district courts have stated that executive agencies should provide some sense of the contents of the classified information so that respondents have an adequate opportunity to respond and prevent error.¹⁵³ These courts have developed multiple methods for balancing the plaintiff's need for classified information with the government's interest in national security. Some have even suggested that the government can provide plaintiffs with the relevant classified information by providing it to an attorney with the appropriate security clearance or providing an unclassified summary to the plaintiff.¹⁵⁴ The exact procedure for sharing classified information would be based on the specific dictates of the case, including factors such as the nature of the classified information, the nature of the national security threat, and the potential opportunities to share this information with the plaintiff.¹⁵⁵ Other courts have suggested that courts should borrow from the guidelines of CIPA and similar statutes to determine how to manage classified information.¹⁵⁶ Some courts have even suggested that the government should refrain from the complexities of working with classified information.¹⁵⁷ The below section will outline each of these approaches.

The Supreme Court provides little guidance on this issue. The applicable Supreme Court cases do not discuss due process and involve confidential—not classified—information. Thus, though the section below discusses Supreme Court cases, they are limited in their applicability.

A. The D.C. Circuit Approach: No Disclosure of Classified Information to Plaintiffs, Thereby Encouraging Overclassification

The D.C. Circuit has repeatedly stated that executive agencies do

¹⁵² See, e.g., *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 319 (D.C. Cir. 2014).

¹⁵³ See *Al Haramain Islamic Found., Inc.*, 686 F.3d at 982–83.

¹⁵⁴ See, e.g., *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010).

¹⁵⁵ See *Al Haramain Islamic Found., Inc.*, 686 F.3d at 984.

¹⁵⁶ See, e.g., *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1359 (S.D. Fla. 2000), *vacated as moot sub nom. Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

¹⁵⁷ See, e.g., *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 U.S. Dist. LEXIS 40177, at *44 (D. Or. Mar. 28, 2016).

not have to reveal classified information to plaintiffs because the executive branch enjoys the privilege to classify information and releasing classified information to plaintiffs may endanger national security.¹⁵⁸ This increases the likelihood that agencies will classify more information in order to avoid disclosure.

In *Ralls Corporation v. Committee on Foreign Investment*, the latest relevant case from the D.C. Circuit, the court stated that “due process does not require disclosure of *classified* information supporting official action.”¹⁵⁹ The Ralls Corporation, owned by Chinese nationals, purchased American companies in Oregon.¹⁶⁰ CFIUS, chaired by the Secretary of the U.S. Treasury, reviewed the purchase and determined that the transaction posed a national security threat.¹⁶¹ Consequently, former President Barack Obama issued a permanent injunction that prohibited the purchase.¹⁶² Ralls contested the decision and the D.C. Circuit decided that due process required the Treasury Department to provide adequate notice of the decision, give Ralls access to the unclassified information that shaped the Treasury Department’s conclusion, and offer the opportunity for Ralls to rebut the unclassified evidence.¹⁶³ However, the court explicitly stated that due process does not require disclosing classified information.¹⁶⁴ The court relied on D.C. Circuit precedent that protected the executive branch’s exclusive authority over classified information.¹⁶⁵

There are several other D.C. Circuit cases that express the same stance on classified information. In *National Council of Resistance of Iran v. Department of State (“NCRI I”)*,¹⁶⁶ the Secretary of State designated two Iranian groups as FTOs.¹⁶⁷ Applying the *Mathews* factors to determine the appropriate due process procedures, the court stated that requiring the release of classified information could be dangerous because “items of classified information which do not appear dangerous or perhaps even important to judges might ‘make all too much sense to a foreign counterintelligence specialist who could learn much about this nation’s intelligence-gathering capabilities from what these documents revealed about sources and

¹⁵⁸ See, e.g., *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 319 (D.C. Cir. 2014).

¹⁵⁹ *Id.* at 319 (citation omitted).

¹⁶⁰ See *id.* at 301.

¹⁶¹ See *id.*

¹⁶² See *id.* at 301–02.

¹⁶³ See *id.* at 319.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001).

¹⁶⁷ See *id.* at 197.

methods.”¹⁶⁸ The court also stated: “[T]he United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality.”¹⁶⁹

In *Holy Land Foundation for Relief & Development v. Ashcroft*,¹⁷⁰ OFAC designated the Holy Land Foundation (“HLF”) as a SDGT and blocked the organization’s assets.¹⁷¹ OFAC did not provide a pre-deprivation notice or a hearing.¹⁷² The court stated that the lack of notice or hearing was justified because the government had to take prompt action to prevent HLF from transferring, spending, or concealing financial assets.¹⁷³ In regard to the classified information at stake in the case, the D.C. Circuit stated: “[D]ue process required the disclosure of *only* the unclassified portions of the administrative record.”¹⁷⁴ The court’s use and emphasis on the word “only” before “unclassified” implies that agencies do not have to disclose any classified information that agencies use to make their decisions. The court also explained that there is no need to disclose classified information because “[classified information] is within the privilege and the prerogative of the [E]xecutive, and we do not intend to compel a breach in the security which that branch is charged to protect.”¹⁷⁵ The court also “emphasized the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive’s ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.”¹⁷⁶ The D.C. Circuit thus does not require revealing classified information. This naturally encourages agencies to classify additional information to avoid disclosure.

¹⁶⁸ *Id.* at 208 (quoting *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)).

¹⁶⁹ *Nat’l Council of Resistance of Iran*, 251 F.3d at 207 (citing *Yunis*, 867 F.2d at 623–24).

¹⁷⁰ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003).

¹⁷¹ *See id.* at 76.

¹⁷² *See id.*

¹⁷³ *See id.* at 77.

¹⁷⁴ *Holy Land Found. for Relief & Dev.*, 333 F.3d at 164 (quoting *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003)).

¹⁷⁵ *Holy Land Found. for Relief & Dev.*, 333 F.3d at 164 (quoting *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001)).

¹⁷⁶ *Holy Land Found. for Relief & Dev.*, 333 F.3d at 164 (quoting *People’s Mojahedin Org. of Iran*, 327 F.3d at 1242); *but cf.* *Rafeedie v. Immigration & Naturalization Serv.*, 795 F. Supp. 13, 18–20 (D.D.C. 1992) (stating that because of the risk of erroneous deprivation and the significant private interest at stake, it was unconstitutional to deny a re-entry permit to an immigrant based on confidential information).

B. The Ninth Circuit Approach: Provide Plaintiffs with Some Access to Classified Information

In contrast, the Ninth Circuit has suggested that executive agencies should provide plaintiffs with some sense of the information contained in classified materials.¹⁷⁷ Providing plaintiffs with access to the classified information against them ensures an accurate adversarial process. The Ninth Circuit suggested that the disclosure standard would vary in each case depending on factors such as “the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges.”¹⁷⁸ Another Ninth Circuit case stated that the use of classified information should be presumptively unconstitutional.¹⁷⁹ A third Ninth Circuit case stated that the use of confidential information without providing the plaintiff with at least a summary of the information is fundamentally unfair.¹⁸⁰

Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury outlined factors to consider when deciding if and how to provide plaintiffs with access to classified information.¹⁸¹ The Ninth Circuit stated that under the *Mathews* test, courts “must consider ‘the value of additional safeguards’ against the risk of error and ‘the burdens of additional procedural requirements.’”¹⁸² The court stated that additional due process safeguards such as an unclassified summary of classified information or sharing classified information with an appropriately cleared lawyer are valuable because it would help plaintiffs respond to accusations, clear up any misinformation, and potentially give the federal agency additional information with minimal risk to national security.¹⁸³ The Ninth Circuit also recognized that in certain situations even these procedures would be inappropriate because the very subject matter would be classified.¹⁸⁴ There could also be operations that are so secret that the government cannot risk sharing information even

¹⁷⁷ See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 686 F.3d 965, 984 (9th Cir. 2012); *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009).

¹⁷⁸ *Al Haramain Islamic Found., Inc.*, 686 F.3d at 984.

¹⁷⁹ See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999).

¹⁸⁰ See *Kaur*, 561 F.3d at 962.

¹⁸¹ See *Al Haramain Islamic Found., Inc.*, 686 F.3d at 982–83.

¹⁸² *Id.* at 982 (quoting *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998)).

¹⁸³ See *Al Haramain Islamic Found., Inc.*, 686 F.3d at 982–83.

¹⁸⁴ See *id.* at 983.

with people who have a security clearance but do not have a need to know.¹⁸⁵

In *Kaur v. Holder*, the Ninth Circuit declared that the use of classified information violated due process because evidence in an administrative proceeding must be fundamentally fair.¹⁸⁶ In 2002, the Board of Immigration Appeals (“BIA”) initially decided that Rajwinder Kaur had engaged in terrorist activity while in the United States and denied her asylum application based solely on unclassified information.¹⁸⁷ After Kaur successfully appealed the decision and the BIA was instructed to re-determine her asylum, the BIA issued an unclassified decision again denying Kaur’s asylum, but this time, based its decision on a classified attachment.¹⁸⁸ According to this decision, DHS had classified evidence that Kaur engaged in alien smuggling and had attempted to obtain fraudulent documents.¹⁸⁹ Kaur then challenged BIA’s second decision as constitutionally unfair because it was based on evidence that she did not have access to.¹⁹⁰

Here, the Ninth Circuit ruled that the use of secret evidence in this manner violated due process.¹⁹¹ However, instead of using the *Mathews* analysis, the Ninth Circuit followed its precedent in *Martin-Mendoza v. INS*,¹⁹² in which evidence in an administrative proceeding must be “fundamentally fair” so as not to infringe on due process rights.¹⁹³ The court decided that the use of secret evidence without providing Kaur with at least a summary of such evidence violated due process.¹⁹⁴ In his concurrence, Judge Noonan wrote that even providing a summary of secret evidence does not suffice because it does not allow for cross-examination and thus the evidence remains untested.¹⁹⁵

Tellingly, the Ninth Circuit took an even stronger stance against classified information prior to 9/11, stating that use of classified information was presumptively unconstitutional. In *American-Arab Anti-Discrimination Committee v. Reno*, the Ninth Circuit decided that the use of undisclosed classified information in an immigration proceeding did violate the plaintiff’s due process rights “because of

¹⁸⁵ See *id.* (citing *United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987)).

¹⁸⁶ See *Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009).

¹⁸⁷ See *id.* at 960.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 961.

¹⁹² *Martin-Mendoza v. Immigration & Naturalization Serv.*, 499 F.2d 918 (9th Cir. 1974).

¹⁹³ *Kaur*, 561 F.3d at 962 (citing *Martin-Mendoza*, 499 F.2d at 921).

¹⁹⁴ See *Kaur*, 561 F.3d at 960.

¹⁹⁵ *Id.* at 963 (Noonan, J., concurring).

the enormous risk of error and the substantial personal interests involved.”¹⁹⁶ This case stated that the use of undisclosed information should be “presumptively unconstitutional.”¹⁹⁷ In this case, the INS began deportation proceedings and arrested Aiad Khaled Barakat, Naim Nadim Sharif, and several other men.¹⁹⁸ The INS charged Barakat and Sharif with being members of the Popular Front for the Liberation of Palestine (“PFLP”).¹⁹⁹ In June 1987, nonimmigrant residents Barakat and Sharif applied under the Immigration Reform and Control Act (“IRCA”) for legalization.²⁰⁰ In 1991, the INS issued an “Intent to Deny” notice based on undisclosed classified information.²⁰¹ Barakat and Sharif challenged that the use of classified information violated due process.²⁰² The Central District of California conducted an in camera, ex parte examination of INS materials and concluded that the use of undisclosed information constituted a due process violation.²⁰³ The court issued a permanent injunction on January 24, 1995.²⁰⁴ The Ninth Circuit affirmed the permanent injunction against the INS, preventing the use of undisclosed classified information against Barakat and Sharif.²⁰⁵ In balancing the *Mathews* factors, the court determined that Barakat and Sharif had a liberty interest in “remaining in their homes” and that the “denial of legalization” affected their opportunity to work.²⁰⁶

The court stated that the use of classified information made the risk of erroneous deprivation high.²⁰⁷ The risk of error derives from the one-sided nature of classified information that only the government can access.²⁰⁸ In reference to the use of classified information, the court stated: “One would be hard pressed to design a procedure more likely to result in erroneous deprivations.”²⁰⁹ This is because “procedural due process notice and hearing requirements have ‘ancient roots’ in the rights to confrontation and cross-

¹⁹⁶ *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999).

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 1052.

¹⁹⁹ *See id.* at 1052–53.

²⁰⁰ *See id.* at 1054.

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *See id.* at 1045, 1054.

²⁰⁴ *See id.* at 1054.

²⁰⁵ *See id.* at 1071.

