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Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy

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JUDGING SECRETS: THE ROLE COURTS SHOULD PLAY IN PREVENTING UNNECESSARY SECRECY

MEREDITH FUCHS*

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In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.¹

INTRODUCTION

When our nation's leaders first established the framework for the United States government, it set up a system of checks and balances to prevent any one branch of government from overreaching its authority. The Founding Fathers gave the public a critical role in that structure through the electoral check. Practical use of the power of public opinion depends on access to information, and the Constitution includes a number of provisions that promote an informed citizenry as one of our nation's highest ideals. In times of war or national crisis, the public's role in governance is especially critical. Yet despite Justice Potter Stewart's admonition above from *New York Times Co. v. United States*, the government's tendency to keep secrets becomes more pronounced and pervasive during times of war or national crisis.² Indeed, for the past four years the United States has been in just such a state and has seen significant growth in executive secrecy.

The Constitution permits the judiciary to play a role in restraining excessive government secrecy. Moreover, Congress has repeatedly affirmed its intent for the judiciary to act on that power, as illustrated by congressional endorsement of specific judicial review powers (including *in camera* review of secret documents) and Congress's refusal to restrain judicial inquiry when it has been exercised. Nonetheless, the judiciary has largely failed to accept its critical role of monitoring and limiting secrecy. Case after case demonstrates the growth of judicial deference to government secrecy claims, which has evolved into a form of broad acceptance that is neither required by the Constitution nor intended by Congress.

The purpose of this Article is not to add to the wide range of compilations of post-September 11th executive branch secrecy initiatives, but instead to examine the role courts should play in evaluating claims of secrecy. After setting forth recent statistics on the growth of secrecy, this Article looks through the lens of the investigations into the September 11th

1. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

2. See Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 452-53 (2004). See generally Geoffrey Stone, *War Fever*, 69 MO. L. REV. 1131 (2004) (discussing wartime government secrecy); JEFFREY A. SMITH, *WAR & PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999).

attacks and considers how secrecy can sometimes harm national security. Next, the Article briefly looks at the origins and goals of open government principles as well as the competing incentives for the government to demand secrecy in national security cases. The Article then considers the origins of judicial deference to executive branch secrecy and contrasts the reasons for deference to national security secrecy claims with deference in other areas. It posits that, despite the incorporation of open government principles into the structure of our constitutional democracy and a series of laws passed by Congress to ensure access to government information, courts have been uneasy about accepting the public's right to know. The Article concludes with the recommendation that judges exercise greater scrutiny of government secrecy claims and more frequently employ discretionary tools to bring adversarial testing back into disputes with the government.

I. THE GROWTH OF SECRECY

Since the September 11th attacks on the United States, government secrecy has dramatically increased. Security classification of information, the formal process by which information is marked and protected against disclosure, has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001.³ Moreover, the cost of the program has skyrocketed from an estimated \$4.7 billion in 2002 to \$7.2 billion in 2004.⁴

Officials throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary. Secretary of Defense Donald Rumsfeld acknowledged the problem in a 2005 *Wall Street Journal* op-ed: "I have long believed that too much material is classified across the federal government as a general rule"⁵ The extent of over-classification is significant. Under repeated questioning from members of Congress at a 2004 hearing concerning over-classification, Deputy Under Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are unnecessary over-classifications.⁶ These

3. INFORMATION SECURITY OVERSIGHT OFFICE (ISOO), REPORT TO THE PRESIDENT 2004, at 3 (2005), available at <http://www.archives.gov/isoo/reports/2004-annual-report.pdf>.

4. ISOO, REPORT ON COST ESTIMATES FOR SECURITY CLASSIFICATION ACTIVITIES FOR 2004, at 3 (2005), available at <http://www.archives.gov/isoo/reports/2004-cost-report.pdf>; ISOO, 2001 REPORT TO THE PRESIDENT 9 (2002), available at <http://www.archives.gov/isoo/reports/2001-annual-report.pdf>.

5. Donald Rumsfeld, *War of the Worlds*, WALL ST. J., July 18, 2005, at A12.

6. *Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the House Comm. on Gov't Reform Hearing*, 108th Cong. 82 (2004) (statement of Carol A. Haave, Deputy Under Sec'y of Def., Counterintelligence and Sec., U.S. Dep't of Def.), available at <http://www.fas.org/sgp/congress/2004/082404transcript.pdf>.

opinions echoed that of the current Director of the Central Intelligence Agency Porter Goss, who told the 9/11 Commission, while then serving as the Chair of the House Permanent Select Committee on Intelligence, “[W]e overclassify very badly. There’s a lot of gratuitous classification going on, and there are a variety of reasons for [it].”⁷

At the same time that unnecessary classification has surged, Congress has enacted a number of new laws in the wake of September 11th that create new categories of information that must be kept secret and place categorical gags on speech about law enforcement matters. These include, among others, the critical infrastructure information provisions of the Homeland Security Act of 2002,⁸ the so-called gag order provisions of Section 215 of the USA PATRIOT Act,⁹ and the revisions to the sensitive security information provisions of the Air Transportation Security Act.¹⁰

In addition to these new categories of secret information, executive agencies have a slew of new non-statutory labels that they apply to protect unclassified information that they deem to be sensitive. Some estimates count as many as 50 different so-called “safeguarding” labels for records.¹¹ Use of these markings, which Representative Christopher Shays has termed “pseudo-classification,”¹² almost certainly increases government secrecy.¹³

Secrecy has expanded in areas beyond those of classification and information policy. In the courts, the government has dramatically increased use of potent litigation tactics such as motions to dismiss lawsuits on the basis of state secrets privilege. This privilege allows the government to withhold information from disclosure in litigation if the disclosure would harm national security. In the 23-year span between the Supreme Court

7. Porter Goss, then serving as Chair of the House Permanent Select Committee on Intelligence, currently serving as Director of the Central Intelligence Agency (CIA), Remarks Before the Nat’l Comm. on Terrorist Attacks upon the United States (9/11 Commission) (May 22, 2003), available at http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

8. 6 U.S.C. § 133 (Supp. II 2002) (protecting any information that private parties voluntarily share with the government about the security of critical infrastructure or protected systems from disclosure under the Freedom of Information Act (FOIA)).

9. 50 U.S.C. § 1861(d) (Supp. II 2002) (prohibiting any person or institution served with a warrant under this act from informing any other person of the search).

10. 49 U.S.C. §§ 114(s), 40,119 (Supp. II 2002) (allowing the Transportation Security Administration to bypass FOIA with respect to “information obtained or developed in carrying out security”).

11. OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2005, at 9-10 (2005), available at http://www.openthegovernment.org/otg/SRC2005_embargoed.pdf.

12. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats and Int’l Relations, House Comm. on Gov’t Reform*, 109th Cong. 1 (2005) (statement of Rep. Christopher Shays, Member of the House Comm. on Gov’t Reform), available at <http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=23113>.

13. See *A Non-Disclosure Agreement for Unclassified Info*, SECRECY NEWS, Nov. 8, 2004 (demonstrating the relationship between classification and secrecy).

case that authorized use of the state secrets privilege in 1953¹⁴ and 1976, the government litigated cases involving the privilege four times.¹⁵ In the 24 years between 1977 and 2001, courts were called to rule on the government's invocation of the privilege 51 times.¹⁶ In the three and one-half years since then, at least six district courts and seven courts of appeals have produced written opinions concerning the privilege.¹⁷ This represents an increase from less than once every five years to twice a year to more than three times a year. Because it prevents any judicial inquiry into the merits of the underlying claims, invocation of state secrets privilege has proven a successful defensive litigation tactic.

The government also has expanded its use of the mosaic theory of intelligence gathering to a level never before seen, perhaps finally falling down the “slippery slope” problem lurking in the background of the [mosaic] theory” that the Third Circuit recognized in *American Friends Service Committee v. Department of Defense*.¹⁸ The mosaic theory rests on the claim that innocuous bits of information can be combined to pose a risk to national security and therefore qualify for classification. Several courts have highlighted the risks attendant to this theory. For example, in *Detroit Free Press v. Ashcroft*, the Court struck down the blanket closure of immigration hearings and cautioned that government's invocation of the mosaic theory could serve “as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely with ‘national security,’ resulting in a wholesale suspension of First Amendment rights.”¹⁹ This stern caution from the court highlights how misuse of the mosaic theory can impinge on the most basic of our constitutional rights.

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

15. William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005).

16. *Id.* Indeed it has proven difficult even to ascertain the frequency or breadth of circumstances when the government has invoked the state secrets privilege. The National Security Archive sought such data through FOIA requests to six components of the Department of Justice (Office of Legal Counsel, Executive Office of U.S. Attorneys, Civil Div., Office of the Att’y Gen. and Office of the Assoc. Att’y Gen., Office of Intelligence Pol’y, and Justice Mgmt. Div.) and has learned that there is no single record system that tracks the invocation of state secrets privilege. Correspondence between the author and components of the Department of Justice named above (on file with author). See generally Weaver & Pallitto, *supra* note 15 (describing the lack of any success in efforts to obtain policy guidance on the use of the state secrets privilege from three dozen agencies and their subcomponents).

17. A search of the LexisNexis Academic Universe conducted on September 2, 2005 resulted in at least 13 federal court cases during the period in which the government has invoked the state secrets privilege.

18. 831 F.2d 441, 445 (3d Cir. 1987).

19. 303 F.3d 681, 709 (6th Cir. 2002).

Beyond these examples, executive agencies have taken numerous actions since September 11th to restrict access to information.²⁰ Although some of those measures may merit criticism, this Article is not focused on the right or wrong of secrecy as much as it is on the importance of judicial engagement in secrecy disputes. Such involvement is particularly important because, as the next Section outlines, withholding information from the public does not always advance security.