²⁰⁶ *See id.* at 1068–69.

²⁰⁷ *See id.* at 1069.

²⁰⁸ *See id.* (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951)).

²⁰⁹ *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069 (quoting *Am.-Arab Anti-Discrimination Comm. v. Reno*, 883 F. Supp. 1365, 1375 (1995)).

examination.”²¹⁰ Further, “[w]ithout any opportunity for confrontation, there is no adversarial check on the quality of the information on which the INS relies.”²¹¹ Quoting the Supreme Court case, *Joint Anti-Fascist Refugee Committee v. McGrath*, the court wrote: “As judges, we are necessarily wary of one-sided process: ‘democracy implies respect for the elementary rights of men . . . and must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.’”²¹² The court went on to conclude: “Thus, the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.”²¹³

Ultimately, the court concluded that the use of undisclosed information in adjudications “should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process.”²¹⁴ Because extraordinary circumstances did not exist in that case, the use of the classified information was impermissible. The court went on to state: “We cannot in good conscience find that the President’s broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.”²¹⁵ Thus, the Ninth Circuit encourages sharing at least the essence of the classified information in an unclassified manner.

C. District Court Approaches: In the Footsteps of the Ninth Circuit

Several district courts have either adopted and expanded the approach laid out by the Ninth Circuit, or have developed their own guidelines. The District of Oregon specified that the executive agency must provide enough information to allow plaintiffs to respond meaningfully.²¹⁶ The Northern District of Ohio and the Southern District of Florida based their recommendations on CIPA.²¹⁷

²¹⁰ *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

²¹¹ *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting)).

²¹² *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069 (quoting *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 170).

²¹³ *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069.

²¹⁴ *Id.* at 1070.

²¹⁵ *Id.*

²¹⁶ *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014).

²¹⁷ *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010); *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1359 (S.D. Fla. 2000), *vacated as moot sub nom. Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

Latif v. Holder stated that executive agencies do not have to provide the exact unclassified reasons for their decision because separating unclassified information from classified information is difficult.²¹⁸ But they must provide “sufficient information” to allow targeted individuals to “respond meaningfully to the reasons that [d]efendants are able to disclose.”²¹⁹ In *Latif*, DHS placed citizens and lawful permanent residents of the United States on the No-Fly list.²²⁰ In balancing each of the *Mathews* factors, the court determined that the plaintiffs did not receive adequate due process.²²¹ The plaintiffs deserved notice regarding their status on the No-Fly list and reasons for placement.²²² The government must also allow plaintiffs to submit evidence relevant to their inclusion on the No-Fly list and include the submitted evidence in the record for administrative and judicial stages of review.²²³ This additional evidence will help DHS form an accurate opinion and allow plaintiffs to correct factual mistakes.²²⁴

Echoing the Ninth Circuit's guidance, the court then went on to say that if classified information is involved in the decision, executive agencies should implement procedures such as “unclassified summaries or disclosures made to counsel with the appropriate security clearances[] that would permit [p]laintiffs to respond meaningfully without creating an undue risk to national security.”²²⁵ If disclosing such information would pose a risk to national security, then defendants must make a case-by-case determination based on “the factors outlined in *Al Haramain*; i.e., (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the [p]laintiff to respond more effectively to the charges.”²²⁶ The court then stated that when such cases come before judicial review, executive agencies must identify “information that was withheld, provide justification for withholding that information, and explain

²¹⁸ See *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 U.S. Dist. LEXIS 40177, at *44 (D. Or. Mar. 28, 2016). It is important to note that the U.S. Attorney General changed from Eric H. Holder to Loretta E. Lynch during the continuation of the *Latif* case, thus the differing case names, yet the cause of action remains linear. See, e.g., *id.* at *1; *Latif*, 28 F. Supp. 3d at 1134.

²¹⁹ *Latif*, 2016 U.S. Dist. LEXIS 40177, at *44.

²²⁰ See *Latif*, 28 F. Supp. 3d at 1140.

²²¹ See *id.* at 1160–61.

²²² See *id.* at 1162.

²²³ See *id.*

²²⁴ See *id.* at 1162–63.

²²⁵ *Latif*, 2016 U.S. Dist. LEXIS 40177, at *45.

²²⁶ *Id.* at *40–41 (quoting *Latif*, 28 F. Supp. 3d at 1162).

why they could not make additional disclosures to th[e p]laintiff.”²²⁷ Agencies can do this by providing “an affidavit or declaration from a competent witness with personal knowledge of the No-Fly [l]ist determination.”²²⁸

The Northern District of Ohio applied CIPA guidelines to determine how the government should handle classified information in administrative cases. In *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, KindHearts for Charitable Humanitarian Development, Inc. (“KindHearts”) challenged OFAC’s determination that KindHearts is a SDGT as well as OFAC’s blocking of KindHearts’ assets.²²⁹ OFAC provided KindHearts with unclassified documents that it relied on in making its decision but did not provide any of the classified material that it used.²³⁰ Though OFAC did provide a three-page summary of the classified information, OFAC did not explain the potential charges nor did it discuss the evidence that supported the charges.²³¹ OFAC did state that KindHearts could submit evidence and OFAC would consider this evidence before making a final SDGT designation.²³² KindHearts requested the full classified and unclassified record and submitted a response to OFAC that guessed at the charges and potential reasoning.²³³

To determine if KindHearts received adequate due process, the court balanced the *Mathews* factors.²³⁴ The court said that KindHearts had a substantial private property interest and the risk of erroneous deprivation was significant because the Treasury Department froze KindHearts’ assets indefinitely without notice, explanation, or evidence.²³⁵ Without this information, KindHearts could not meaningfully rebut the charges.²³⁶ As to the government interest at stake, the court ruled that this factor, too, favored KindHearts.²³⁷ The government failed to provide an explanation for its lack of notice or the reasons why OFAC blocked KindHearts’

²²⁷ *Latif*, 2016 U.S. Dist. LEXIS 40177, at *47.

²²⁸ *Id.*

²²⁹ *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 864 (N.D. Ohio 2009).

²³⁰ *See id.* at 868.

²³¹ *See id.*

²³² *See id.*

²³³ *See id.*

²³⁴ *See id.* at 904, 905–06.

²³⁵ *See id.* at 904.

²³⁶ *See id.*

²³⁷ *See id.* at 905–06.

assets.²³⁸ The court determined that though the Treasury Department had notified KindHearts of its status as a SDGT, this notice was not sufficient because it did not provide the reasons for the SDGT designation.²³⁹ Additionally, though KindHearts had an opportunity to respond to the designation, because OFAC never provided them with the unclassified administrative record on which it relied, OFAC's option of sending a letter had no hope of changing OFAC's mind and thus constituted neither effective notice nor an opportunity to respond.²⁴⁰

Additionally, after surveying the limited case law on releasing classified information, the court stated: "Courts have found that their duty to protect individual rights extends to requiring disclosure of classified information to give a party an ability to respond to allegations made against it."²⁴¹ Thus, instead of accepting the summary that OFAC provided, the court recommended that the Treasury Department provide information *ex parte*, *in camera* to the court so that the court could determine what evidence could be further declassified and whether the information was adequately summarized as much as CIPA requires.²⁴² The government would have had to declassify or summarize the classified information that the court determined would give KindHearts adequate notice.²⁴³ If this was not possible, then KindHearts' attorney would have had to obtain a security clearance to review the relevant documents *in camera* and under protective order, but could not reveal the content to KindHearts.²⁴⁴

The Southern District of Florida recommended avoiding the use of classified information as evidence.²⁴⁵ When classified information is unavoidable, the court also recommended using CIPA and the Alien Terrorist Removal Court ("ATRC") to determine how to handle classified information in administrative cases.²⁴⁶ In *Najjar v. Reno*,

²³⁸ See *id.* at 905.

²³⁹ See *id.* at 902.

²⁴⁰ See *id.* at 901–02.

²⁴¹ KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 659 (N.D. Ohio 2010) (citing *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070–71 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999)).

²⁴² See *KindHearts for Charitable Humanitarian Dev., Inc.*, 710 F. Supp. 2d at 660.

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See, e.g., *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1358 (S.D. Fla. 2000), *vacated as moot sub nom. Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001) ("If the IJ determines the public record insufficient to conclude that [p]etitioner must be detained as a national security threat, only then should the Government present, if it wishes, classified information in support of its argument for continued detention.").

²⁴⁶ See *Najjar*, 97 F. Supp. 2d at 1358–59.

Mazen Al Najjar's former spouse, Jan Fairbetter, filed a petition with the INS to adjust Najjar's status.²⁴⁷ The INS denied the petition and issued an order that petitioner was deportable for failure to maintain and comply with his non-immigrant status.²⁴⁸ The Immigration Judge ("IJ") held an in camera, ex parte hearing to receive classified information about the petitioner's involvement with terrorists.²⁴⁹ Neither the petitioner nor his counsel was present and there was no recording of the in camera proceeding.²⁵⁰ Later, petitioner was given an unclassified one-line summary, which stated: "This Court was provided with information as to the association of [Petitioner] with the Palestinian Islamic Jihad."²⁵¹ The petitioner then presented witnesses to rebut the terrorist accusation.²⁵² The IJ determined that based on the classified evidence, petitioner was a threat to the national security of the United States and thus allowed the INS to detain petitioner without bond.²⁵³ On appeal, the BIA found that the IJ was constitutionally allowed to use classified evidence in making its determination and found that the classified evidence indicated that the petitioner posed a security risk.²⁵⁴

The Southern District of Florida reviewed the BIA's decision and determined that the use of classified information violated the petitioner's due process rights.²⁵⁵ The court determined that the petitioner had a liberty interest in:

- (1) [T]he right to petition the government and have that petition fairly adjudged "at a meaningful time and in a meaningful manner[;]"
- (2) notice of the grounds on which the Government continues to detain him[;]
- and (3) an opportunity to present evidence in opposition to the Government's asserted reasons for his detention.²⁵⁶

The court also found that the risk of erroneous deprivation was high:

Without an opportunity for [p]etitioner to confront the information demonstrating his alleged "association," there was no adversarial check on the quality of the information on

²⁴⁷ *See id.* at 1332.

²⁴⁸ *See id.*

²⁴⁹ *See id.* at 1333.

²⁵⁰ *See id.*

²⁵¹ *Id.* at 1333–34 (alteration in original).

²⁵² *See id.* at 1334.

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ *See id.* at 1356 (citing *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999)).

²⁵⁶ *Najjar*, 97 F. Supp. 2d at 1353–54 (internal citations omitted).

which the INS relied. . . . Therefore, the Court finds that the introduction of classified information in an *ex parte in camera* proceeding, without the benefit of an adversarial check on the reliability of that information, posed a substantial risk that the IJ and the BIA could reach an erroneous or unreliable determination that [p]etitioner should continue to be detained as a threat to national security.²⁵⁷

Finally, the court determined that though the government has an interest in protecting national security, it “also has an interest in the integrity and accuracy of administrative proceedings in which those interests are furthered.”²⁵⁸ Therefore, in balancing the interests of the plaintiff, the interests of the government, and the risk of erroneous deprivation, the court decided that the BIA had violated the plaintiff's due process rights by using classified information.²⁵⁹

The court suggested several techniques to remedy the conflict between classified information and due process. For one, the court suggested that as much as possible, the government should provide evidence that draws from the public record and should refrain from abusing the classification system.²⁶⁰ In cases when the evidence must be classified, the court suggested that the petitioner should have been allowed to review the classified information against him or should be given an unclassified statement admitting the relevant facts as CIPA suggests.²⁶¹ The court found that the one-line summary that the IJ provided insufficiently gave “notice of the information underlying the IJ's determination that he was a threat to national security.”²⁶² The court also suggested that there should be a record of the *ex parte in camera* proceeding as CIPA suggests.²⁶³ Additionally, the court suggested referencing the ATRC which provides alien alleged terrorists with access to counsel with security clearances who can review classified evidence.²⁶⁴

In another case from the District of New Jersey, the court rejected the unclassified summary that the government provided to plaintiffs. In *Kiareldeen v. Reno*,²⁶⁵ “the INS presented classified evidence *ex*

²⁵⁷ *Id.* at 1355 (citing *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069).

²⁵⁸ *Najjar*, 97 F. Supp. 2d at 1356 (citing *Bridges v. Wixon*, 326 U.S. 135, 153 (1945)).

²⁵⁹ *See Najjar*, 97 F. Supp. 2d at 1356 (citing *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1070).

²⁶⁰ *See Najjar*, 97 F. Supp. 2d at 1357–58 (citing *Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987)).

²⁶¹ *See Najjar*, 97 F. Supp. 2d at 1355.

²⁶² *Id.*

²⁶³ *See id.* at 1359.

²⁶⁴ *See id.*

²⁶⁵ *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999).

parte and *in camera* to the [IJ] which allegedly demonstrated that Kiareldeen was a suspected member of a terrorist organization and a threat to the national security.”²⁶⁶ The court agreed that the INS’ use of classified evidence in the bond hearings and throughout the removal process violated due process.²⁶⁷ Weighing the three *Mathews* factors, the court wrote: “[T]he petitioner’s private interest in his physical liberty[] must be accorded the utmost weight. Kiareldeen has been removed from his community, his home, and his family, and has been denied rights that [rank] high among the interests of the individual.”²⁶⁸ The risk of erroneous deprivation was also high because “[u]se of secret evidence creates a one-sided process by which the protections of our adversarial system are rendered impotent.”²⁶⁹ Finally, the court refused to accept “at face value the government’s contentions that the national security is implicated by the petitioner’s alleged misdeeds. The court . . . considered the government’s unclassified ‘summary’ evidence and [found] it lacking in either detail or attribution to reliable sources which would shore up its credibility.”²⁷⁰ Thus, district courts have adopted their own approaches but they share the philosophy of the Ninth Circuit that some information should be shared with plaintiffs.

D. Limited Supreme Court Guidance

As of the time of this writing, there have been no Supreme Court cases directly pertaining to classified information and due process in administrative cases. *Hamdan v. Rumsfeld*²⁷¹ discusses the use of classified information but its applicability is limited because it applies only to Guantanamo Bay military tribunals.²⁷² A few cases involve confidential information but they were not decided on due process grounds and they date back to the 1950s, before *Mathews* outlined due process requirements.²⁷³ Thus, they are not particularly relevant to the issue of balancing classified information with due process. The confidential information at stake in these cases also differs from classified information. Confidential information includes information and sources that the government did not want

²⁶⁶ *Id.* at 404.

²⁶⁷ *See id.* at 414.

²⁶⁸ *Id.* at 413 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

²⁶⁹ *Kiareldeen*, 71 F. Supp. 2d at 413.

²⁷⁰ *Id.* at 414.

²⁷¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁷² *See id.* at 633.

²⁷³ *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

to reveal,²⁷⁴ whereas classified information is information that has gone through the government's national security classification process.²⁷⁵

In *Hamdan*, the Department of Defense ("DoD") detained Salim Ahmed Hamdan in Guantanamo Bay for terrorism offenses.²⁷⁶ The DoD intended to try Hamdan before a military commission.²⁷⁷ The Supreme Court ruled that the military commissions could not proceed because their structure and procedures violated the Uniform Code of Military Justice ("UCMJ") and the four Geneva Conventions signed in 1949.²⁷⁸ One of the violations was that defendants would have no access to the classified or protected information against them, thereby denying them a full and fair trial.²⁷⁹ The Supreme Court wrote: "That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him."²⁸⁰

Justices Scalia, Thomas, and Alito dissented.²⁸¹ Justice Thomas wrote that the power that Congress has given the President as the Commander-in-Chief meant that the judiciary should defer to the President's judgment in national security decisions, such as setting up military courts.²⁸² Justice Thomas quoted another Supreme Court case, stating: "When 'the President acts pursuant to an express or implied authorization from Congress,' his actions are 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'"²⁸³ This is because:

"Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional

²⁷⁴ See *Jay v. Boyd*, 351 U.S. 345, 347–48, 349–50 (1956).

²⁷⁵ See *Hamdan*, 548 U.S. at 614.

²⁷⁶ See *id.* at 566.

²⁷⁷ See *id.*

²⁷⁸ See *id.* at 567.

²⁷⁹ See *id.* at 613–14.

²⁸⁰ *Id.* at 634–35 (internal citation omitted).

²⁸¹ See *id.* at 655 (Scalia, J., dissenting).

²⁸² See *id.* at 682–83 (Thomas, J., dissenting).

²⁸³ *Id.* at 680 (alterations in original) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)).

disapproval' of action taken by the Executive."²⁸⁴

Justice Alito further argued that though specific procedural rules of the military commissions may be illegal, the courts themselves are not illegal.²⁸⁵

Though *Hamdan* is based on a military commission context, it provides some insight into how the Supreme Court may address classified information in the context of civilian due process rights. As just discussed, the Supreme Court stated that even a foreigner accused of terrorism would be deprived of a fair trial if the government fails to provide access to classified information against that individual. The Supreme Court may be similarly inclined to rule that American citizens and aliens, who unquestionably have due process rights, should have access to classified information used against them.

In *Jay v. Boyd*, Cecil Reginald Jay filed a habeas corpus petition to contest the denial of his application for discretionary suspension of deportation under the Immigration and Nationality Act of 1952 ("the Act").²⁸⁶ The Act authorized the deportation of any alien who was a communist.²⁸⁷ In 1952, the INS decided to deport Jay,²⁸⁸ and in 1953, the petitioner sought discretionary relief from the Attorney General.²⁸⁹ The petitioner had another hearing before a special inquiry officer of the INS,²⁹⁰ but the special inquiry officer denied the discretionary suspension of deportation based on "confidential information."²⁹¹ The Court ruled 5-4 that suspension of deportation is not a right and that the decision is based on the Attorney General's discretion, akin to a parole board granting parole.²⁹² Thus, the Attorney General can base his or her decision on confidential evidence that is not in the administrative record when releasing such information would be "prejudicial to the public interest, safety, or security."²⁹³ However, when "there is no compelling reason to refuse to disclose the basis of a denial of an application, the statute does not contemplate arbitrary secrecy."²⁹⁴

²⁸⁴ *Hamdan*, 548 U.S. at 679 (Thomas, J., dissenting) (alterations in original) (quoting *Dames & Moore*, 453 U.S. at 678).

²⁸⁵ See *Hamdan*, 548 U.S. at 731–33 (Alito, J., dissenting).

²⁸⁶ See *Jay v. Boyd*, 351 U.S. 345, 347 (1956).

²⁸⁷ See *id.* at 348.

²⁸⁸ See *id.*

²⁸⁹ See *id.*

²⁹⁰ See *id.* at 348–49.

²⁹¹ See *id.* at 349.

²⁹² See *id.* at 354–55.

²⁹³ *Id.* at 358.

²⁹⁴ *Id.*

Though *Jay* may seem analogous, it does not apply in this context for two reasons. First, two decades after *Jay*, the Supreme Court decided *Mathews v. Eldridge* in 1976, which articulates specific due process requirements that must be met before the government can deprive an individual of life, liberty, or property.²⁹⁵ Therefore, the issue of how classified information affects due process rights should be based on the *Mathews* test and not the *Jay* ruling, as courts have done since the Supreme Court issued *Mathews*.²⁹⁶

Second, *Jay* was decided on statutory interpretation rather than constitutional requirements.²⁹⁷ Therefore, *Jay* applies narrowly to interpreting the Immigration and Nationality Act of 1952 and not to other administrative decisions or to the question of the *Mathews* due process standard as applicable to classified information. Because of *Jay*'s narrow applicability, several courts, including the District of New Jersey, have chosen not to uphold *Jay*, stating: "That case does not further the government's argument for a simple reason: the petitioner there did not raise a constitutional challenge to the statute or the regulation, the *Jay* decision answers a question of statutory interpretation."²⁹⁸

Though *Jay* was not decided on due process terms, Chief Justice Earl Warren vociferously dissented, stating that the use of secret evidence undermines due process:

In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play in both our judicial and administrative processes. . . . To me, this is not due process. If sanction of this use and effect of "confidential" information is confirmed against this petitioner by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways. I am unwilling to write such a departure from American standards into the judicial or administrative process . . .²⁹⁹

Several other Supreme Court cases from this decade also involved confidential information and were decided on grounds other than due process.³⁰⁰

²⁹⁵ See generally *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (describing factors in the due process analysis).

²⁹⁶ All of the cases discussed in the sections below apply *Mathews* and not *Jay* in deciding due process rights.

²⁹⁷ See *Jay*, 351 U.S. at 355–56.

²⁹⁸ *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 411 (D.N.J. 1999) (citing *Jay*, 351 U.S. at 357).

²⁹⁹ *Jay*, 351 U.S. at 361–62 (Warren, C.J., dissenting).

³⁰⁰ See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539–43 (1950)

V. CONSEQUENCES OF OVERCLASSIFICATION FOR AMERICAN DEMOCRACY

The classification system plays a critical role in protecting national security. As both the D.C. Circuit and the Ninth Circuit have stated, the classification system protects sensitive information from falling into enemy hands.³⁰¹ Limiting access to classified information is also important because it prevents evidence destruction or capital flight in an ongoing counterterrorism investigation.³⁰² Classified information should also be guarded because mosaic theory states that seemingly innocuous information, when combined or supplemented with other information, can reveal national vulnerabilities.³⁰³

However, overclassification is harmful. Several government investigations and events have demonstrated the accuracy of Max Weber's theories of secrecy as a tool to avoid accountability and preserve bureaucratic dominance.³⁰⁴ As discussed in the following subsections, this poses problems for American democracy because excessive classified information weakens American security, undermines the legal system, fosters lack of public accountability, and empowers the executive branch. The D.C. Circuit's approach of stating that classified information is always protected from disclosure encourages overclassification and the consequences of overclassification.

(stating that the Attorney General could deny the foreign wife of an American soldier entry into the United States based on confidential information because allowing the Attorney General to develop regulations that restricted entry and departure of persons into the United States is an extension of the Executive's authority to control foreign affairs); *see also* *Dayton v. Dulles*, 357 U.S. 144, 145–47, 153–54 (1958) (concluding that the Secretary of State could not deny passports to communists after the State Department denied a passport to an American citizen based on confidential information that the citizen was a communist); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207–09, 210, 214 (1953) (stating that based on the Passport Act of 1918, the Attorney General could deny an immigrant, who had lived in the United States for twenty-five years and left to visit his dying mother in Europe, re-entry into the United States without a hearing and based on confidential information).

³⁰¹ *See, e.g., Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 984 (9th Cir. 2012); *Scarbeck v. United States*, 317 F.2d 546, 551 (D.C. Cir. 1962).

³⁰² *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

³⁰³ *See* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005).

³⁰⁴ *See* WENDY GINSBERG ET AL., CONG. RESEARCH SERV., R42817, GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH 8 (2012).

A. Undermining American Security

The classification system can weaken national security by stifling communication within the government. First, overclassification harms American society because it clutters the national security information system, making it difficult to find valuable information. Justice Potter Stewart once noted: "When everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."³⁰⁵

Second, overclassification prevents information sharing between agencies. For example, the second Iraq War featured at least one instance of an unclassified document that lacked important classified details but nevertheless influenced the decision to go to war.³⁰⁶ In October 2002, Senator Bob Graham, then chairman of the Senate Intelligence Committee, asked the CIA for the classified National Intelligence Estimate ("NIE") on Iraq's weapons of mass destruction.³⁰⁷ The CIA provided Graham with the classified ninety-page NIE but Graham also requested an unclassified white paper that legislators could debate and share publicly.³⁰⁸ The twenty-five page unclassified version was more assertive and did not contain the nuances that the classified version did.³⁰⁹ The CIA excluded or relegated dissent or precautions to footnotes.³¹⁰ This helped the Bush Administration more forcefully argue for the Iraq War and made it less likely that the public and Congress would have the information necessary to challenge the Bush Administration's argument.³¹¹ If the CIA had discussed more of its unknowns in the unclassified version, perhaps Congress would have called for more information or chosen not to support the war.

Indirectly, excessive classification contributes to a culture of secrecy that fosters inter-agency rivalries and prevents information sharing.³¹² President Truman believed that classification compartmentalized information and kept valuable intelligence away

³⁰⁵ Fuchs, *supra* note 77, at 139.

³⁰⁶ See Jason Leopold, *The CIA Just Declassified the Document that Supposedly Justified the Iraq Invasion*, GLOBAL RES. (Mar. 20, 2015), <http://www.globalresearch.ca/the-cia-just-declassified-the-document-that-supposedly-justified-the-iraq-invasion/5437861>.

³⁰⁷ See Bryan Burrough et al., *The Path to War*, VANITY FAIR: HIVE (May 2004), <http://www.vanityfair.com/news/2004/05/path-to-war200405>.

³⁰⁸ See *id.*

³⁰⁹ See Wyden et al., *supra* note 15, at 349; Burrough et al., *supra* note 307.

³¹⁰ See Walcott, *supra* note 98.

³¹¹ See Wyden et al., *supra* note 15, at 349–50.