II. DOES SECRECY KEEP US SAFE?

The association of disclosure of government information with threats to our national security is a false dichotomy. Sharing highly sensitive information that could be used by a terrorist obviously involves a high social cost. There also are, however, real costs associated with keeping unnecessary secrets. As the Director of the Information Security Oversight Office (ISOO), the governmental agency responsible to the President for policy oversight of the government-wide security classification system and the National Industrial Security Program,²¹ has explained:

Classification, of course, can be a double-edged sword. Limitations on dissemination of information that are designed to deny information to the enemy on the battlefield can increase the risk of a lack of awareness on the part of our own forces, contributing to the potential for friendly fire incidents or other failures. Similarly, imposing strict compartmentalization of information obtained from human agents increases the risk that a Government official with access to other information that could cast doubt on the reliability of the agent would not know of the use of that agent's information elsewhere in the Government. Simply put, secrecy comes at a price.²²

That price includes undermining the legitimacy of government actions,²³

20. See, e.g., REPORTERS COMM. FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL (6th ed. 2005), available at http://www.rcfp.org/homefrontconfidential/Homefront_Confidential_6th.pdf; MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., SECRECY IN THE BUSH ADMINISTRATION (2004), available at http://democrats.reform.house.gov/features/secrecy_report/pdf/pdf_secrecy_report.pdf.

21. See About ISOO, <http://www.archives.gov/isoo/about> (last visited Feb. 6, 2006) (listing ISOO's source of authority in Executive Orders and describing ISOO's mission).

22. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. 3 (2005) (statement of J. William Leonard, Director, ISOO, Nat'l Archives & Records Admin.), available at <http://reform.house.gov/UploadedFiles/ISOO%20Leonard%20testimony%20final%203-2-05%20hearing.pdf>.

23. See, e.g., COMM'N ON PROTECTING & REDUCING GOV'T SECRECY, REPORT OF THE COMM'N ON PROTECTING & REDUCING GOV'T SECRECY, S. DOC. NO. 105-2, at 8 (1997), available at <http://www.access.gpo.gov/congress/commissions/secrecy/pdf/06overpm.pdf> (concluding that a consequence of the government keeping the public uninformed is "a heightened degree of cynicism and distrust of government, including in contexts far removed from the area in which the secrecy was maintained"). The full report of the Commission on Protecting and Reducing Government Secrecy may be accessed at

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reducing accountability,²⁴ hindering critical technological and scientific progress,²⁵ interfering with the efficiency of the marketplace,²⁶ and breeding paranoia.²⁷

Indeed, the inquiries concerning the September 11th attacks on the United States taught us this lesson: Better information dissemination both empowers the public and enables agencies to protect national security. Eleanor Hill, the Staff Director of the Joint House-Senate Intelligence Committee Investigation into the September 11th Attacks, directly addressed this lesson in her congressional testimony, in which she stated that the record presented to Congress demonstrated that the most potent weapon against terrorism is “an alert and committed American public.”²⁸

<http://www.access.gpo.gov/congress/commissions/secretcy> (last visited Feb. 6, 2006).

24. See, e.g., *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (ordering the federal government to process and release records requested under FOIA concerning treatment of detainees held abroad). Specifically the court stated,

The information plaintiffs have requested are matters of significant public interest. Yet, the glacial pace at which defendant agencies have been responding to plaintiffs’ requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the documents are more of an embarrassment than a secret, the public should know of our government’s treatment of individuals captured and held abroad.

Id. at 504-05. Senator Susan Collins of Maine and Senator Joe Lieberman of Connecticut tried to obtain documents relating to the closure of military bases. See David Lightman, *So Much Data, So Few Answers; Base Closing Discs Called Impenetrable*, HARTFORD COURANT, June 8, 2005, at A1. For two weeks after the Department of Defense made public its base closure list, which would severely impact both Maine and Connecticut, the Department closely held the documents and notes that supported its decisions—documents the law requires the Department to release immediately upon announcing its decisions in order to allow Congress and affected communities the opportunity to review and perhaps challenge them. *Id.*

25. See, e.g., NAT’L ACAD. OF SCIS., *SEEKING SECURITY: PATHOGENS, OPEN ACCESS, AND GENOME DATABASES* (2004), available at <http://www.nap.edu/books/0309093058/html/54.html> (subsequent pages may be accessed by using a hyperlink on the site). According to the National Academy of Sciences, secrecy impedes scientific discovery because it poisons the camaraderie of the scientific community:

[A]ny policy stringent enough to reduce the chance that a malefactor would access data would probably also impede legitimate scientists in using the data and would therefore slow discovery. . . . It is possible that the harm done during a process of negotiating [a uniform international agreement to impose similar control measures worldwide]—through building walls of mistrust between peoples—would be greater than the benefit gained through the sense of security that such a regime might provide. Finally, such a restrictive regime, the committee believes, could seriously damage the vitality of the life sciences. . . . There is some concern that restricting access to this information might lead to a situation in which the mainstream scientific community is unaware of dangers that may threaten us.

Id. at 54-57.

26. See Aaron Edlin & Joseph E. Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 AM. ECON. REV. 1301 (1995).

27. See ASSASSINATION RECORDS REVIEW BD., *FINAL REPORT OF THE ASSASSINATION RECORDS REVIEW BD.* 26 (1998), available at <http://www.archives.gov/research/jfk/review-board/report> (“[Thirty] years of government secrecy relating to the assassination of President John F. Kennedy led the American public to believe that the government had something to hide.”).

28. *The Intelligence Community’s Response to Past Terrorist Attacks Against the*

This conclusion is echoed in the report produced by the National Commission on Terrorist Attacks on the United States (the 9/11 Commission or the Commission), which made only one finding that the federal government might have prevented the attacks on the World Trade Center and the Pentagon. According to the interrogation of the hijackers' paymaster, if the organizers—particularly Khalid Sheikh Mohammed—had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Osama Bin Ladin and Mohammed would have called off the 9/11 attacks.²⁹ News of that arrest might also have alerted the Federal Bureau of Investigation (FBI) agent in Phoenix, who had warned the FBI of the enrollment of Islamic militants in U.S. flight schools in a July 2001 memo. Instead, that memo vanished into the FBI's vaults in Washington and was not connected to Moussaoui in time to prevent the attacks.³⁰ The Commission's wording on this issue is important: Only "publicity . . . might have derailed the plot."³¹ Disclosure of security-related information may reduce risk by alerting the public to current threats and enabling better-informed responses from both local and federal agencies.

Unnecessary secrecy and the resulting lack of informed debate and diminished accountability can interfere with the formulation of independent, well-grounded policy positions. Luther Gulick, a high-level Roosevelt Administration official during World War II, observed that, despite the apparent efficiencies of totalitarian political organizations, democracy and expressive freedom gave the United States and its democratic allies an important competitive advantage because public debate encouraged wise policy choices.³² The corollary is also true. As Senator Daniel Patrick Moynihan concluded, the Cold War and related arms race were greatly exacerbated by the secrecy imposed by the military establishment.³³ The Senate Select Committee on Intelligence made a similar observation in the context of its investigation of pre-war intelligence concerning weapons of mass destruction in Iraq. The

United States from February 1993 to September 2001: Hearing Before the J. S. and H. Intelligence Comms., 107th Cong. 5 (2002) (statement of Eleanor Hill, Staff Dir., Joint Inquiry Staff), available at http://fas.org/irp/congress/2002_hr/101702hill.pdf.

29. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 247, 276, 541 n.107 (2004) (recounting information gleaned from the interrogation of Ramzi Binalshibh).

30. See *Joint Investigation into September 11th: Hearing Before the J. S. and H. Intelligence Comms.*, 107th Cong. 1 (2002), <http://intelligence.senate.gov/0209hrg/020924/hill.pdf> (statement of Eleanor Hill, Staff Dir., Joint Inquiry Staff).

31. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 29, at 276.

32. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 8 (2003) (citing LUTHER GULICK, ADMINISTRATIVE REFLECTIONS FROM WORLD WAR II 121-29 (1948)).

33. DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 154-77 (1998).

Committee concluded that the Central Intelligence Agency (CIA) hampered its assessment of the situation by “examining few alternatives, selective gathering of information, pressure to conform within the group or withhold criticism, and collective rationalization.”³⁴ Openness can improve bureaucratic decisionmaking by allowing criticism of poor or inadequate analysis. It can also temper extremist viewpoints by exposing them to public scrutiny.³⁵

Overclassification and unneeded secrecy also undermine the effort to keep truly sensitive information secret. As Justice Stewart 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.”³⁶ Indeed, the ISOO reached the same conclusion in its 2002 Report to the President by stating that classifying too much information or classifying information for an extended period of time reduces the effectiveness of the classification system.³⁷ Thus, history teaches that secrecy cannot always be equated with improved security and instead may harm the nation.

III. ORIGINS OF THE PUBLIC’S RIGHT OF ACCESS TO GOVERNMENT INFORMATION

If secrecy does not always prove helpful to the nation, and may even be harmful, then how should secrecy claims be evaluated? At a fundamental level, secrecy claims must be measured against our historic and constitutional commitments to government openness. Substantial evidence suggests that open government is among the basic principles on which this

34. REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 18 (2004), available at <http://intelligence.senate.gov/iraqreport2.pdf>.

35. Although not the focus of this Article, it is worth noting that openness may enhance inter- and intra-agency coordination and effectiveness. Many of the findings of the 9/11 Commission highlighted the failure of U.S. intelligence and law enforcement agencies to communicate effectively. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 29, at 400. Efforts to minimize secrecy will unclog the system of safeguards, compartments, barriers, and walls used to protect classified or sensitive unclassified materials. This will result in resources being freed up to focus on protecting the information that truly needs to be protected and assessing the need to share such information within the government. Thus, greater openness may help minimize the barriers to effective intra-governmental communication.

36. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

37. ISOO, REPORT TO THE PRESIDENT 7 (2002), available at <http://www.archives.gov/isoo/reports/2002-annual-report.pdf>; see also OFFICE OF SCIENTIFIC & TECHNICAL INFO., DEP’T OF ENERGY, OPENNESS IN THE DEPARTMENT OF ENERGY (1997), available at <http://www.osti.gov/opennet/forms.jsp?formurl=document/prfacts.html#14> (likening the effect of overclassification on our national security to the “indiscriminate use of antibiotics” on combating infections because in both situations over-reliance on the remedy in fact provides less protection).

nation was founded. In his 1765 essay entitled “A Dissertation on the Canon and the Feudal Law” John Adams wrote that “liberty must at all hazards be supported . . . and liberty cannot be preserved without a general knowledge among the people who have a right from the frame of their nature to knowledge”³⁸ The founders viewed openness as a necessary check on the government, consistent with the general scheme of our tripartite system.³⁹

A number of scholars have argued in favor of a constitutional right to know information about the government.⁴⁰ Most commonly, this argument

38. DAVID McCULLOUGH, JOHN ADAMS 620 (2001).

39. See *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors . . . [and] was protected so that it could bare the secrets of government and inform the people.”).

40. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489-93 (1985) (arguing that the “right to know” is a logical extension of the right to free speech, protected by the First Amendment to the Constitution); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 203 (1983) (arguing against the “constitutionalization” or “cabining” of government speech); Thomas I. Emerson, *The Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (asserting that the “right to know” falls within First Amendment protection of freedom of expression); Frank Horton, *The Public’s Right to Know*, 3 N.C. CENT. L.J. 123 (1972) (examining the public’s “right to know” against the question of classification and declassification of government information relevant to national security); David M. Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977) (arguing that the “right to know . . . is a constitutional right, independent of parallel statutory and common law doctrines”); Mark W. Voigt, *Visa Denials on Ideological Grounds and The First Amendment Right to Receive Information: The Case for Stricter Judicial Scrutiny*, 17 CUMB. L. REV. 139 (1986) (setting forth the rationale for protecting citizens’ right to both freedom of expression and receipt of information); Nat Stern, Note, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 513-17 (1979) (observing the Court’s recognition of a right to receive information under the First Amendment); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (“Meaningful democratic decisionmaking and the public’s ability realistically to perceive and respond to the world require the widespread availability of information of general interest.”); Richard F. Johnson & Kay Marmorek, Note, *Access to Government Information and the Classification Process—Is There A Right to Know?*, 17 N.Y. L. F. 814 (1971) (urging the recognition of a “constitutional ‘right to know’” under the First Amendment); Lee Pray, Note, *What Are the Limits to a School Board’s Authority to Remove Books from School Library Shelves?* 1982 WIS. L. REV. 417 (noting the recognition by some courts of a First Amendment “right to read” or “right to know”); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980); Eric G. Olsen, Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979) (laying out evidence for a First Amendment right to know). *Contra* Walter Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 WASH. U. L.Q. 25 (criticizing the extension of the First Amendment to cover the “right to know” and categorizing it as a right so “broadly and vaguely phrased that it cannot decide cases”); James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29 (agreeing in principle with the existence of a “right to know” but warning against its use in the context of the First Amendment). While arguments in favor of the right to know most often rely on protections afforded under the First Amendment, scholars have also traced this right to other constitutional provisions. E.g., Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 8-9, 12 (1957) (arguing that the emergence of “big government” requires interpretation of the Constitution’s First, Fifth, Ninth, and Fourteenth Amendments to prevent executive and legislative branches from “withholding information beyond that

stems from the First Amendment, which provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴¹ Freedom of speech and the right to petition the government for redress of grievances are weak rights if government officials withhold information necessary to a complete understanding of the issue in controversy. In this conception, the right of access relies on a structural understanding of the Constitution and the First Amendment: A citizen cannot participate in self-government without access to information. In a democracy, the public must have all available information to direct the government. The Supreme Court first recognized the strong connection between self-government and access to information in *Grosjean v. American Press Co.*,⁴² in which it stated that an “informed public opinion is the most potent of all restraints upon misgovernment.”⁴³ At the very least, the right to vote is a hollow vote if the government keeps citizens ignorant about the record of the candidates for office.⁴⁴

The Supreme Court has often used language supportive of a constitutional basis for the right to know. In *Board of Education v. Pico*, a case that concerned a local school board’s removal of a library book, the Court stated that the right of access to information is “an inherent corollary

reasonably required for the exercise of delegated powers or the protection of other rights”).

41. U.S. CONST. amend. I.

42. 297 U.S. 233 (1936).

43. *Id.* at 250. An interesting analysis of the impact of secrecy on participatory government has been presented by Nobel Laureate in economics Joseph Stiglitz. Stiglitz posits:

If outsiders have less information, voters may feel less confident that they will be able to takeover management effectively. Indeed, the lack of information of outsiders does increase the costs of transition, and make it more expensive (for society) to change management teams. The fact that the alternative management teams have less information means that there is a higher probability of any proposals that they put forward will be ill-suited to the situation. By increasing the mean cost of transition and increasing the subjective variance, secrecy puts incumbents at a distinct advantage over rivals. By the same token, secrecy undermines participation in democratic processes even by voters. Voters are more likely to exercise independent judgments—both to vote, and to vote independently of party—if they feel confident about their views. And this in turn requires that they be informed. . . . Secrecy raises the price of information—in effect, it induces more voters who do not have special interests not to participate actively, leaving the field more to those with special interests.

Joseph E. Stiglitz, On Liberty, the Right to Know and Public Discourse: The Role of Transparency in Public Life, Oxford Amnesty Lecture (Jan. 27, 1999), in *THE REBEL WITHIN* 250-78 (Ha-Joon Chang ed., 2001), and in *GLOBALIZING RIGHTS* 115-56 (Matthew Gibney ed., 2003), available at http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_On_Liberty_the_Right_to_Know_and_Public.pdf.

44. R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 228 (1990) (arguing for a Court-recognized presumption in favor of openness in legislated meetings, based on the rights protected by the First Amendment to the Constitution).

of the rights of free speech and press.”⁴⁵ In recognizing the public right of access to a criminal trial, the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*⁴⁶ recognized that “[t]hese expressly guaranteed [First Amendment] freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of a government.”⁴⁷ Similarly, in upholding the “fairness doctrine,” which requires broadcasters to supply equal air time to opposing viewpoints, a unanimous Court held, “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”⁴⁸

The Court has adopted the same rationales for openness as those discussed by the founders of the nation. Chief among these is the power of the public to act as a check: “Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account.”⁴⁹ Further, the Court has recognized that openness fosters fairness and legitimacy on the part of the government.⁵⁰

45. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

46. 448 U.S. 555 (1980).

47. *Id.* at 575. In his oft-relied upon concurrence, Justice Brennan reflected the same understanding, noting that, “Implicit in th[e] structural role [of the First Amendment] is not only ‘the principle that debate on public issues should be uninhibited robust, and wide-open,’ but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.” *Id.* at 587 (Brennan, J., concurring) (quoting *N.Y. Times, Inc. v. Sullivan*, 376 U.S. 254, 270 (1964)); *see also id.* at 583 (Stewart, J., concurring) (“Today . . . the court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedom of speech and the press protected by the First Amendment.”); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 859 (2d ed. 1988) (interpreting *Richmond Newspapers* as establishing the public’s right to information as one of constitutional proportions).

48. *Red Lion Broad. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 390 (1969).

49. *E.g., Richmond Newspapers, Inc.*, 448 U.S. at 569; *see also id.* at 592-97 (Brennan, J., concurring) (discussing openness as a check and balance, as a means for citizens to maintain control over government, as a means for government officials to sustain public confidence in the government, as an aide to improve decisionmaking, and as a means of discouraging falsehood); *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (stating that campaign finance disclosure requirements “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity”).

50. Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 *HARV. C.R.-C.L. L. REV.* 95, 109-10 (2004) (noting the Court’s emphasis on the value of open trials in the fair administration of justice and analyzing secrecy in criminal proceedings and immigration hearings following the September 11, 2001 attacks on the World Trade Center). The Court, however, has never accorded the right of access to government information the same level of protection as those rights explicitly set forth in the Constitution and the Bill of Rights. For example, the Court rejected the right of access in a line of cases that considered media access to prisons when there were alternative means—such as in-person access to the prison or to prisoners—for the press to get information. *Assaf*, *supra* note 44, at 232 (discussing *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)); *see also Gannett Co. v. DePasquale*, 443 U.S. 468, 404

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In the face of an executive branch tendency to keep secrets, however, Congress has explicitly codified the right of access to information. Congress enacted the Administrative Procedure Act (APA) in 1946 to provide greater accessibility to the public in the rulemaking process. Section 3 of the APA governs disclosure of government records.⁵¹ Although Congress originally intended to make government records widely available through Section 3, agencies typically invoked it to withhold records on several ill-defined grounds, including any matter requiring “secrecy in the public interest” and for “good cause found.”⁵² Records not determined to be exempt from disclosure under these vague standards were available only to those “properly and directly concerned” with the matters covered by the records.⁵³

Agencies seeking to withhold information invoked the APA more often than citizens seeking access to information, and it afforded no recourse for those denied information.⁵⁴ Revision of the APA “was deemed necessary because ‘Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute,’” as the Supreme Court noted in 1976.⁵⁵

After many years of congressional efforts to remove impediments to public access to government records, Congress’s response to the problem with the APA culminated in the passage of the Freedom of Information Act (FOIA) in 1966.⁵⁶ FOIA establishes a presumptive right for any person to obtain identifiable, existing records of federal agencies without any showing of the reason the information is sought.⁵⁷ It creates “a general

(1979) (Rehnquist, J., concurring) (“[I]t is clear that this Court has repeatedly held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.”).