³¹² See *id.* at 346.

from him.³¹³ The *9/11 Commission Report* stated the lack of information sharing contributed to 9/11 because though the INS had immigration records of al-Qaeda members, and the FBI had classified information about these individuals as terrorists, the two agencies did not communicate.³¹⁴ This made it impossible to deport suspected terrorists. More recently during the lead up to the Iraq War, the Director for Intelligence of the Joint Chiefs of Staff prepared a classified report that bluntly stated the weaknesses of U.S. intelligence: “Our knowledge of the Iraqi (nuclear) weapons program is based largely—perhaps [ninety percent]—on analysis of imprecise intelligence. . . . We’ve struggled to estimate the unknowns. . . . We range from [zero percent] to about [seventy-five percent] knowledge on various aspects of their program.”³¹⁵ Yet, the Joint Chiefs of Staff only shared this report with former Defense Secretary Donald Rumsfeld, and did not share the report with the State Department, the CIA, or the National Security Council.³¹⁶ This type of isolated analysis hampers productive foreign policy because it prevents decision makers from having a comprehensive understanding of U.S. vulnerabilities and strengths. Perhaps if this report was shared widely with both government executives and the public, Secretary of State Colin Powell would not have argued for the war at the United Nations and the war would not have happened. Thus, the classification system can undermine the very thing that it was meant to protect.

B. Questioning the Integrity of the Legal System

Over the last fifty years, the Supreme Court has written extensively about how secret or confidential information can undermine the integrity of the American legal system by undermining the right to due process and the right to confrontation. In *Jay v. Boyd*, Justice Hugo Black wrote that using confidential information undermines an independent and fair court system and threatens individual liberty, which is at the heart of the American constitutional system:

His condemnation is in open defiance of all the public testimony given, and rests exclusively on “confidential information” he claims to have received from unrevealed

³¹³ See HORTON, *supra* note 14, at 74, 75.

³¹⁴ See THE 9/11 COMMISSION REPORT, *supra* note 70, at 80.

³¹⁵ Walcott, *supra* note 98.

³¹⁶ See *id.*

sources. Unfortunately this condemnation of Jay on anonymous information is not unusual—it manifests the popular fashion in these days of fear. Legal rationalizations have been contrived to shift trials from constitutional courts to temporary removable appointees like the hearing officer who decided against Jay. And when an accused rises to defend himself before such an officer he is met by a statement that “We have evidence that you are guilty of something, but we cannot tell you what, nor who gave us the evidence.” If, taking the Bill of Rights seriously, he complains, he is met by the rather impatient rejoinder that the Government’s safety would be jeopardized by according him the kind of trial the Constitution commands. But the core of our constitutional system is that individual liberty must never be taken away by shortcuts, that fair trials in independent courts must never be dispensed with. That system is in grave danger. This case emphasizes that fact. Prosecution of any sort on anonymous information is still too dangerous, just as it was when Trajan rejected it nearly two thousand years ago. Those who prize liberty would do well to ponder this.³¹⁷

In the same case, Justice Black also wrote that using confidential information is problematic because the accuracy of the information can never be contested:

What is meant by “confidential information”? According to officers of the Immigration Service it may be “merely information we received off the street”; or “what might be termed as hearsay evidence, which could not be gotten into the record . . .”; or “information from persons who were in a position to give us the information that might be detrimental to the interests of the Service to disclose that person’s name . . .”; or “such things, perhaps, as income-tax returns, or maybe a witness who didn’t want to be disclosed, or where it might endanger their life, or something of that kind . . .” No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the

³¹⁷ Jay v. Boyd, 351 U.S. 345, 368–70 (1956) (Black, J., dissenting).

community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, much less decide the most trifling issue on it.³¹⁸

In another case in which an alien was detained and prevented from entry back into the United States, Justice Jackson wrote that using confidential information undermines the justice system because it can lead to errors: “Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.”³¹⁹ Justice Jackson went on to compare such procedures to Nazi Germany:

There are other differences, to be sure, between authoritarian procedure and common law, but differences in the process of administration make all the difference between a reign of terror and one of law. Quite unconsciously, I am sure, the Government’s theory of custody for “safekeeping” without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the “protective custody” of the Nazis more than of any detaining procedure known to the common law. Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. That these apprehensive surmises are not “such stuff as dreams are made on” appears from testimony of a top immigration official concerning an applicant that “He has no rights.”³²⁰

The use of classified materials in courts without an opportunity to access and respond to these materials challenges basic principles of due process.

C. Limiting Opposition to Controversial or Illegal Policies

Perhaps the most obvious consequence of overclassification is that the public cannot stop policies that it does not know about. When the government classifies information, there is much less debate because a smaller community of people have access to the relevant

³¹⁸ *Id.* at 365.

³¹⁹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–25 (1953) (Jackson, J., dissenting).

³²⁰ *Id.* at 226.

information necessary to make a decision.³²¹ This is a problem because lack of oversight gives political leaders greater opportunity to hide wrongdoing from the public or push poorly reasoned or extremist policies.³²² President Eisenhower's attorney general, Herbert Brownell, reported that the classification process was "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security."³²³

The House Committee on Government Operations concurred with Brownell by declaring that secrecy had become "the first refuge of incompetents."³²⁴ The 1994 Commission on Protecting and Reducing Government Secrecy also stated that individuals manipulated security classifications to prevent oversight and criminal investigations and escape accountability.³²⁵ For example, the Atomic Energy Commission classified reports of its human medical experiments, as did the CIA about its human testing of hallucinogens, to protect both organizations from public opinion and lawsuits that challenged these practices.³²⁶

In recent history, both the Bush and Obama Administrations utilized the classification system to advance controversial or illegal programs. For example, the Obama Administration used the classification system to shield drone policies from public discussion.³²⁷ Until 2016, Obama classified the number of civilians killed by drones.³²⁸ The chair of the SSCI, Senator Dianne Feinstein, disclosed the existence of a classified count of innocent people killed by drones and stated that this number was "typically in the single digits."³²⁹ Yet until 2016, the White House refused to release an exact count because of fears about the reliability of its methodology and reluctance to create debate around a specific number of victims.³³⁰ Only in 2016 did the Obama Administration announce that the

³²¹ See Pozen, *supra* note 62, at 278.

³²² See *id.*

³²³ HORTON, *supra* note 14, at 75.

³²⁴ *Id.*

³²⁵ See *id.* at 73, 75.

³²⁶ See Aftergood, *supra* note 49, at 403.

³²⁷ See HORTON, *supra* note 14, at 124–25.

³²⁸ See Karen DeYoung & Greg Miller, *White House Releases Its Count of Civilian Deaths in Counterterrorism Operations under Obama*, WASH. POST (July 1, 2016), https://www.washingtonpost.com/world/national-security/white-house-releases-its-count-of-civilian-deaths-in-counterterrorism-operations-under-obama/2016/07/01/3196aa1e-3fa2-11e6-80bc-d06711fd2125_story.html; see also Steve Coll, *The Unblinking Stare: The Drone War in Pakistan*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/unblinking-stare>.

³²⁹ See Coll, *supra* note 328.

³³⁰ See *id.*

United States had killed between 64 and 116 civilians through drone attacks since 2009.³³¹ This is far higher than Senator Feinstein's single-digit estimate but also far lower than the estimates of watchdog groups that calculated that hundreds or thousands of civilians were been killed.³³² Because the methodology and data used to reach this conclusion is still classified, there is no way to challenge the Obama Administration's count of how many civilians were wrongly killed and fully assess the effectiveness and cost of the drone program.³³³

Similarly, the Bush Administration classified many memorandums regarding its torture policies.³³⁴ For example, the Bush Administration classified General Antonio Taguba's report about torture at Abu Ghraib,³³⁵ but the report was leaked, leading to media investigations and public outrage.³³⁶ Ultimately, the public outrage was so severe that President George Bush apologized for the conduct; former Defense Secretary Donald Rumsfeld took responsibility for the abuse before the Senate and House Armed Services Committee; several soldiers were found guilty of abusing prisoners; and former prisoners brought a class action lawsuit against military contractors who administered the prison.³³⁷

Bush Administration officials also issued classified legal opinions through the Office of Legal Counsel ("OLC") that provided legal protection to individuals who tortured prisoners in Iraq and

³³¹ See DeYoung & Miller, *supra* note 328.

³³² See Coll, *supra* note 328; Conor Friedersdorf, *The Obama Administration's Drone-Strike Dissembling*, ATLANTIC (Mar. 14, 2016), <http://www.theatlantic.com/politics/archive/2016/03/the-obama-administrations-drone-strike-dissembling/473541/>.

³³³ See Ryan Devereaux, *Obama Administration Finally Releases Its Dubious Drone Death Toll*, INTERCEPT (July 1, 2016), <https://theintercept.com/2016/07/01/obama-administration-finally-releases-its-dubious-drone-death-toll/>.

³³⁴ See Pozen, *supra* note 62, at 331, 336.

³³⁵ See Elizabeth Goitein & David Shapiro, *Classification and Consequences*, BRENNAN CTR. FOR JUST. (Apr. 16, 2010), <https://www.brennancenter.org/analysis/classification-and-consequences>; see generally Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became One of Its Casualties*, NEW YORKER (June 25, 2007), <http://www.newyorker.com/magazine/2007/06/25/the-generals-report> [hereinafter Hersh, *The General's Report*] (providing background information about General Taguba's report).

³³⁶ See Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, NEW YORKER (May 10, 2004), <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> [hereinafter Hersh, *Torture at Abu Ghraib*]; *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 12, 2016), <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/>; Hersh, *The General's Report*, *supra* note 335.

³³⁷ *Chronology of Abu Ghraib*, WASH. POST, <http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/timeline.html> (last updated Feb. 17, 2006); see *Iraq Prison Abuse Scandal Fast Facts*, *supra* note 336.

Afghanistan.³³⁸ In 2002, two OLC memorandums, written by attorney John Yoo and signed by Assistant Attorney General Jay Bybee, defined torture broadly as physical pain that is “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”³³⁹ It also stated that people captured in the War on Terror and held outside the U.S. could be tortured without violating either international or domestic law.³⁴⁰ Both memorandums were only leaked in 2004 as part of public outrage against detainee abuse at Abu Ghraib.³⁴¹

The Justice Department argued that these memorandums were classified because they had to keep information about intelligence techniques and methods secret.³⁴² But in reality, this information could have (and eventually had) redacted sections while leaving the legal strategy intact.³⁴³ Once these documents were publicly released, it became likely that the Justice Department had only classified these documents to conceal their flawed reasoning.³⁴⁴ These officials likely knew that the reasoning in these memorandums would not withstand public scrutiny and that their discovery would consequently lead to the termination of the torture program.³⁴⁵ Subsequently, the DOJ's internal watchdog, the Office of Professional Responsibility, recommended that Bybee and Yoo be referred to their state bars for discipline.³⁴⁶ The Bush Administration later rescinded the memorandums.³⁴⁷

Attorneys at the Brennan Center for Justice summarize some of the most harmful policies that the Bush Administration covered up through the classification system:

The Bush [A]dministration held on to classified Justice Department memo[rands] that signed off on waterboarding

³³⁸ See HORTON, *supra* note 14, at 181.

³³⁹ Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzalez, Counsel to the President 5 (Aug. 1, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>; see *Redefining Torture?*, PBS (Oct. 18, 2005), <http://www.pbs.org/wgbh/pages/frontline/torture/themes/redefining.html>.

³⁴⁰ See Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579, 589–90 (2009).

³⁴¹ See *id.*

³⁴² See HORTON, *supra* note 14, at 182.

³⁴³ See *id.*

³⁴⁴ See *id.*

³⁴⁵ See *id.*

³⁴⁶ See David Luban, *David Margolis is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, SLATE (Feb. 22, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html.

³⁴⁷ See HORTON, *supra* note 14, at 182.

and other forms of torture. A classified program shunted people off to secret prisons in foreign countries, where they suffered even more brutal interrogations. A classified program let the government spy on phone calls without warrants. Government by the people can exist only if the people know what their government is doing, but the “top secret” stamp has become a tool of closed institutions.³⁴⁸

Ultimately, excessive classified information means that Americans know less and less about how our government operates. This means we cannot object to policies that infringe on our rights, such as the NSA surveillance program, oppose poorly reasoned measures, or temper extremist views.³⁴⁹

D. Unduly Empowering the Executive Branch

While the classification system protects national security, several presidential administrations have also abused the system to advance executive power. It is no coincidence that the first prosecution for releasing classified information focused on an individual who threatened executive authority.³⁵⁰ President Richard Nixon prosecuted Daniel Ellsberg, the government official who leaked the classified “Pentagon Papers” to the *New York Times* and the *Washington Post*.³⁵¹ The Pentagon Papers was a top secret Department of Defense study that revealed that successive U.S. Presidents had actually further involved the United States in Vietnam while denying any involvement to the U.S. public.³⁵² Ellsberg released the papers because he wanted to stop U.S. involvement in the Vietnam War and expose the executive branch’s dishonesty.³⁵³ The United States Supreme Court ruled that the papers could be printed because the government had not shown that the papers should not be published for national security reasons.³⁵⁴ Almost two decades after the Pentagon Papers, Erwin Griswold, the Solicitor General under Nixon who had worked to prevent the

³⁴⁸ David Shapiro & Elizabeth Goitein, *Shapiro and Goitein: Classification and Consequences*, ROLL CALL (Apr. 16, 2010), <http://www.rollcall.com/news/45260-1.html>.

³⁴⁹ See Fuchs, *supra* note 77, at 138–39.

³⁵⁰ See Wells, *supra* note 16, at 458–59.

³⁵¹ See *id.* at 459.

³⁵² See, e.g., Jon Swaine, *The Impact of the Pentagon Papers 40 Years On*, TELEGRAPH (June 13, 2011), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8573899/The-impact-of-The-Pentagon-Papers-40-years-on.html>.

³⁵³ See Michael Cooper & Sam Roberts, *After 40 Years, the Complete Pentagon Papers*, N.Y. TIMES (June 7, 2011), http://www.nytimes.com/2011/06/08/us/08pentagon.html?_r=0.

³⁵⁴ See Swaine, *supra* note 352.

publication of the Pentagon Papers, admitted that the Pentagon Papers never posed a national security threat and that he had “never seen any trace of a threat to the national security from the publication. Indeed, [he said he had] never seen it even suggested that there was such an actual threat.”³⁵⁵ Further still, Griswold had not even read the Pentagon Papers entirely when he argued before the Supreme Court that the papers threatened national security.³⁵⁶

The Obama Administration had also used the classification system to expand its authority. For example, the Obama Administration classified documents that provided the unprecedented legal authority for a President to kill an American citizen through a drone attack.³⁵⁷ In July 2010, the OLC drafted a classified memorandum that authorized the killing of American citizen Anwar al-Awlaki without due process.³⁵⁸ The Administration stated the documents were classified to protect details about clandestine operations.³⁵⁹ The memorandum was only revealed when the Court of Appeals for the Second Circuit ordered that the government declassify and release the report pursuant to a Freedom of Information Act (“FOIA”) request by the *New York Times* and the American Civil Liberties Union (“ACLU”).³⁶⁰ Newspapers, scholars, and intellectuals criticized the memorandum because it: watered down the definition of due process; redacted its justification for killing al-Awlaki, preventing any potential criticism of the Obama Administration’s judgment that al-Awlaki posed a threat and that it would not have been possible to capture al-Awlaki alive; redacted the justification for allowing the CIA to kill al-Awlaki when it was not clear that the CIA had such authority; and broadened the definition of the battlefield from Afghanistan and Iraq to anywhere al-Qaeda goes, thereby expanding the President’s authority to use lethal force anywhere in

³⁵⁵ Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST (Feb. 15, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/?utm_term=.40b273013e6f.

³⁵⁶ *See id.*

³⁵⁷ *See* Pam Benson & Lesa Jansen, *Senate Panel Gets Classified Drone Document from Obama*, CNN (Feb. 8, 2013), <http://www.cnn.com/2013/02/07/politics/drones-classified-document/>.

³⁵⁸ *See* HORTON, *supra* note 14, at 116 & 220 n.12; *see generally* Memorandum from the U.S. Dep’t of Justice on Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar al-Aulaqi, to the U.S. Attorney Gen. (July 16, 2010), <https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-Awlaki-Memo.pdf> (providing the actual authorizing memorandum used).

³⁵⁹ *See* Brief for Defendants-Appellees at 26, *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100 (2d Cir. 2014) (Nos. 13-422(L), 13-445(CON)).

³⁶⁰ *See* HORTON, *supra* note 14, at 182–83.

the world.³⁶¹

The Obama Administration also used the classification system to expand an executive agency's reach. For example, James Clapper lied to Congress about the existence of the NSA's extensive illegal phone surveillance program.³⁶² The NSA classified information about this program, preventing Congress and the American public from knowing and therefore objecting to it.³⁶³ Once information about the program became public, several courts ruled that it was unconstitutional.³⁶⁴ In addition, Congress passed legislation that phases out the program and now requires warrants for the government to search through phone records.³⁶⁵

After forty years of reflection, Ellsberg remarked on the dangers of unchecked secretive executive power:

[L]etting a small group of men in secret in the executive branch make these decisions—initiate them secretly, carry them out secretly and manipulate Congress, and lie to Congress and the public as to why they're doing it and what they're doing—is a recipe for, a guarantee of Vietnams and Iraqs and Libyas, and in general foolish, reckless, dangerous policies.³⁶⁶

³⁶¹ See Editorial, *A Thin Rationale for Drone Killings*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/2014/06/24/opinion/a-thin-rationale-for-drone-killings.html>; Editorial, *The Awlaki Drone Memo*, WALL STREET J. (June 25, 2014), <http://www.wsj.com/articles/the-awlaki-drone-memo-1403653290>; Conor Friedersdorf, *A Ray of Sunlight on Obama's Extrajudicial Killings*, ATLANTIC (June 24, 2014), <http://www.theatlantic.com/politics/archive/2014/06/a-ray-of-sunlight-on-obamas-extrajudicial-killings/373247/>; Nicandro Iannacci, *Justice Department Memo Explains Justification for Drone Strikes Abroad*, CONST. DAILY BLOG (June 30, 2014), <http://blog.constitutioncenter.org/2014/06/justice-department-memo-explains-justification-for-drone-strikes-abroad/>; John Yoo, *The Real Problem with the Obama Administration's Drone Memo*, NAT'L REV. (June 26, 2014), <http://www.nationalreview.com/corner/381351/real-problem-obama-administrations-drone-memo-john-yoo>.

³⁶² See Julian Hattem, *Attorney: Spy Chief had 'Forgotten' about NSA Program when he Misled Congress*, HILL (May 08, 2015), <http://thehill.com/policy/technology/241508-spy-head-had-absolutely-forgotten-about-nsa-program>.

³⁶³ See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

³⁶⁴ See *Appeals Court Reverses Ruling that Found NSA Program Illegal*, CBS NEWS (Aug. 28, 2015), <http://www.cbsnews.com/news/appeals-court-reverses-ruling-that-found-nsa-program-illegal/>; Jonathan Stempel, *NSA's Phone Spying Program Ruled Illegal by Appeals Court*, REUTERS (May 7, 2015), <http://www.reuters.com/article/us-usa-security-nsa-idUSKBN0NS1IN20150507>.

³⁶⁵ See *Appeals Court Reverses Ruling that Found NSA Program Illegal*, *supra* note 364.

³⁶⁶ Cooper & Roberts, *supra* note 353.

VI. DEVELOPING COMMON LAW THAT BALANCES DUE PROCESS WITH PROTECTING NATIONAL SECURITY

Courts, such as the D.C. Circuit, should not contribute to the consequences of overclassification by protecting classified information from disclosure. Such rulings incentivize agencies to classify more information because it encourages agencies to seek new ways to avoid disclosing information. Thus, if agencies want to minimize information disclosure and courts state that classified information does not have to be disclosed, agencies will classify as much information as possible to avoid disclosure.

Increasing classified information creates significant problems for American democracy. As described in the previous section, excessive classification threatens national security, undermines the American legal system, leads to poor public policies, and empowers the executive branch to engage in questionable activities without oversight from the other branches of government.

Though this article argues that classification should be reduced, it is unlikely that the executive branch will judiciously regulate the classification system. The executive branch created and maintains the classification system based on executive privilege, and the aforementioned sections discuss how the executive branch has used the classification system to advance its goals, such as torture and drones, beyond the purview of Congress. Hence, it would be irrational for the executive branch to limit its own power and unrealistic to expect that it will regulate an aspect of its own authority.

The Judiciary is ideally positioned to check overclassification. In order to discourage executive agencies from classifying information to avoid disclosing it, courts should take a nuanced approach to classification. Instead of categorically stating that classified information does not have to be disclosed, courts should balance the individual's interest in accessing and rebutting classified information with the national security interest.

Last, it would be ideal for Congress to pass legislation that thwarts overclassification, yet this prospect is unlikely because Congress lacks the political will to pass similar bills, as described below.³⁶⁷

³⁶⁷ See Stephen J. Schulhofer, *Oversight of National Security Secrecy in the United States* 13 (N.Y.U. Pub. L. & Legal Theory, Working Paper No. 396, 2013), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1397&context=nyu_plltwp. The working paper just cited provides a comparison regarding how the press is highly motivated to unveil classified information that the public deserves to see, yet it usually "lacks dependable means for obtaining information," while "Congress has potent tools but usually lacks the motivation to use them constructively."

A. *Congress' Role: Pass a Statute Similar to CIPA that Applies in the Civil and Administrative Law Context*

Congress seems the most appropriate institution to regulate the use of classified information in civil and administrative cases; however, Congress has not effectively regulated this area thus far.

Unlike the judiciary, Congress can pass regulations that have a broad impact. Congress is also democratically elected and has a say in foreign affairs through its ability to authorize force, provide financial support for wars, ratify treaties, and regulate the intelligence community.³⁶⁸ Moreover, Congress already passed CIPA, a statute about classified information.³⁶⁹ Thus, Congress' authority, expertise, and experience apply to regulating how courts and executive agencies manage classified information.

Congress could pass a statute similar to CIPA that both codifies the state secrets privilege common law, distinguishes state secrets from classified information, and specifies how executive agencies and courts could balance national security interests that are embroiled in classified information with individual due process rights. Similarly, Congress could pass a statute that gives judges the opportunity to review and weigh the classified information that the executive branch uses to make its administrative decisions and decide whether to reveal that information to plaintiffs.

Congress could also require that executive agencies receive judicial approval prior to affecting individual liberties. Executive agencies could present evidence to a magistrate or an Article III judge, similar to getting a warrant.³⁷⁰ The judge could then review the information that the executive branch presented and decide if the information was reliable, if the plaintiff's liberty should be infringed, and, if there was classified information at stake, if the classified information should be revealed to plaintiffs. Admittedly, this process would slow down the process of making executive branch administrative decisions, and it therefore may lead to fewer people placed on national security lists. However, the reduction in number of people

Id. As such, "Congress's motivation to seek information and to act on it is a function of political incentives, which in turn are a function of the public awareness that neither the press more Congress can normally supply." *Id.*

³⁶⁸ See, e.g., U.S. CONST. art. I, §§ 1, 2, 8.

³⁶⁹ See Classified Information Procedures Act, Pub. L. No. 96-456, § 1, 94 Stat. 2025, 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1-16 (2012)).

³⁷⁰ See Michael Ramsey, A Return Flight for Due Process? An Argument for Judicial Oversight of the No-Fly List 26 (Mar. 25, 2014) (unpublished comment, University of Mississippi School of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414659.

on national security watch lists may prevent people from being erroneously placed on these lists to begin with.³⁷¹ This is an improvement, since being placed on a national security watch list significantly restricts liberty and hundreds of people have seemingly been placed on these lists for unknown or erroneous reasons.³⁷² Judicial review would also protect a plaintiff's due process rights by allowing an impartial arbitrator—the judge—to decide the appropriate action in the situation while shielding the government from revealing information that would actually harm U.S. national security.³⁷³ Judicial authorization would not be required in emergency situations, similar to warrant exceptions.³⁷⁴

Finally, Congress could also pass a statute that creates special advocates, similar to what is done in Canada or the United Kingdom.³⁷⁵ These advocates, armed with the appropriate security clearances, could represent the plaintiff in a closed hearing about classified information.³⁷⁶ The closed hearing would include the judge, the government, and the special advocate.³⁷⁷ The advocate could then scrutinize the classified material, identify potential problems with the evidence, argue for an acceptable summary of the classified evidence, and also advocate for disclosure to the plaintiff.³⁷⁸

B. New Statute Unlikely Because Congress has Repeatedly Failed to Pass the State Secrets Protection Act ("SSPA")

Though legislation in this area is preferable, it is unlikely based on Congress' current efforts to pass the State Secrets Protection Act ("SSPA"), which would curb the state secrets privilege.

In civil cases, the government can claim the common law state secrets privilege to prevent disclosing sensitive national security information.³⁷⁹ The doctrine states that judges can decide to not release particular evidence or can decide to halt court proceedings if

³⁷¹ See *id.* at 25.

³⁷² See David Smith, "The Illusion of Security": No-Fly List Draws Scrutiny from Left and Right, *GUARDIAN* (Dec. 9, 2015), <https://www.theguardian.com/us-news/2015/dec/09/no-fly-list-errors-gun-control-obama>.