51. See 5 U.S.C. § 1002 (1964); S. REP. NO. 89-813 (1965), *reprinted in* H.R. REP. NO. 89-1497 (1966), *reprinted in* S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 93-82, at 38 (1974) [hereinafter FOIA SOURCE BOOK]; H.R. REP. NO. 89-1497 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* at 26; *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 12 (1974) (describing FOIA’s legislative history).

52. See H.R. REP. NO. 89-1497 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 51, at 26-27.

53. *Id.* at 27.

54. See S. REP. NO. 89-813 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 51, at 38 (describing the APA as “full of loopholes which allow agencies to deny legitimate information to the public”); H.R. REP. NO. 89-1497, *reprinted in* FOIA SOURCE BOOK, *supra* note 51, at 26 (“Improper denials [of requests for information] occur again and again.”); *id.* (“The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in . . . cases [of improper withholding].”).

55. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)).

56. See S. REP. NO. 89-813 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 51, at 38-39; H.R. REP. NO. 89-1497 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 51, at 26-27; see *Renegotiation Bd.*, 415 U.S. at 12 (describing FOIA’s legislative history).

57. See *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (stating that FOIA indicates “a strong presumption in favor of disclosure [that] places the burden on the agency to justify

philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language.”⁵⁸ Thus, in its central disclosure provision, FOIA requires every agency, “upon any request for records which . . . reasonably describes such records [to make such records] promptly available to any person.”⁵⁹ FOIA requesters need not make a preliminary showing that disclosure would serve any public purpose. As the Supreme Court explained, “Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”⁶⁰

FOIA relieves the government of its statutory obligation to provide public access, however, pursuant to only nine “limited exemptions” from disclosure.⁶¹ These exemptions “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”⁶² The exemptions “are explicitly made exclusive” and “must be narrowly construed.”⁶³

In enacting the law, Congress sought to “enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities,”⁶⁴ to “eliminat[e] ‘secret law,’”⁶⁵ and to prevent the damage that pervasive secrecy in government

the withholding of any requested documents”).

58. *Rose*, 425 U.S. at 360-61 (quoting S. REP. NO. 89-813, at 3 (1965)).

59. 5 U.S.C. § 552(a)(3) (2000).

60. *EPA v. Mink*, 410 U.S. 73, 80 (1973).

61. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1976) (quoting *Rose*, 425 U.S. at 360-61); *see also* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (“As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act’s nine exemptions.”). These exemptions permit an agency to deny access to records or portions of records if, broadly speaking, the information (1) is classified for national defense or foreign policy purposes, (2) relates solely to an agency’s internal personnel rules and practices, (3) has been clearly exempted under other laws, (4) contains confidential business information, (5) consists of internal government deliberative communications about a decision before an announcement, (6) consists of certain information about an individual that, if disclosed, would cause a clearly unwarranted invasion of personal privacy, (7) consists of law enforcement records in certain circumstances, (8) concerns bank supervision, or (9) consists of geological or geophysical information. *See* 5 U.S.C. § 552(b).

62. *Rose*, 425 U.S. at 361.

63. *Id.*; *see also* *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (“Consistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.”); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (“FOIA exemptions are to be narrowly construed.”).

64. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974) (internal quotes omitted).

65. *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989).

agencies caused to public confidence in government.⁶⁶ In short, Congress designed FOIA to make democratic participation and citizen oversight a reality.⁶⁷ Throughout FOIA's 39-year history, Congress has repeatedly reaffirmed these broad purposes,⁶⁸ most recently in 1996.⁶⁹

In addition to FOIA, a number of other statutes open up specific government processes. Congress enacted the Federal Advisory Committee Act⁷⁰ to improve the quality and legitimacy of government decisionmaking by "prevent[ing] the surreptitious use of advisory committees to further the interests of any special interest group."⁷¹ The Government in the Sunshine Act⁷² rests upon the same recognition that public scrutiny of government actions and deliberations will "permit 'wider and more informed public debate of the agency's policies.'"⁷³

Beyond these U.S. laws, an emerging international consensus recognizes the right to know about the activities of government as a fundamental human right. As in the United States, the concept exists internationally that democratic governments are under a general obligation to make information they hold available to their citizens.

Courts in several countries have upheld a fundamental right of access to information as a corollary of freedom of expression and participation rights. The Supreme Court of India recognized a right to know in a case involving the government's refusal to release intra-agency correspondence regarding transfers and dismissals of judges:

Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government

66. See S. REP. NO. 89-813 (1965), reprinted in FOIA SOURCE BOOK, *supra* note 51, at 45 ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.")

67. The *Congressional Record* is replete with references to a broad conception of the public interest embodied by FOIA. In particular, the pervasive secrecy in government agencies and the damage that this secrecy cost in terms of public confidence in the government concerned Congress. See *supra* note 66.

68. Congress amended FOIA in 1974, 1976, 1986, and 1996.

69. The House Report concerning the 1996 amendments, otherwise known as the Electronic Freedom of Information amendments, explains that, "The findings make clear that Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use." H.R. REP. NO. 104-795, at 19 (1996).

70. 5 U.S.C. §§ 1-14 (2000).

71. H.R. REP. NO. 92-1017, at 10 (1972), as reprinted in 1972 U.S.C.C.A.N. 3491, 3500.

72. 5 U.S.C. § 552b (2000).

73. *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 934 (D.C. Cir. 1982) (quoting S. REP. NO. 94-354, at 19 (1975)).

can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. . . . The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State."⁷⁴

The Supreme Court of India, therefore, noted the strong connections between an informed citizenry and the right of access to government information.

The Constitutional Court of (South) Korea reached a similar conclusion in a 1989 case involving a municipal office's refusal to grant the applicant access to real estate records he had requested. The Korean Court held that access to government information is essential to the "free formation of ideas," which is itself a precondition for the realization of true freedom of expression and communication.⁷⁵

The Constitutional Chamber of the Supreme Court of Costa Rica held in a 2002 case that the Central Bank's refusal to disclose a report of the International Monetary Fund to a newspaper violated the constitutional right to information. The Court reasoned that, "The State must guarantee that information of a public character and importance is made known to the citizens, and, in order for this to be achieved, the State must encourage a climate of freedom of information."⁷⁶ Relying on the relationship between the right to information and the right of democratic participation, the Costa Rican Supreme Court explained that "the right to information . . . implicates the citizens' participation in collective decision-making, which, to the extent that freedom of information is protected, guarantees the formation and existence of a free public opinion, which is the very pillar of a free and democratic society."⁷⁷

In addition, a number of multilateral and regional bodies have formalized the right of access to government information.⁷⁸ The Interamerican

74. S.P. Gupta v. Union of India, (1982) 69 A.I.R. 149, at 232.

75. See KOREAN CONSTITUTIONAL CT., THE FIRST TEN YEARS OF THE CONSTITUTIONAL COURT: 1988-1998, at 132 (2001), available at http://www.court.go.kr/english/download/decision_10years.pdf (discussing *Forests Survey Inspection Request* Case, 1 KCCR 176 (1989)). A summary of the judgment is available at <http://www.court.go.kr/english/decision.htm> (last visited Feb. 6, 2006).

76. Navarro Gutiérrez v. Lizano Fait, Judgment of April 2, 2002, as translated in the 2003 Report of the Special Rapporteur for Freedom of Expression, 157.

77. *Id.* para. VI.

78. Universal Declaration of Human Rights, art. 19, Dec. 10, 1948, UN Resolution 217A(III) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); African Charter on Human and Peoples' Rights, art. 9, June 26, 1981 ("Every individual shall have the right to receive information."); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."); American

Commission on Human Rights has recognized that “access to information held by the state is a fundamental right of every individual.”⁷⁹ The General Assembly of the Organization of American States passed 2003 and 2004 resolutions on access to public information both of which recognize the state’s obligation to “respect and promote respect for everyone’s access to public information,” an obligation that the Organization of American States deems “a requisite for the very exercise of democracy.”⁸⁰

Although U.S. courts have not widely followed the international consensus in the recognition of fundamental rights, the growing acceptance of these norms is illustrative of the centrality of access to information to the democratic principles that are well accepted in this country. Secretary of Defense Rumsfeld has recognized, “As more citizens gain access to new forms of information, to new ways of learning of the outside world, it will be that much more difficult for governments to cement their [anti-democratic] rule by holding monopolies on news and commentary.”⁸¹

IV. THE SECRECY SYSTEM ENCOURAGES OVERREACHING BY THE GOVERNMENT

Despite the important goals and benefits that openness can achieve, the executive branch has a tendency to keep too many secrets. Certainly, the need for secrets is easily apparent. The executive branch plays the central role in protecting the nation’s security, with the President serving as Commander in Chief and the principal law enforcer.⁸² As discussed below, the authority to keep secrets from the public derives directly from this responsibility. The adequate protection of sources is necessary to facilitate intelligence gathering. The ability to develop a case against a criminal suspect without alerting the target is crucial in government investigations and prosecutions. The ability to negotiate in confidence is critical to effective foreign policy. A compelling, common sense logic supports most arguments that secrecy is necessary in the intelligence, military, and

Convention on Human Rights, art. 13, Nov. 22, 1969 (guarantees “freedom to seek, receive and impart information”).

79. Inter-American Comm’n on Human Rights, Declaration of Principles on Freedom of Expression, ¶ 4, Oct. 19, 2000, *as translated in* the 2000 Annual Report of the Inter-American Comm’n on Human Rights, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, 11.

80. In addition, the resolutions provide for the states’ obligation to “promote the adoption of any necessary legislative or other types of provisions to ensure [the right’s] recognition and effective application.” *Resolution 1932 (XXXIII-O/03) on Access to Public Information: Strengthening Democracy*, adopted on June 10, 2003; and *Resolution 2057 (XXXIV-O/04) on Access to Public Information: Strengthening Democracy*, adopted on June 8, 2004.