³⁷³ See Micah Wyatt, Comment, *Designating Terrorist Organizations: Due Process Overdue*, 39 *GOLDEN GATE U. L. REV.* 221, 258–59 (2009).

³⁷⁴ See Ramsey, *supra* note 370, at 27.

³⁷⁵ See Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 *COLUM. J. TRANSNAT'L L.* 3, 25 (2009).

³⁷⁶ See *id.* at 24–25.

³⁷⁷ See *id.* at 24, 28.

³⁷⁸ See *id.* at 24–25, 29.

³⁷⁹ See *The State Secrets Privilege*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/nsa-spying/state-secrets-privilege> (last visited Jan. 23, 2017).

the government claims that doing so would prevent disclosing state secrets.³⁸⁰

In order to invoke the state secrets privilege, the head of an executive agency must sign an affidavit stating that he or she has personally reviewed the information and determined that it qualifies as a state secret.³⁸¹ The court must then decide whether there exists a state secret and whether the evidence is admissible.³⁸² There is no definition or standard for what type of information is considered a state secret, and information does not have to be classified to be considered a state secret.³⁸³ If the court deems that this evidence is inadmissible, the case will still go forward without the evidence unless the plaintiff cannot prove the prima facie elements of the claim without the requested information.³⁸⁴ In that case, the suit will be dropped.³⁸⁵ Courts have also determined that if the privilege prevents defendants from accessing information that would provide a valid defense, the court may grant summary judgment in favor of the defendant.³⁸⁶ Finally, if the subject matter at the heart of the action remains a state secret, courts can dismiss the suit entirely.³⁸⁷

The state secrets privilege does not afford both parties equal privileges. Unlike CIPA, there is no method under the state secrets privilege for non-government plaintiffs to use the state secrets privilege to present their own classified evidence, prevent classified information from being used against them, or access classified evidence against them.³⁸⁸ The privilege prevents allegedly sensitive information from being used against the government.³⁸⁹

The one-sided nature of the privilege is especially problematic when combined with the government incentive to not reveal information. In civil cases in which the government is a defendant, the government has little incentive to reveal information that may harm its defense.³⁹⁰ Therefore, the government can hide behind the state secrets privilege to prevent disclosing relevant and damaging

³⁸⁰ *See id.*

³⁸¹ *See* Amanda Frost & Justin Florence, *Reforming the State Secrets Privilege*, 3 J. ACS ISSUE GROUPS 111, 112 (2009).

³⁸² *See id.*

³⁸³ *See id.*

³⁸⁴ *See id.*

³⁸⁵ *See id.*

³⁸⁶ *See id.*

³⁸⁷ *See id.* at 112–13.

³⁸⁸ *See* Rossmiller, *supra* note 33, at 1281–82.

³⁸⁹ *See id.*

³⁹⁰ *See id.* at 1282.

information, much like what happened in *Reynolds*.³⁹¹ This is unlike CIPA because with CIPA, the government either wants to work with the judicial system to disclose classified information to advance its prosecution or the government faces sanctions if the defendant possesses classified evidence that it wants to use but the government cannot provide an adequate unclassified substitute.³⁹² The state secrets privilege provides no similar incentives or consequences.³⁹³ Thus, it is no surprise that the government has used the state secrets privilege with more frequency.³⁹⁴ The government has also cited the state secrets privilege to dismiss cases before they begin, though the privilege was only meant to prevent certain pieces of evidence from being used in trial.³⁹⁵

Unsurprisingly, a variety of legal professionals and politicians have criticized the doctrine.³⁹⁶ The late Senator Edward Kennedy, Senator Diane Feingold, Senator Patrick Leahy, and Senator Arlen Specter, the senior ranking member of the Judiciary Committee at the time, sponsored the 2008 SSPA, which was meant to reform the state secrets privilege.³⁹⁷ In *Mohamed v. Jeppesen Dataplan, Inc.*,³⁹⁸ Judge Hawkins critiqued the privilege by stating:

At base, the government argues here that state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official. . . . This sweeping characterization of the “very subject matter” bar has no logical limit According to the government’s theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny,

³⁹¹ Frost & Florence, *supra* note 381, at 121; see *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

³⁹² See Rossmiller, *supra* note 33, at 1282.

³⁹³ See *id.*

³⁹⁴ See *id.* at 1285.

³⁹⁵ See *id.*

³⁹⁶ See, e.g., Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 78 (2010); Frost & Florence, *supra* note 381, at 120–21; Elizabeth Goitein & Frederick A. O. Schwarz, Jr., *Congress Must Stop Abuses of Secrets Privilege*, BRENNAN CTR. FOR JUST. (Dec. 14, 2009), <https://www.brennancenter.org/analysis/congress-must-stop-abuses-secrets-privilege>; David Kravets, *Much-Abused ‘State Secrets Privilege’ Under Fire in Congress*, WIRED (June 25, 2012), <https://www.wired.com/2012/06/state-secrets-privilege/>; Press Release, ACLU, Government is Abusing “States Secrets Privilege” to Cover Up National Security Blunders, ACLU Says (Jan. 12, 2005), <https://www.aclu.org/news/government-abusing-states-secrets-privilege-cover-national-security-blunders-aclu-says>; *The State Secrets Privilege*, *supra* note 379.

³⁹⁷ See Press Release, U.S. Senator Patrick Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009), <https://www.leahy.senate.gov/press/leahy-specter-feingold-kennedy-introduce-state-secrets-legislation>.

³⁹⁸ *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009).

immunizing the CIA and its partners from the demands and limits of the law.³⁹⁹

Criticism of the overuse of the state secrets privilege was so common that in May 2009, President Obama said that his Administration was reviewing the use of the state secrets privilege, stating: “[M]y [A]dministration is also confronting challenges to what is known as the ‘state secrets’ privilege. . . . I am concerned that it has been over-used.”⁴⁰⁰

Since 2008, Congress has unsuccessfully tried to pass some version of the SSPA,⁴⁰¹ but several senators oppose the SSPA. They argue that the bill is not necessary because judges already have common law procedures for adjudicating state secrets and these procedures could be adapted to the needs of any individual case.⁴⁰² They also argue that the bill makes it harder for the executive branch to protect national security because the government must meet a greater threshold in order to withhold state secrets.⁴⁰³ Thus, despite being brought up every congressional term since 2008, the SSPA has never made it past committee hearings and thus, never made it to a vote.⁴⁰⁴

Both the Bush and Obama Administrations also opposed the SSPA. Attorney General Michael Mukasey wrote a letter to the Senate Judiciary Committee stating that he would recommend that President Bush veto the SSPA if it ever passed both houses.⁴⁰⁵ Mukasey stated that the SSPA would “interfere with the appropriate constitutional role of both the [j]udicial and [e]xecutive branches in state secrets cases; would alter decades of settled case law; and would likely result in the harmful disclosure of national security information that would not be disclosed under current doctrine.”⁴⁰⁶ Similarly, the Obama Administration issued internal guidelines to reform the state secrets privilege, instead of supporting the passage

³⁹⁹ *Id.* at 955.

⁴⁰⁰ Press Release, Office of the Press Sec’y, The White House, Remarks by the President on National Security (May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09>.

⁴⁰¹ *See, e.g.*, State Secrets Protection Act, H.R. 4767, 114th Cong. (2015); State Secrets Protection Act, H.R. 3332, 113th Cong. (2013); State Secrets Protection Act, H.R. 5956, 112th Cong. (2012); State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secrets Protection Act, S. 2533, 110th Cong. (2008).

⁴⁰² *See, e.g.*, S. REP. NO. 110-442, at 39–40 (2008).

⁴⁰³ *See id.* at 42.

⁴⁰⁴ *See, e.g.*, sources cited *supra* note 401.

⁴⁰⁵ *See* Letter from Michael B. Mukasey, U.S. Attorney Gen., to Patrick J. Leahy, Chairman, Comm. on the Judiciary (Mar. 31, 2008), <https://www.justice.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf>.

⁴⁰⁶ *Id.*

of the SSPA.⁴⁰⁷ Thus, congressional involvement is unlikely.

C. Judicial Role: Scrutinizing the Executive Branch's National Security Claims

As discussed above, courts have a long history of accepting the executive branch's explanations for national security issues because courts do not believe they have the expertise to make foreign policy judgments.⁴⁰⁸ However, courts should not give up their opportunity to evaluate the executive branch's claims that information should not be released for national security reasons. The personal interests at stake are critical and the risk of error is high when there is no adversarial process to assess the quality of information. *Kiareldeen v. Reno* states that "because secret procedures deprive individuals of their rights of confrontation and cross-examination, the use of undisclosed information presented an 'exceptionally high risk of erroneous deprivation.'"⁴⁰⁹ Senator Arlen Specter, who co-sponsored the 2008 SSPA, in regard to the idea that judges should defer to the Executive about secret information, stated: "It's beyond arrogant, . . . It's insulting."⁴¹⁰

In many cases, a court's refusal to accept the executive branch's claims regarding the reliability of classified intelligence or the applicability of the state secrets privilege has helped individual Americans and has set critical legal precedent about balancing security with liberty.⁴¹¹ This is because the executive branch has relied on classified intelligence that is shoddy and uncorroborated; applied the state secrets privilege to evade accountability; and attempted to deceive the court.

In *Ibrahim v. Department of Homeland Security*, a case about a Stanford Ph.D. student who was wrongly placed on the No-Fly list, the court reviewed the classified information in camera and the government admitted that the entire reason Ibrahim was on the No-Fly list was due to human error.⁴¹² Judge Alsup of the Northern

⁴⁰⁷ See Editorial, *An Incomplete State Secrets Fix*, N.Y. TIMES (Sept. 28, 2009), http://www.nytimes.com/2009/09/29/opinion/29tue1.html?_r=0.

⁴⁰⁸ See Deeks, *supra* note 118, at 830.

⁴⁰⁹ *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 412 (D.N.J. 1999) (quoting *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999)).

⁴¹⁰ Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, NEW YORKER (Apr. 28, 2008), <http://www.newyorker.com/magazine/2008/04/28/state-secrets-2>.

⁴¹¹ See, e.g., *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 930 & n.1 (N.D. Cal. 2014) (providing an example of how to balance those interests).

⁴¹² See *id.* at 916.

District of California wrote: “That it was human error may seem hard to accept—the FBI agent filled out the nomination form *in a way exactly opposite* from the instructions on the form, a bureaucratic analogy to a surgeon amputating the wrong digit—human error, yes, but of considerable consequence.”⁴¹³

In another case, a court reviewed the classified evidence and found that it did not prove the government’s allegations. In *Bensayah v. Obama*,⁴¹⁴ Belkacem Bensayah petitioned for a writ of habeas corpus to challenge his detention in Guantanamo Bay.⁴¹⁵ The government claimed that Bensayah “was a member of and a travel facilitator for al-Qaeda.”⁴¹⁶ The district court denied the request for a writ of habeas corpus because it said that the government had shown by a preponderance of evidence that Bensayah planned to travel to Afghanistan to “take up arms against the United States”⁴¹⁷ As evidence, the government offered a classified document that featured a statement about Bensayah from an unnamed source and evidence that allegedly corroborated the assertion.⁴¹⁸ On appeal, the government stopped relying on some of the evidence it provided at the district level.⁴¹⁹ After reviewing the classified evidence, the D.C. Circuit reversed the decision because of the limited evidence linking Bensayah to al-Qaeda.⁴²⁰ The government presented no evidence of any communication between Bensayah and any al-Qaeda member or any evidence that Bensayah communicated with anyone in order to facilitate travel for any al-Qaeda member.⁴²¹ Though Bensayah admitted to traveling with false paperwork, the D.C. Circuit decided that this did not prove that Bensayah worked for al-Qaeda.⁴²²

In a similar case, the United States District Court for the District of Columbia found that the government did not meet the burden of proof to deny plaintiff’s habeas corpus challenge to his detention in Guantanamo Bay.⁴²³ The plaintiff, Al Rabiah, traveled to Afghanistan in July 2001 and October 2001.⁴²⁴ The U.S. government alleged that Al Rabiah traveled to Afghanistan as a devotee of Osama

⁴¹³ *Id.* at 927–28 (emphasis added).

⁴¹⁴ *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

⁴¹⁵ *See id.* at 720.

⁴¹⁶ *Id.* at 721.

⁴¹⁷ *Id.*

⁴¹⁸ *See id.*

⁴¹⁹ *See id.* at 726.

⁴²⁰ *See id.* at 727.

⁴²¹ *See id.* at 726.

⁴²² *See id.* at 727.

⁴²³ *See Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 (D.D.C. 2009).

⁴²⁴ *See id.* at 20, 21.

bin Laden, while the plaintiff alleged that he traveled there as part of his charitable work for various organizations.⁴²⁵ After reviewing the classified and unclassified evidence, the District Court for the District of Columbia found that:

[T]here is also no evidence in the record that these organizations supported terrorism at the time Al Rabiah volunteered for them (regardless of their designations by the United States), or evidence that Al Rabiah had any role involving terrorism or knowledge that these organizations had links to terrorism. In short, there is no evidence in the record supporting the inference that Al Rabiah was involved with terrorist activities when he previously traveled to impoverished and war-torn locations.⁴²⁶

The court also said that additional evidence of Al Rabiah's support for terrorism was not sufficient because it was "based on one sentence, from one interrogation[.]"⁴²⁷ and that "there [was] no evidence identifying the source of [text redacted by the court] knowledge, or evidence that the Government ever determined that he was a reliable witness."⁴²⁸ The court also chided the government for continuing to rely on a fellow detainee who alleged that Al Rabiah had a history of terrorist activities even though the detainee was not reliable because his allegations were inconsistent and implausible.⁴²⁹

Kiareldeen also demonstrates that undisclosed classified information may come from dishonest sources motivated by personal vendettas. In *Kiareldeen's* case, the INS used classified evidence as part of *Kiareldeen's* deportation proceedings.⁴³⁰ This information was presented *ex parte* and *in camera* to the IJ.⁴³¹ It is likely that *Kiareldeen's* accuser was his ex-wife, Amal Kamal.⁴³² After a bitter divorce, Kamal had falsely accused *Kiareldeen* of domestic abuse six times.⁴³³ *Kiareldeen* produced evidence that during one of these instances, Kamal accused *Kiareldeen* of having ties to Islamic groups.⁴³⁴ At his removal hearing, *Kiareldeen* attempted to subpoena his ex-wife.⁴³⁵ The INS filed an unsuccessful motion to prevent

⁴²⁵ *See id.* at 21.

⁴²⁶ *Id.* at 22.

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 22–23 (alteration in original).

⁴²⁹ *See id.* at 24.

⁴³⁰ *See Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 404 (D.N.J. 1999).

⁴³¹ *See id.*

⁴³² *See id.* at 416.

⁴³³ *See id.* at 416–17.

⁴³⁴ *See id.* at 417.

⁴³⁵ *See id.*

Kiareldeen from asking Kamal if she had any contact with a law enforcement agency.⁴³⁶ Kamal appeared at the removal hearing and refused to answer questions about her interactions with the FBI.⁴³⁷ The INS provided no other witnesses to support its testimony but the plaintiff offered exculpatory testimony, documents, and expert witnesses to demonstrate that he had no terrorist ties.⁴³⁸ The District of New Jersey determined that Kiareldeen received insufficient due process because of the lack of credible evidence that the government used against him:

The quality of the evidence offered by the government as the basis for petitioners' continued detention does not attain that level of reliability sufficient to satisfy the constitutional standard of fundamental fairness. Even the majority opinion of the Board of Immigration Appeals, which overruled Judge Meisner's decision to release the petitioner on bond, noted: "Like the Immigration Judge and the dissent, we have some concerns about the reliability of some of the classified information." The court finds that to be an understatement.⁴³⁹

In a few instances in which the judiciary failed to challenge the executive branch's designation of information as a state secret or as classified information, declassified records and historical research have revealed deception and negligence. For example, as aforementioned, the Supreme Court decided the *Reynolds* case without reviewing the privileged accident reports.⁴⁴⁰ When the government declassified the accident reports decades later, the report revealed no state secrets but did demonstrate government negligence.⁴⁴¹ There was no mention of secret electronic equipment in the accident reports, but the report did discuss maintenance issues, fire hazards, and mechanical problems that could have contributed to the accident.⁴⁴² Revealing this report would likely have lost the government's case, so to hide it, the government created the state secrets privilege.

Though the Judiciary has a history of deferring to the Executive, the executive branch has previously deceived the Judiciary. In *Korematsu v. United States*,⁴⁴³ the Supreme Court decided that

⁴³⁶ *See id.*

⁴³⁷ *See id.*

⁴³⁸ *See id.* at 417–18.

⁴³⁹ *Id.* at 418.

⁴⁴⁰ *See United States v. Reynolds*, 345 U.S. 1, 11–12 (1953).

⁴⁴¹ *See Frost & Florence*, *supra* note 381, at 11.

⁴⁴² *See Rossmiller*, *supra* note 33, at 1336.

⁴⁴³ *Korematsu v. United States*, 323 U.S. 214 (1944).

Congress and the executive branch had the power to place Japanese people in internment camps in order to prevent espionage and sabotage.⁴⁴⁴ This was based on a military assessment that it was impossible to ascertain which Japanese people were loyal.⁴⁴⁵ The Court decided that according to Congress, the military had the authority to determine “who should, and who should not, remain in the threatened areas[,]” and the court could not reject the military’s finding.⁴⁴⁶

In 2011, Acting Solicitor General Neal Katyal apologized for the *Korematsu* decision.⁴⁴⁷ Katyal wrote that by the time the case reached the Supreme Court, the Solicitor General knew of the Office of Naval Intelligence’s “Ringle Report.”⁴⁴⁸ The Ringle Report contained analysis by the FBI and the Federal Communications Commission (“FCC”) that concluded that only a small minority of Japanese-Americans posed any security risk and that the government knew about the most dangerous Japanese-Americans.⁴⁴⁹ However, the Solicitor General did not disclose the report to the Supreme Court, though DOJ attorneys counseled in favor of alerting the Court, arguing that to not do so “might approximate the suppression of evidence.”⁴⁵⁰ Instead, the Solicitor General argued that it was impossible to determine which Japanese individuals were loyal and that the Japanese people were motivated by “racial solidarity,” making them loyal only to Japan.⁴⁵¹ The Solicitor General also did not alert the Court that the FBI disproved allegations that Japanese-Americans used radio transmitters to communicate with Japanese submarines off the west coast, another rationale used for the Japanese internment camps.⁴⁵² If the Court would have had all the information that the Solicitor General knew, or had asked for an explanation of the evidence, it is unlikely that *Korematsu* would have blemished American law.⁴⁵³

The Court of Appeals for the Fourth Circuit summarized the

⁴⁴⁴ See *id.* at 217–18.

⁴⁴⁵ See *id.* at 219.

⁴⁴⁶ *Id.* at 217–18.

⁴⁴⁷ See Neal Katyal, *Confession of Error: The Solicitor General's Mistakes during the Japanese-American Internment Cases*, U.S. DEP'T JUST. BLOG (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

⁴⁴⁸ See *id.*

⁴⁴⁹ See *id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² See *id.*

⁴⁵³ See *id.*

troubling consequences of judicial deference to the Executive:

We note further that, troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to “national security” may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.⁴⁵⁴

Patricia M. Wald, a former judge on the D.C. Circuit, commented:

Probing even a little into national security matters is not an easy or a pleasant job; in most cases the court ends up agreeing with the Executive that the dangers of disclosure are real. But if they honor the statutory command, judges must conscientiously make the inquiry to the best of their ability—insisting on affidavits setting out the security concerns, looking at the documentary material *in camera* if necessary, transmitting to the security agencies . . . the message that they are being held to account.⁴⁵⁵

Without judicial review, executive agencies have and will continue to abuse secrecy to their advantage.⁴⁵⁶ However, courts can temper this phenomenon by closely scrutinizing executive agency arguments about the need for secrecy.⁴⁵⁷

D. Judicial Role: Developing Applicable Common Law Procedures

Courts have an opportunity to check the expansion of classified information and executive power in a way that Congress has not done. Because of the unlikelihood of congressional legislation on this issue and the potential for a broader, society-wide impact, courts should continue to develop common law around how executive agencies can balance individual access to classified information with

⁴⁵⁴ *In re Washington Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986).

⁴⁵⁵ Fuchs, *supra* note 77, at 168.

⁴⁵⁶ *See id.*

⁴⁵⁷ *See id.*

the need to protect national security. Guidance from courts would help these agencies implement procedures that better incorporate due process and the need to protect classified information. And because there is a circuit split, the Supreme Court should resolve the discrepancy between the Ninth Circuit and the D.C. Circuit.

In fact, courts could even base the doctrine for dealing with administrative actions involving classified information on CIPA, the precedent set by the state secrets privilege doctrine, and the common law application of CIPA to civil cases.

E. Judicial Authority and Experience to Review Cases Involving National Security and Classified Information

Courts have the authority to review national security and classified information matters. The Administrative Procedure Act (“APA”) is the federal statute that governs how administrative agencies may propose and establish regulations.⁴⁵⁸ The APA explicitly applies to organizations that deal with national security and foreign policy such as the State Department, the Treasury Department, the Department of Defense, the Department of Homeland Security, and the Justice Department.⁴⁵⁹ The APA authorizes courts to review final decisions that these agencies make, thereby giving courts the authority to review national security decisions made by these and other executive agencies.⁴⁶⁰

Furthermore, courts frequently handle cases relating to classified information and national security. For example, courts have reviewed cases about the state secrets privilege, CIPA, and a host of other national security issues.⁴⁶¹ In fact, litigation has forced the executive branch to declassify important public policy documents such as the memorandum about killing American citizen Anwar al-Awlaki without due process;⁴⁶² review detention policies and grant detainees increased levels of procedural protections; regulate the state secrets doctrine; and reveal information about the rendition

⁴⁵⁸ See Administrative Procedure Act, 5 U.S.C. §§ 551, 704 (2012).

⁴⁵⁹ See *id.* § 551.

⁴⁶⁰ See *id.* §§ 702, 704.

⁴⁶¹ See, e.g., *Mohamed v. Holder*, No. 1:11-cv-50(AJT/MSN), 2015 U.S. Dist. LEXIS 92997, at *4–6 (E.D. Va. July 16, 2015) (showing that the district court evaluated *ex parte* and *in camera* information that the government claimed was protected by the state secrets privilege); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 5, 6–7, 10 (D.D.C. 2012) (showing that a district court reviewed the classified and unclassified record in order to rule on the plaintiff's claim that OFAC's decision to designate him as a SDGT lacked sufficient procedural safeguards).

⁴⁶² See *HORTON*, *supra* note 14, at 182.

process.⁴⁶³

Even senators who opposed the 2008 SSPA, which was meant to reform the state secrets privilege, stated that the bill was unnecessary because judges already had “broad latitude in crafting the appropriate procedures for determining whether the privilege exists, and ‘procedural innovation’ is encouraged.”⁴⁶⁴ The report then goes on to quote the D.C. Circuit, stating: “[T]here is considerable variety in the situations in which a state secrets privilege may be fairly asserted. We would not wish to hobble district courts in designing procedures appropriate to novel cases.”⁴⁶⁵ This suggests that Congress not only accepts judicial judgment about classified information but also encourages judges to develop appropriate procedures for handling classified information based on the specifics of individual cases.

CIPA also encourages judicial review of classified information. CIPA, which Congress wrote and passed, encourages courts to review classified information in criminal cases.⁴⁶⁶ CIPA does not contain any language that prevents courts from reviewing classified information and instead specifies that courts should use *in camera* and *ex parte* proceedings to determine the admissibility and relevance of classified information at stake.⁴⁶⁷ This means that Congress *encourages* courts to access and evaluate classified information.⁴⁶⁸ In the CIPA context, courts also have the responsibility of determining whether government statements admitting relevant facts or a summary of the classified material is sufficient.⁴⁶⁹ This inherently involves reviewing and assessing classified information.⁴⁷⁰

F. Common Law Components: Notice, Access to the Unclassified and Classified Evidence, and an Opportunity to Rebut the Classified and Unclassified Evidence

In deciding whether to release classified information to plaintiffs, judges should build on the common law that courts have already developed. The following common law suggestions stem from the existing common law around this issue, CIPA, and the proposed

⁴⁶³ See Deeks, *supra* note 118, at 831.

⁴⁶⁴ S. REP. NO. 110-442, at 39–40 (2008).

⁴⁶⁵ *Id.* at 40.

⁴⁶⁶ See Rossmiller, *supra* note 33, at 1317.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.*

⁴⁶⁹ See *id.*

⁴⁷⁰ See *id.* at 1317–18.

2016/2017] Overclassification's Impact on Civil Liberties 561

SSPA.