81. Rumsfeld, *supra* note 5.

82. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1976) (Stewart, J., concurring) (“[T]he successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.”).

foreign policy arenas. Indeed, there is no doubt that disclosure of some secrets has caused harm.

Yet, policy positions taken by the government also expose an absolutist position against public access to information about intelligence and law enforcement activities.⁸³ This perspective ignores the negative effects of excessive secrecy, as well as the constitutional and statutory roles that access to information plays in our democracy. As it stands, the structure of the executive branch and the secrecy apparatus do not provide any counterbalance to the absolutist position, and without such a counterbalance, the government often has overreached.⁸⁴

The internal checks on secrecy are minimal. As Professor Cass Sunstein has illustrated, “Deliberative processes within a unitary [executive] branch are likely to lead to an amplification of preexisting tendencies, not toward a system of internal checks and balances.”⁸⁵ Within agencies, for example, government employee performance reviews do not consider proper decisions to release information to the public or poor decisions to keep information closely guarded.⁸⁶ While agencies are required to prepare reports of their decisions to withhold records under the FOIA exemptions,⁸⁷ no apparent internal consequences follow reports of increased secrecy.⁸⁸ In fact, the reports have underlying flaws, thus making them of limited utility to Congress or the public.⁸⁹ Agencies with classification authority also

83. See, e.g., REPORT OF THE COMM’N ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, ch. 3 (1997) (describing the agency perspective that members of the public seeking declassified information are “the enemy” and “a disruption”), available at <http://www.fas.org/sgp/library/moynihan/chap3.html>. In addition, agencies have taken the position that the security sensitivity of information does not diminish over time, despite changes in circumstances and the release of similar information. See, e.g., *Berman v. CIA*, 378 F. Supp. 2d 1209 (E.D. Cal. 2005) (upholding the denial of a FOIA request for Presidential Daily Briefs about the Vietnam War provided to President Johnson in 1965 and 1968); *Aftergood v. CIA*, 355 F. Supp. 2d 557 (D.D.C. 2005) (denying access to historical CIA budgets from 1947 to 1970).

84. See *infra* note 127 and accompanying text (providing examples of overreaching).

85. Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 75 (2004).

86. See GENERAL ACCOUNTING OFFICE, GOVERNMENT AUDITING STANDARDS: 2003 REVISION, REP. NO. GAO-03-673G (2003), at 21-25 (setting forth the methods by which an employee’s performance should be measured).

87. See 5 U.S.C. § 552 (2000) (mandating reports on classification activities). The FOIA is the principal means for the public to request access to government records. For more discussion of the FOIA, see *supra* notes 56-69 and accompanying text.

88. See 5 U.S.C. § 552(e)(1) (omitting discussion of repercussions for over-classification); DEP’T OF JUSTICE, ANNUAL FOIA REPORTS SUBMITTED BY FEDERAL DEPARTMENTS AND AGENCIES (describing, rather mathematically, classification activities but omitting a discussion of repercussions for over-classification), available at http://www.usdoj.gov/04foia/04_6.html (last visited Feb. 6, 2006).

89. See GENERAL ACCOUNTING OFFICE, INFORMATION MANAGEMENT: PROGRESS IN IMPLEMENTING THE 1996 ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS, [fas.org/irp/congress/2002_hr/101702hill.pdf](http://www.fas.org/irp/congress/2002_hr/101702hill.pdf) REP. NO. GAO 01-378 (2001), at 32, 34, 39, 40 (noting that reports are prepared inconsistently and are frequently not reviewed and that reporting activities are unevenly reported based on exemption category), available at

must provide reports of their classification decisions.⁹⁰ These reports are collected and summarized by the ISOO, but again agencies face no consequences for increases in classification numbers. Other practices that magnify secrecy go virtually unmonitored. No governmental officers are charged with keeping data on the use of sensitive unclassified information designations such as “sensitive but unclassified,” “for official use only,” and possibly almost 50 others.⁹¹ The government does not conduct central monitoring of the invocation of the state secrets privilege in court.⁹² Nor is there a system for tracking requests to seal courtrooms or court dockets.⁹³

Thus, agencies face very little internal pressure to minimize secrecy. Without any such checks, it is easy to understand how secrecy can grow within an executive branch with a penchant for keeping secrets.⁹⁴ With regard to secrecy, this observation is almost certainly true.

For the most part, the public cannot place much external pressure on the government to limit abuse of the secrecy stamp.⁹⁵ The statutes that mandate openness do not impose penalties for too much secrecy. At best, lawsuits brought under FOIA, the Federal Advisory Committee Act,⁹⁶ or other open government statutes may cause courts to require that withheld

<http://www.gao.gov/new.items/d01378.pdf>.

90. See 32 C.F.R. § 2001.80 (2004).

91. See, e.g., Letter from Rear Admiral Christopher A. McMahon to Representative Christopher Shays, Chairman, Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations, Comm. on Gov't Reform, U.S. House of Representatives (May 9, 2005) (“During the period in question, we did not keep records of restricted information designations other than national security classifications. . . . Information has also been designated as ‘For Official Use Only’ this year, but we have no record of how many times.”).

92. See *supra* note 16.

93. See Dan Christensen, *Feds Drop \$373,000 FOIA Search Fee Demand*, DAILY BUS. REV. (Apr. 4, 2005), available at <http://www.law.com/jsp/article.jsp?id=1112349912757> (tracing the legal battles of an advocacy group trying to obtain information about a post-September 11 immigrant detainees).

94. See *Public Interest Declassification Act: Hearing on S. 1801 Before the S. Comm. on Governmental Affairs*, 106th Cong. (2000) (statement of Porter Goss, then serving as Chair of the H. Permanent Select Comm. on Intelligence, currently serving as Dir. of the CIA), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:66249.pdf. Representative Goss stated that:

I believe that we do classify too much material, because it is the path of least resistance, and I know that from experience. If I get a piece of paper on my table and I am not sure what to do with it, I put a confidential stamp on it and put it in the confidential box. Then I will not have to worry about whether I released something that was classified that I should not have. So, the incentive is to do the wrong thing, and that is something we have to get at.

Id. at 6-7; see also *supra* notes 5-7 and accompanying text; *infra* note 121 and accompanying text.

95. See FOIA SOURCE BOOK *supra* note 51, at 27; S. REP. NO. 89-813 (1965), reprinted in FOIA SOURCE BOOK, *supra* note 51, at 40-41; see also *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983) (“Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to ‘mistakes’ or, less nefariously, just do not think about preserving ‘information necessary to protect the legal and financial rights . . . of persons directly affected by the agency’s activities.’”).

96. 5 U.S.C. § app. 2 (2000).

information be released.⁹⁷ These statutes do not penalize the government official who made the decision to keep the information secret, however, and they provide no compensation to the member of the public who fought to obtain the information at issue. In fact, no penalties exist for an agency or official that engages in a battle over information even when the government almost certainly knows such information should be released.⁹⁸

Moreover, unnecessary secrecy is rarely exposed. There are, of course, occasional leaks. But whistleblowers who leak secret national security information face grave consequences.⁹⁹ At the very least, the fear that a leak will expose a secret has not been a pervasive pressure toward openness. Therefore, public opinion plays only a limited role in discouraging secrecy. Moreover, the hope that leaks will discourage unnecessary government secrecy is a poor solution to the problem. The integrity of the classification system is critical to national security. If those inside the system chip it away, then the nation will be exposed to harm.¹⁰⁰

Congress does conduct oversight hearings on secrecy matters, but Congress is not a useful institution for overseeing day-to-day matters because Congress is limited in terms of the breadth, speed, and frequency with which it can perform oversight functions.¹⁰¹ Although Congress has enacted statutes requiring a declassification process for certain classified information,¹⁰² those processes are largely effectuated through negotiation

97. *E.g., id.* § 552(a)(4)(B) (authorizing a court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld); *see* *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994) (observing that the Federal Advisory Committee Act is silent as to the appropriate remedy for violating its openness requirements).

98. Because of the case *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 605 (2001), a FOIA litigant cannot recover attorney's fees from the government for successfully challenging the government's decision to withhold unless the FOIA requester is able to obtain a court order for the release. Given the nature of FOIA litigation, this is rarely the outcome. FOIA litigators also have suggested that the government takes advantage of this situation by delaying the release of even pedestrian information until shortly before a court would actually consider the matter. In such a scenario, the FOIA litigant would have spent a great deal of time and effort pursuing unnecessary litigation, and the government would have no penalty or consequences for either the improper withholding or this unscrupulous litigation tactic. *See Information Policy in the 21st Century: A Review of the Freedom of Information Act: Hearing Before the Subcomm. on Gov't Mgmt., Fin. & Accountability of the H. Comm. on Gov't Reform*, 109th Cong. (2005) (statement of Senator John Cornyn), available at http://www.cjog.net/documents/Cornyn_Statement.pdf.

99. *See* 18 U.S.C. §§ 793(d)-(e), 798 (2000) (creating criminal penalties for disclosing classified information); 50 U.S.C. § 421 (2000) (creating penalties for those who "out" undercover agents). *See generally* C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER (2002) (describing, among other things, why whistleblowers speak and providing examples of what is at stake).

100. *See* J. William Leonard, The Importance of Basics, Remarks at the National Classification Management Society Conference 2-3 (June 15, 2004), available at <http://www.fas.org/sgp/isoo/leonard061504.pdf>.

101. *See* Weaver & Pallitto, *supra* note 15, at 89.

102. *E.g.,* Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998);

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with the agency whose records are at issue. Congress has never used its own authority to declassify documents in its possession.¹⁰³ Thus, the legislative oversight check is sporadic at best.

There are many incentives, on the other hand, to keep secrets. First, there are penalties in some circumstances for disclosing classified information.¹⁰⁴ Potential repercussions may include loss of security clearances, termination of employment, fines, and prison. One naturally will tend to err on the side of withholding information when faced with the risk of a penalty for disclosure, especially in the absence of a penalty for improperly withholding information—even when the withholding is knowingly improper.

Second, claims of national security secrecy often permit the government to enforce policies that otherwise would be controversial. This result certainly is the lesson of cases like *Korematsu v. United States*.¹⁰⁵ *Korematsu* concerned an order that directed the expulsion from the West Coast of all persons of Japanese ancestry. The Supreme Court held the order constitutional. In that case, the Court based its finding of “military necessity” on the representation of government lawyers that Japanese Americans were committing espionage and sabotage by signaling enemy ships from ashore. Documents later released under FOIA revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the FBI, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans posed a threat to security.¹⁰⁶ Had the Court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that the government lacked sufficient evidence, and it likely would have been able to discern the improper rationale for the policy. Thus, many have argued that secrecy is most dangerous when the government targets small groups that lack the political clout to keep information in the public’s hands.¹⁰⁷

President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (1992); Foreign Relations Authorization Act, Pub. L. No. 102-138, § 198, 105 Stat. 647, 685-691 (1991).

103. See S. Res. 400, 94th Cong. (2d Sess. 1976).

104. See *supra* note 98.

105. 323 U.S. 214 (1944) (allowing the internment of Japanese-Americans during World War II).

106. See *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. Cal. 1984).

107. A number of commentators have discussed how secrecy and national security concerns are useful for targeting minority groups because of the absence of other checks to protect the minority interests. See Kitrosser, *supra* note 50, at 132 (arguing that the denial of access to information takes on a greater constitutional status when it is directed at discrete parties or groups for which there are no channels for political recourse because it is easier for the government to shield its activity from view and there is a denial of political debate

Some believed the nation faced a crisis of similar magnitude after the attacks of September 11th. In *Center for National Security Studies v. Department of Justice*,¹⁰⁸ public interest groups made requests under FOIA for the names of more than 1,000 individuals, mostly of Arab descent, who had been rounded up in the aftermath of the September 11th attacks. These public interest groups sought the information in order to serve the highest purposes of the open government laws—namely, to investigate allegations that these detainees had suffered “deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury.”¹⁰⁹ Yet, the government argued that that the release of the names could assist terrorists in piecing together the course, direction, and focus of the investigation.¹¹⁰ The Court of Appeals for the District of Columbia accepted the government’s mosaic argument over the dissent of Judge Tatel, who chastised the court for its “uncritical deference to the government’s vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government’s case.”¹¹¹

The practical implications of the denial of the information sought in *Center for National Security Studies* are detailed in a report of the Department of Justice Inspector General, who concluded that the roundup, detention, and deportation of many of the immigrants amounted to a “pattern of physical and verbal abuse.”¹¹² Detainees, many of whom were held for weeks before they were formally charged, were housed in restricted confinement conditions where they were unable to contact their attorneys and families for long periods of time.¹¹³ They were forced to live in cells illuminated 24-hours a day.¹¹⁴ The government held the vast majority of the detainees on immigration charges and ultimately released or

over the activities); Sunstein, *supra* note 85, at 73 (positing that liberty-reducing intrusions are easier to impose on identifiable subgroups because of the weakened political check); *see also* Alisdair Roberts, *National Security and Open Government*, 9 GEO. PUB. POL’Y REV. 69, 73 (2004) (using Human Radiation Experiments in the United States as an example of why an independent check is needed to ensure fair treatment for individuals).

108. 331 F.3d 918 (D.C. Cir. 2003).

109. *Id.* at 922.

110. *Id.* at 928.

111. *Id.* at 937 (Tatel, J., dissenting) (remarking that the court’s blind adoption of the government’s position “eviscerates both FOIA itself and the principles of openness in government that FOIA embodies”).

112. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 142-49 (2003), *available at* <http://justice.gov/oig/special/0306/full.pdf> (reporting on alleged abuses of detainees seized after the attacks of September 11, 2001).

113. *Id.* at 135-42.

114. *Id.* at 153-54.

deported them.¹¹⁵ Of the 134 detainees held on federal criminal charges, only one was found guilty of a terrorism-related offense.

Certainly the possibility that the government might use extreme measures in the wake of a terrible attack on U.S. citizens and search for any available tools to establish a sense of control and authority is not itself surprising. The government's effort to stem subsequent discussions that might prevent the perpetuation of abusive government practices, however, is less tolerable.

A third incentive to keep secrets is that national security secrecy ends public inquiry into allegations of misconduct as well as forecloses any governmental liability. A long line of cases involve invocation of the state secrets privilege to shut down prosecution of claims against the United States,¹¹⁶ including claims of illegal interception of U.S. citizen telephone calls,¹¹⁷ alleged racial and sexual discrimination claims by government employees working in law enforcement and intelligence agencies,¹¹⁸ allegations of mismanagement or misdeeds within federal agencies,¹¹⁹ and claims for recompense by surviving members of the families of civilians killed during a military mission.¹²⁰ In almost any case involving an intelligence, law enforcement, or military agency, classified information likely will be involved, and the state secrets privilege therefore constitutes a potent weapon for government litigators to avoid liability.

The scandal over the treatment of prisoners at the Abu Ghraib prison offers another example of the tendency of the government to keep secrets in order to avoid accountability.¹²¹ In April 2004, leaks of photographs, policy papers, and internal military investigations brought the situation in Abu Ghraib to light. A number of civil liberties groups had requested these records many months earlier, citing a public urgency for information related to concerns of potential abuses.¹²² The Department of Defense rejected the request for expedited processing because the FOIA requesters could not demonstrate a "compelling need" for the information or a

115. *Id.* at 1-8.

116. *See generally* Weaver & Pallitto, *supra* note 15, at 90-92.

117. *E.g.*, Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1979).

118. *E.g.*, Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005); Tilden v. Tenet, 140 F. Supp. 2d 623 (E.D. Va. 2000).

119. *Edmonds v. Dep't of Justice*, 2005 WL *3462750 (D.D.C. 2005) (concerning allegations of improper influences and criminal acts in FBI translation unit); *Barlow v. United States*, 53 Fed. Cl. 667 (2002) (concerning allegations of intelligence agency deception of Congress).

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

121. *See, e.g.*, Letter from Amrit Singh, Staff Attorney, ACLU, to Freedom of Information Officers of the Dep't of Defense, Dep't of Justice, Dep't of State, and the CIA (Oct. 7, 2003), available at http://www.aclu.org/FilesPDFs/torture_foia.pdf (chronicling media discoveries related to prisoners' treatment at Abu Ghraib).

122. *E.g., id.*

“breaking news story” about the matter.¹²³ The dramatic public, media, and congressional reaction to the controversy demonstrates the strong public interest in how the United States conducts itself with respect to enemy prisoners.¹²⁴ In situations like this, a common government response is, “Just because the public is interested does not mean it is in the public interest to disclose it.” Yet the issues raised by the release of pictures, memos, and policies surrounding the Abu Ghraib abuses have long-term implications for the treatment of Americans abroad, the treatment of American prisoners abroad, and the national conception of American values.¹²⁵ It is worth considering what interest the Department of Defense sought to protect by delaying the release of information about alleged prisoner abuse, particularly after the scandal had emerged. Obviously, the prisoners were already aware of the conditions of their interrogation and confinement. Thus, arguably the Department of Defense delayed and resisted releasing the records to protect the public from knowing and to avoid the inevitable backlash against the behavior.

A final incentive to keep secrets is that, by controlling information, the government has the ability to control public opinion and fashion a message. For example, the government may try to avoid embarrassing public officials.¹²⁶ Former Solicitor General of the United States Erwin Griswold, who led the government’s fight for secrecy in the *Pentagon Papers Case*, acknowledged this motivation: “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 with governmental embarrassment of one

123. Letter from Dep’t of Def. to Amrit Singh, Staff Attorney, ACLU (Oct. 30, 2003), available at <http://www.aclu.org/intlhumanrights/gen/137811gl20040513.html>.

124. E.g., S. AMDT. 1581, 109th Cong. (1st Sess. 2005). The purpose of the Senate Amendment is “[t]o prohibit cruel, inhuman, or degrading treatment or punishment of persons under the custody or control of the United States Government.” *Id.*

125. The controversy also shielded from public view the internal debate that led to competing analyses of the legality of various interrogation practices, which are now coming to the forefront.

126. See Aaron Edlin & Joseph E. Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 AM. ECON. REV. 1301 (1995) (hypothesizing that managers will exercise the scope of their discretion, in the broadest sense, to enhance their incomes); see also Joseph E. Stiglitz, Remarks in Accepting the Nobel Prize for Economics: Information and the Change in the Paradigm in Economics (Dec. 8, 2001), in THE NOBEL PRIZES 2001 (Tore Frängsmyr ed., 2002), available at <http://nobelprize.org/economics/laureates/2001/stiglitz-lecture.pdf>. Governmental control of information sometimes

gives rise to rents, rents which in some countries are appropriated through outright corruption (selling information), but in others are part of a “gift exchange” in which reporters not only provide puff pieces praising the government official who has given the reporter privileged access to information, particularly in ways which are designed to enhance the officials influence and power, but distort news coverage.