1. Notice

First, the common law should include the right to notice. This right stems from the holding in *Mathews* that plaintiffs in administrative actions have the right to notice before deprivation.⁴⁷¹ Virtually all of the aforementioned cases regarding administrative national security decisions have also acknowledged this right. Section 10 of CIPA also requires notification by stating that “the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.”⁴⁷²

2. Access to Unclassified Evidence

Second, courts should encourage the government to use only unclassified evidence as much as possible.⁴⁷³ This would enable everyone involved in the litigation to avoid the complications related to handling classified information and avoid abusing the classification system.⁴⁷⁴

The law should also specify that plaintiffs are entitled to the unclassified evidence that the administrative agency used to make their decision. This is very much in line with what courts have already decided is required for due process in administrative cases. For example in *NCRI I*, the court stated: “[T]he Secretary must provide notice of those unclassified items upon which he proposes to rely to the entity to be designated.”⁴⁷⁵

3. Access to Classified Information with Safeguards for Protecting Classified Information

If classified information is involved, courts should balance the plaintiff's need for classified information with the government's security concerns. By avoiding blanket protection for classified information, courts would encourage executive agencies to limit

⁴⁷¹ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–71 (1951)).

⁴⁷² 18 U.S.C. app. § 10 (2012).

⁴⁷³ See *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1357–58 (S.D. Fla. 2000), *vacated as moot sub nom. Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

⁴⁷⁴ See *Najjar*, 97 F. Supp. 2d at 1357–58.

⁴⁷⁵ *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001).

overclassification. At the same time, this approach would allow for more context-specific analysis regarding the necessity of releasing or distilling classified information. Courts could weigh both the plaintiff's and government's interests before making a decision. If classified information would have to be distilled or disclosed, courts could take additional steps to protect this information.

The first step would be identifying the relevance of the contested classified information. As CIPA specifies, whenever an administrative agency uses classified information to make a decision, judges should have a hearing and use the in camera review process to assess the merits of the classified information. Executive agencies would have significant advantages in this process because only they would have the full context behind classified information that would allow them to make a better case. The plaintiff would also not be present to actively advocate on their own behalf, a huge benefit for the government.⁴⁷⁶ To help judges more objectively analyze the importance of the information, judges could request that executive agencies submit something similar to the "Vaughn Index," an analysis that executive agencies already have to submit in the FOIA context.⁴⁷⁷ Such an analysis would include a detailed explanation of the information at hand, the potential risks of revealing specific sections of information, the value that such information might provide to plaintiffs, and any potential methods the government could use to concede facts or provide an unclassified version of the information to the plaintiffs.⁴⁷⁸ This would be similar to the requirements outlined in *Latif*, which state that executive agencies must identify withheld information, justify the withholding, and explain why further disclosures would be dangerous.⁴⁷⁹ The more specific the analysis, the better equipped the judges would be to assess the value of the information objectively instead of relying on broad national security justifications.⁴⁸⁰

Throughout this process, judges should consider the evidence critically from the perspective of the plaintiff, as neither the plaintiff nor the plaintiff's counsel would be present in the hearing.⁴⁸¹ Other

⁴⁷⁶ See generally Fuchs, *supra* note 77, at 171 (discussing how the government is advantaged in situations in which a civilian does not have full access to classified information).

⁴⁷⁷ See *Vaughn Index*, OFF. GOV'T INFO. SERVS., https://ogis.archives.gov/Resources/the-ogis-library/vaughn-index_s1_p214.htm (last updated Oct. 19, 2011).

⁴⁷⁸ See Fuchs, *supra* note 77, at 171, 172, 173.

⁴⁷⁹ See *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 U.S. Dist. LEXIS 40177, at *47 (D. Or. Mar. 28, 2016).

⁴⁸⁰ See Fuchs, *supra* note 77, at 172.

⁴⁸¹ See Barak-Erez & Waxman, *supra* note 375, at 21–22.

nations such as Israel have even developed specific techniques for judges to review such information critically.⁴⁸² If the evidence is not relevant, the judge could decide to proceed without the use of the evidence.⁴⁸³

If the evidence is relevant, judges can balance the government's need to classify information with the plaintiff's need to rebut information against them. In doing so, judges could weigh considerations, such as those outlined in *Al Haramain*: (1) "the nature and extent of the classified information," and (2) "the nature and extent of the threat to national security[.]"⁴⁸⁴ Judges may also consider the issues at stake for the plaintiff and other ways that the government could provide this information to the plaintiff, as was done in *Kiareldeen*.⁴⁸⁵

If the judge decided that the classified information should be made available to the plaintiff, the government should have an opportunity to concede to the classified facts through an unclassified statement or provide an unclassified summary, as many courts have already suggested and just as CIPA suggests.⁴⁸⁶ Courts could review the government's unclassified summary to determine that the document adequately distilled the classified information, as was done in *KindHearts*.⁴⁸⁷ The government could also declassify the relevant information before sharing it with plaintiffs, as suggested by *KindHearts*.⁴⁸⁸

In the rare instances in which the court felt it should release the classified information to plaintiffs, the information should be limited to in camera proceedings and these proceedings should be sealed in order to protect national security.⁴⁸⁹ Additionally, everyone with access to these documents should sign non-disclosure statements regarding the classified information, much like CIPA procedures.⁴⁹⁰ This, too, would protect national security while balancing the plaintiff's interests.

If revealing classified information to plaintiffs would be too much of a risk, the government could provide classified information only to

⁴⁸² See *id.* at 19–20, 21.

⁴⁸³ See *id.* at 21, 22.

⁴⁸⁴ *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 984 (9th Cir. 2012).

⁴⁸⁵ See *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413–14, 418 (D.N.J. 1999).

⁴⁸⁶ See *Al Haramain Islamic Found., Inc.*, 686 F.3d at 982–83; *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010).

⁴⁸⁷ See *KindHearts for Charitable Humanitarian Dev., Inc.*, 710 F. Supp. 2d at 660.

⁴⁸⁸ See *id.*

⁴⁸⁹ See 18 U.S.C. app. § 6(d) (2012).

⁴⁹⁰ See *id.* § 6(e).

the plaintiff's cleared counsel.⁴⁹¹ Again, this would be in camera, under protective order, and with the stipulation that the attorney would not disclose the contents of these materials to the plaintiffs.⁴⁹² Sharing the information only with the plaintiff's cleared counsel has been suggested by both *Al Haramain* and *KindHearts*.⁴⁹³ However, this would not be ideal because the attorney may not have much context for understanding the evidence without the client's input, and thus the plaintiff would not be able to adequately prepare his case.⁴⁹⁴

In some cases, the information may be so sensitive or critical that the government could not provide an unclassified summary and "might have a legitimate interest in shielding the materials even from someone with the appropriate security clearance."⁴⁹⁵ In that case, judges could review the material and decide whether to proceed without giving plaintiffs the information or prevent the agency from using this information, much like in the CIPA context.⁴⁹⁶

4. An Opportunity to Rebut Unclassified and Classified Evidence

Courts require that plaintiffs have an opportunity to rebut the unclassified support that administrative agencies rely on.⁴⁹⁷ This means that the plaintiff should have an opportunity to rebut evidence before the executive action is finally decided. For example, in *PMOI III*, the court required the state to give unclassified portions of the record to the organization and identify the most valuable sources *before* a decision was made about the organization's FTO status.⁴⁹⁸ If plaintiffs are given access to classified information, it is a natural extension of due process that plaintiffs should also have a meaningful opportunity to respond to the classified information.

The opportunity to be heard should "be tailored, in light of the

⁴⁹¹ See *KindHearts for Charitable Humanitarian Dev., Inc.*, 710 F. Supp. 2d at 660.

⁴⁹² See *id.*

⁴⁹³ See *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 983 (9th Cir. 2012); *KindHearts for Charitable Humanitarian Dev., Inc.*, 710 F. Supp. 2d at 660.

⁴⁹⁴ See Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. SCH. L. REV. 69, 83 (2004).

⁴⁹⁵ *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 U.S. Dist. LEXIS 40177, at *56 (D. Or. Mar. 28, 2016) (quoting *Al Haramain Islamic Found., Inc.*, 686 F.3d at 983).

⁴⁹⁶ See Rossmiller, *supra* note 33, at 1288.

⁴⁹⁷ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)).

⁴⁹⁸ See *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 227 (D.C. Cir. 2010) (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001)).

decision to be made, to 'the capacities and circumstances of those who are to be heard'"⁴⁹⁹ The below cases demonstrate that courts have decided that plaintiffs should at least have an opportunity to respond in writing, and that plaintiffs should be able to present evidence that disputes the potential decision by providing affidavits or other forms of proof.

In *Kahane Chai v. Department of State*,⁵⁰⁰ the D.C. Circuit again ruled that the plaintiff received adequate notice and opportunity to respond because the plaintiff organization was able to inspect and supplement its record.⁵⁰¹ In October 2003, Secretary of State Colin Powell designated Kahane Chai as a FTO.⁵⁰² Kahane Chai complained that this violated its due process rights because the organization had no notice, access to the administrative record, or opportunity to respond to this allegation before the designation.⁵⁰³ In response, in 2004, the State Department conducted a *de novo* review and gave the organization the opportunity to inspect and supplement its record.⁵⁰⁴ The court ruled that this opportunity to inspect and supplement the record during the *de novo* review constituted adequate notice and opportunity to respond.⁵⁰⁵

Similarly, in *NCRI I*, the D.C. Circuit ruled that the Secretary must provide an opportunity for plaintiffs to present evidence that would negate or rebut the proposition that they are FTOs.⁵⁰⁶ This opportunity may mean responding in writing to the pending decision.⁵⁰⁷ Even if this action does not approximate a judicial trial, it suffices because of the hearing requirements outlined in *Mathews*.⁵⁰⁸

Though a hearing is not required to fulfill due process requirements, a hearing may be preferable to a written response. A hearing will allow both sides to present evidence and identify errors through the adversarial process. A hearing is also especially advantageous for plaintiffs who may not have the educational or

⁴⁹⁹ *Mathews*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970)).

⁵⁰⁰ *Kahane Chai v. Dep't of State*, 466 F.3d 125 (D.C. Cir. 2006).

⁵⁰¹ *See id.* at 132.

⁵⁰² *See id.* at 126.

⁵⁰³ *See id.* at 132.

⁵⁰⁴ *See id.*

⁵⁰⁵ *See id.*

⁵⁰⁶ *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001).

⁵⁰⁷ *See id.*

⁵⁰⁸ *See id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *see also Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 154 (D.C. Cir. 2004) (quoting *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999)) (stating that plaintiffs do not have the right to adversarial hearings).

language skills to respond effectively in writing.⁵⁰⁹ If there is a hearing and the government will be sharing classified information, the hearing should be a closed, classified hearing, as suggested in *KindHearts*.⁵¹⁰

Confirmation bias tells us that humans are likely to interpret information in a way that conforms to their existing thinking.⁵¹¹ Upon hearing new information, instead of analyzing the information independently, humans assess new information based on their existing prejudices and views.⁵¹² Confirmation bias can influence this context because even if plaintiffs have an opportunity to respond to the evidence against them, it is likely that the administrative agency, which is susceptible to confirmation bias, will continue to view the plaintiff as a threat to national security. This is because the executive agency initiated the process of investigating the plaintiff and thus the agency is likely to interpret any new information in a manner consistent with the agency's conclusion that the plaintiff threatens national security. Ideally, in order to avoid confirmation bias, an independent judge should review the plaintiff's response, along with all evidence that the executive agency provides, and should make a final determination as to whether the plaintiff threatens national security. This would reduce error and protect both national security interests and due process.

Thus, courts should continue developing common law, taking into consideration existing common law about due process that requires notice, an opportunity to be heard, and access to unclassified evidence. Courts should require the government to share some classified information by utilizing existing procedures and precautions. The court should also provide an opportunity to rebut evidence so plaintiffs can challenge inaccuracies.

VII. CONCLUSION

As stated above, the D.C. Circuit and the Ninth Circuit have differing approaches as to whether executive agencies should share classified information with plaintiffs in administrative decisions.

⁵⁰⁹ See Eric Broxmeyer, Note, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT'L L. 439, 477 (2004).

⁵¹⁰ See *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010).

⁵¹¹ See Shahram Heshmat, *What is Confirmation Bias?*, PSYCHOL. TODAY (Apr. 23, 2015), <https://www.psychologytoday.com/blog/science-choice/201504/what-is-confirmation-bias>.

⁵¹² See *id.*

2016/2017] Overclassification's Impact on Civil Liberties

567

The D.C. Circuit has repeatedly and explicitly stated that plaintiffs have no right to access classified information. This creates a moral hazard because it encourages executive agencies to classify more information to avoid sharing it with plaintiffs and to protect agencies from any criticism. Though classification is necessary, overclassification is problematic because neither the public nor Congress can check policies that it does not know about and does not support, such as the use of torture. Overclassification also stifles debate and consolidates power in the executive branch. Instead of absolutely protecting classified information from disclosure, courts should take the Ninth Circuit's approach of balancing the need to protect classified information with an individual's due process rights. Based on the specific circumstances of the case, courts could decide whether to provide plaintiffs with unclassified summaries of the classified information, or to provide classified information to properly cleared counsel. This approach balances the need for secrecy with the need to protect due process.