Id. at 523-24. A related problem, not addressed here, is selective declassification to control opinion. See Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 910-14 (1990).

sort or another.”¹²⁷ The *Pentagon Papers Case*¹²⁸ illustrates this point. The case involved an effort to enjoin *The New York Times* and *The Washington Post* from publishing a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy” (the Pentagon Papers).¹²⁹ As with *Korematsu*, a review of the materials shielded by government secrecy demonstrated that the protection of national security did not motivate the government to enshroud the Pentagon Papers in secrecy. The Pentagon Papers described a series of misrepresentations and poor policy decisions concerning the Vietnam War. They were improperly leaked. As Griswold eventually admitted, he had not perceived a threat to national security relating to the publication of the Pentagon Papers.¹³⁰ The Supreme Court denied the government’s efforts to enjoin publication by the newspapers.¹³¹ The publishing of the Pentagon Papers “broke a kind of spell in this country, a notion that the people and the government had to always be in consensus on all the major [foreign policy] issues.”¹³²

Recent efforts to assess ways in which the government uses new law enforcement techniques suggest that similar motivations are at work in controlling public opinion today. In a FOIA case, the government argued that it could not disclose the total number of applications to third parties (for “production of any tangible things”) sought by FBI field offices under Section 215 of the USA PATRIOT Act (in investigations to protect against international terrorist activity or clandestine intelligence operations) because disclosure would permit adversaries to create a mosaic of FBI investigations.¹³³ Nonetheless, the Department of Justice saw fit to declassify a memorandum from Attorney General John Ashcroft to FBI Director Robert S. Mueller indicating that the power had never been used.¹³⁴ Thus, except for the possibility of parsing the controlled, selective, and conflicting release of information by the Department of Justice about its use of a highly controversial new power to require production of tangible things that was enacted at a time of extreme national crisis, the government completely denied the public the information necessary to assess the impact of Section 215 of the USA PATRIOT Act.

127. See Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

128. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1976). This case is commonly referred to as the *Pentagon Papers Case*.

129. *Id.*

130. Griswold, *supra* note 127.

131. See *N.Y. Times Co.*, 403 U.S. at 714.

132. See JOHN PRADOS & MARGARET PRATT PORTER, *INSIDE THE PENTAGON PAPERS* 191-93 (2005) (relating insiders’ views as to the impact of the *Pentagon Papers Case*).

133. *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 38 n.16 (D.D.C. 2004).

134. *Id.* at 27.

On many occasions, the government has taken national security secrecy positions that could be described as overreaching.¹³⁵ If the government were an ordinary litigant, its past practices might cause a court to consider secrecy claims with some level of skepticism. At the very least, one would expect the courts to be sensitive to red flags raised in individual cases, including cases in which the government allegedly violates fundamental constitutional principles, cases in which the government employs categorical secrecy claims instead of an individualized assessment of the need for secrecy, cases involving allegations of government misconduct, cases in which the government targets minority segments of the population, cases that suggest a denial of informed citizen participation in government, and the like.¹³⁶ Instead, courts have increasingly deferred to the government's assertions of secrecy. As discussed below, the unwillingness of the courts to employ even minimal scrutiny to government secrecy claims is inconsistent with the will of Congress and weakens the judiciary's critical role as a check against governmental overreaching.

V. SECRECY AND JUDICIAL DEFERENCE TO NATIONAL SECURITY SECRECY CLAIMS

Information that concerns the national security of the nation is by its very nature of public interest.¹³⁷ Increased military action puts Americans at risk and has a strong impact on taxation and other public policies. For reasons of personal security and because defensive and offensive actions taken by the government should be debated in order to formulate good policy, information about military action ranks high among the categories of information that citizens of a democracy arguably have a strong need to know.

Virtually all commentators agree, nonetheless, that strong legal and practical reasons exist to protect from disclosure information that puts the nation at risk or interferes with foreign affairs. Protecting properly classified information aids defense of the nation during peacetime and wartime. Maintaining confidentiality during negotiations with foreign

135. See, e.g., Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449 (2005) (describing how terrorism concerns encourage the government to overreach in attempting to control information); Wells, *supra* note 2 (describing the expansion of secrecy through the 20th century, citing examples of overreaching by the government, and discussing how secrecy and the abuse of intelligence practices work together).

136. See Kitrosser, *supra* note 50 (discussing some guideposts for determining whether a denial of access to information has constitutional significance).

137. For a discussion of the public character of government information, see Assaf, *supra* note 44, at 244-48, and also Note, *supra* note 126, at 917-25.

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powers protects national interests. Some specific areas of government activity function best, at least in the short term, with some guarantee of secrecy.

From a constitutional perspective, however, secrecy was not intended to be the norm. The U.S. Constitution itself contains only one specific mention of secrecy, which relates to proceedings of the Congress:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.¹³⁸

This short provision does not posit any tension between openness and security. Instead, the Constitution compels publicity of Congress's proceedings and accountability for its actions, with secrecy as the exception that proves the rule.¹³⁹ The Constitution does not mention the Executive's power to keep information secret, but this power is derived from Article II powers vested in the President as Commander in Chief and as maker of treaties (with the advice and consent of the Senate).¹⁴⁰

Congressional authority balances the significant presidential powers to "provide for the common Defence,"¹⁴¹ "declare War . . . and make Rules concerning Captures on Land and Water,"¹⁴² "make Rules for the Government and Regulation of the land and naval Forces,"¹⁴³ advise in and consent to the making of treaties,¹⁴⁴ "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States,"¹⁴⁵ and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law."¹⁴⁶ Thus, the Constitution vests significant powers with regard to the protection of national security in Congress as well.

138. U.S. CONST. art. I, § 5.

139. *See supra* notes 132-37 and accompanying text.

140. U.S. CONST. art. II, § 2. Since the founding of the nation, the necessity presented by national security or foreign affairs has justified the keeping of secrets. The current national security classification system traces its roots directly to Executive Order No. 10,290, issued by President Truman in 1951. Since that time, successive presidential administrations have issued Executive Orders setting forth the categories of information that must be classified and the procedures for classifying. The nation currently operates under Executive Order No. 12,958, as amended by President Bush with Executive Order No. 13,292, issued on March 25, 2003. Exec. Order No. 12,958, 60 Fed. Reg. 12,958 (Apr. 17, 1995); Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003).

141. U.S. CONST. art. I, § 8, cl. 1.

142. *Id.* cl. 11.

143. *Id.* cl. 14.

144. *Id.* art. II, § 2, cl. 2.

145. *Id.* art. I, § 8, cl. 18.

146. *Id.* § 9, cl. 7.

Congress, in turn, has acknowledged the judiciary's constitutional role in policing executive claims of secrecy; the constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary. Article III of the Constitution empowers the judiciary to resolve disputes including secrecy disputes.¹⁴⁷ Congress defined that role with even greater precision with the passage of FOIA and later with its 1974 amendments, as described below.

Although the Constitution does not vest exclusivity over national security information with the executive branch,¹⁴⁸ courts have been reluctant to interfere with presidential military and foreign affairs powers for separation of powers reasons, for fear of becoming enmeshed in political questions, and out of concern that the judiciary lacks the expertise to reach appropriate decisions in these areas. The separation of powers concerns do not appear to have a strong basis. In FOIA cases, at least, the Executive Order on classification serves as a touchstone for Exemption 1 analysis: it permits withholding of information that is both properly classified under an Executive Order and is "secret in the interest of national defense and foreign policy."¹⁴⁹ Executive Orders are issued by the President. Courts are not asked to assess what information should be classified; FOIA cases do not challenge the categories of information that Executive Orders list as subject to security classification.¹⁵⁰ Instead, the focus is on whether particular information is properly classified. Courts do not intrude on executive power by considering this issue. Even in cases in which the government invokes the state secrets privilege, concerns over separation of powers do not prohibit courts from considering the legitimacy of the claims.¹⁵¹ In a democracy, courts are charged with exactly that task—ensuring that power is not improperly invoked.

147. As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (plurality opinion); see Cass R. Sunstein, *National Security, Liberty and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 703 (2005) ("Nor does the Constitution support the view, at least implicit in the rulings of the D.C. Circuit, that the domain of war is the domain of largely unbounded presidential discretion. On the contrary, that view is a tendentious reading of the legal materials."); Note, *supra* note 126, at 917-25 (arguing that separation of powers does not prevent courts from substantively evaluating executive classification decisions).

148. Note, *supra* note 126, at 918-20.

149. 5 U.S.C. § 552(b)(1) (2000).

150. In theory, since the Executive Order is a public document, there are electoral and congressional checks on an overbroad classification scheme.

151. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.").

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Congress sought to counter judicial reluctance with FOIA. FOIA requires agencies to disclose all records that do not fall within one of nine explicit exemptions specified by Congress.¹⁵² In the event of agency nondisclosure, FOIA provides for court review. Specifically, Congress provided for de novo review “in order that the ultimate decision as to the propriety of the agency’s action is made by the court and [to] prevent [review] from becoming meaningless judicial sanctioning of agency discretion.”¹⁵³

In FOIA’s first decade, agencies acted with extreme reluctance in complying with the Act, and the courts were also reluctant to vigorously enforce it.¹⁵⁴ In *Environmental Protection Agency v. Mink*,¹⁵⁵ the Supreme Court considered the judicial responsibility to assess a national security denial of a FOIA request under FOIA Exemption 1, which at that time covered matters “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.”¹⁵⁶ The controversy in *Mink* arose out of a request by members of Congress who sought access to a secret report concerning nuclear weapons testing in Alaska. *Mink* held that a court should not review the substantive propriety of a classification decision or go behind an agency affidavit stating that the agency had duly classified the requested documents pursuant to Executive Order. In other words, the reviewing court’s only function in an Exemption 1 case was to determine if the records had in fact been classified. The *Mink* Court asserted that it based its ruling on congressional intent, stating that “Congress chose to follow the Executive’s determination in these matters” and that the law did not authorize *in camera* inspection to test the propriety of the classification.¹⁵⁷ In effect, the Supreme Court held that judges were not to perform a checking function on secrecy decisions but merely to ensure the proper procedures for classifying a document had been observed.

Following *Mink* and in the wake of the Watergate scandal, Congress significantly strengthened FOIA. In 1974 Congress amended FOIA with the primary purpose of overruling the Supreme Court’s reading of Exemption 1 in *Mink*.¹⁵⁸ President Ford vetoed the amendments based on his view that it would be unconstitutional for a judge to decide questions of the proper classification of a record.¹⁵⁹ Congress overrode that veto,

152. See *supra* notes 61-63 and accompanying text.

153. S. REP. NO. 89-813, at 8 (1965).

154. See Robert P. Deyling, *Judicial Deference and De Novo Review*, 37 VILL. L. REV. 67, 73-74 (1992).

155. 140 U.S. 73 (1973).

156. 5 U.S.C. § 552(b)(1) (2000).

157. 140 U.S. at 81.

158. S. REP. NO. 93-1200, at 11-12 (1974).

159. Letter from Gerald R. Ford, President of the United States, to the House of

explicitly providing judges with the authority to conduct *in camera* review of records despite the government's assertion of national security. The 1974 amendments modified Exemption 1 to exempt only matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."¹⁶⁰

The amendments provided that

the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.¹⁶¹

Thus, with the addition of these amendments, FOIA explicitly provides for de novo review of records.

The legislative history of the 1974 amendments sheds important light on the scope of review that Congress envisioned for courts in FOIA cases.¹⁶²

In explaining de novo review under the Act, the Conference Report states:

While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

. . .

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.¹⁶³

Thus, Congress revealed its intention to strengthen FOIA's scope by

Representatives (Oct. 17, 1974), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/101774%20Veto%20Message.pdf>.

160. 5 U.S.C. § 552(b)(1) (2000) (emphasis added).

161. 5 U.S.C. § 552(a)(4)(B).

162. Some early cases interpreting the amendments improperly relied on legislative history concerning versions of the statute that eventually were rejected. See *Ray v. Turner*, 587 F.2d 1187, 1192 n.14 (D.C. Cir. 1978). Because of the differing versions of the legislation that moved through both houses of Congress, the Conference Report is generally considered the best source for determining congressional intent. For a more thorough review of the legislative history, see Judge Wright's concurrence in *Ray*, 587 F.2d at 1201-15 (Wright, J., concurring).

163. S. Rep. No. 93-1200, at 9, 12 (1974).

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providing direct judicial review. The D.C. Circuit recognized the importance of the legislative history of Congress's intent with de novo review in *Ray v. Turner*.¹⁶⁴ That court acknowledged Congress's desire for independent judicial determination of national security decisions. Commenting on this part of the Conference Report, the D.C. Circuit stated,

The legislative history underscores that the intent of Congress regarding de novo review stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document.¹⁶⁵

...

[Congress] stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security. They emphasized that in reaching a de novo determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had "unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record."¹⁶⁶

The type of review envisioned by Congress, according to the legislative history of the 1974 amendments to FOIA, is quite different in its nature than the deference typically provided in regulatory law. The primary form of judicial deference to government agencies is so-called *Chevron* deference, under which federal courts defer to reasonable agency interpretations of the law.¹⁶⁷ *Chevron U.S.A. Inc. v. Natural Resources Defense Council* involved a congressional delegation to the Environmental Protection Agency (EPA) of rulemaking authority with respect to the Clean Air Act. The EPA issued a rule that defined a "stationary source" of pollutants to encompass all emissions within a single industrial plant. Environmental organizations challenged the rule. In considering the challenge, the Supreme Court described a two-step analysis for examining agency construction of a statute that the agency administers. The first step considers whether Congress "has spoken directly to the precise question at

164. 587 F.2d 1198 (D.C. Cir. 1978).

165. After the veto, President Ford sent a letter to Senator Kennedy with recommendations for revision of the language. It suggested a provision that permitted the presumption of proper classification to be rebutted only upon a showing that there was no reasonable basis for the classification. Letter from Gerald R. Ford, President of the United States, to Edward M. Kennedy, United States Senator (Oct. 25, 1974) (on file with National Security Archive), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm#_edn36. President Ford's request was rejected by the Conference Committee.

166. 587 F.2d at 1193-94.

167. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

issue.”¹⁶⁸ If Congress has made its intention “clear,” then that intention governs. If, however, the statute is ambiguous or is silent on the particular issue, then the court must accept the agency’s construction of the statute so long as it is “permissible.”¹⁶⁹ Thus, the court essentially defers to the agency’s legal interpretation of the statutory language, rather than conducting its own interpretation. A subsequent Supreme Court decision indicated that *Chevron* deference was not derived from separation of powers doctrine, but on a reading of Congress’s intent about the allocation of interpretive authority between agencies and the courts.¹⁷⁰

In the FOIA context, by contrast, Congress had a very different intention. Congress stated both in the statutory language and in the legislative history that it wanted courts to exercise their authority to determine whether secrecy claims made sense. By directing *de novo* review (instead of the ordinary arbitrary and capricious review under the APA), Congress signaled its wish that the courts undertake a new review of the facts and law, without relying on the original agency decision.¹⁷¹ This approach makes sense in light of the fact that FOIA denials, unlike most other agency actions, are made without adjudication, notice and comment, or other protections. In fact, aside from citation to the particular exemption upon which the denial is based, most FOIA denials do not even explain the rationale for the denial. Thus, Congress plainly intended that the courts would review procedural and substantive issues and would permit a full airing of the factual and legal issues.¹⁷²

Congress did not direct courts to defer to agency determinations. Instead, it sought to assuage concerns about whether judges could be trusted to perform a *de novo* review by expressing the expectation that agency affidavits would be given substantial weight.¹⁷³ As D.C. Circuit Chief Judge J. Skelly Wright recognized after an extensive review of the legislative history of the 1974 amendments, “[t]he Conference Committee . . . register[ed] its anticipation that rational judges conducting *de novo* reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy.”¹⁷⁴ Were agencies to provide detailed, common sense, and credible assertions, then they would be given substantial weight. In practice, courts instead have made it

168. *Id.* at 842.

169. *Id.* at 843.

170. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

171. *See* Deyling, *supra* note 154, at 89.

172. *Id.*

173. *See supra* notes 154-57 and accompanying text.

174. *Ray v. Turner*, 587 F.2d 1187, 1213 (D.C. Cir. 1978) (Wright, J., concurring).

increasingly difficult for private parties to counter the presumption of proper classification or of preeminent agency expertise without a whistleblower or leaker to shock the court.

VI. JUDICIAL TREATMENT OF SECRECY CASES INVOLVING NATIONAL SECURITY

Despite Congress's attempts to get courts to perform a rigorous review of agency withholding under FOIA in cases involving national security information, courts have generally been reluctant to probe agency explanations for decisions to withhold information on national security grounds. Even when purporting to conduct a *de novo* review as mandated by FOIA, courts have adopted a doctrine of deference to executive claims that secrecy is needed to protect national security interests.

In his concurrence in *Ray v. Turner*, Judge Wright prophetically warned against the ascendancy of judicial deference in FOIA cases. Speaking of the "substantial weight" language in the Conference Report, Judge Wright noted the following:

Stretching the Conference Committee's recognition of the "substantial weight" deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute and would render meaningless Congress' obvious intent in passing these provisions over the President's specific objections.¹⁷⁵

As it turns out, courts, for the most part, have not constrained the deference afforded the government in secrecy cases. In most cases challenging FOIA Exemption 1 determinations as to national security, courts have exhibited great deference to agency affidavits and granted the government summary judgment without *in camera* inspection of the requested records. The courts usually ground their reasoning for this deferential stance in the agencies' expertise and the relatively poor position from which the court may evaluate the potential harm to national security. For example, in *Weissman v. CIA*,¹⁷⁶ a case involving a request for information on a CIA investigation of the plaintiff, the appeals court affirmed the district court's grant of summary judgment on Exemptions 1 and 3 and affirmed the district court's refusal to conduct *in camera* review. The court specifically cited the "substantial weight" portion of the Conference Report and added that "[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information."¹⁷⁷ Likewise, in *Hayden v. NSA*, the court refused to question

175. *Id.* at 1213-14 (D.C. Cir. 1978) (Wright, J., concurring).

176. 565 F.2d 692 (D.C. Cir. 1977).

177. *Id.* at 697-99.

the agency's explanation that revealing the channels it monitors would impair its mission, stating that, "This is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency; for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review."¹⁷⁸

As a consequence of the substantial weight given to agency affidavits, courts have made it virtually impossible for individual litigants to counter the opinions of agency personnel. Judges, viewing themselves as non-experts, have also refused to give weight to opposing affidavits from outside experts, such as retired diplomats and government officials, including those with substantial national security credentials.¹⁷⁹ In practice, courts have reasoned that only a current intelligence agency classifier or reviewer can understand all of the considerations that require the continued secrecy. Thus, agency affidavits are often non-falsifiable.¹⁸⁰

Nor has it generally been possible to use the important litigation tool of disproving the factual claims of the opponent. In a case involving a FOIA request for the biographies of nine former Communist leaders of Eastern European countries, the CIA refused to confirm or deny the existence of the documents. In the court case that followed, the CIA Information Officer swore under oath that only one line in one of the requested histories could be declassified. He also claimed that the CIA could never confirm nor deny the existence of biographical sketches of Soviet bloc leaders. The FOIA requester argued that the testimony was "facially incredible," not least because the CIA had already released biographical information on some of the same Eastern European Communists—Janos Kadar and Gustav Husak—that were the subject of its FOIA request.¹⁸¹ When the falsity of the CIA declaration became apparent to the court, the court struck the declaration but permitted the agency to file a new declaration from another official. Further review of the CIA History Staff Study showed the testimony to be false because the study included a number of paragraphs

178. *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979).

179. *See Deyling, supra* note 154, at 85 nn.116-20 (citing cases in which courts rejected the opinions of a former CIA employee who had seen the information and was aware of its content, Senators, former ambassadors, retired government officials, and others).

180. Numerous courts have stated that agency affidavits do not merit "substantial weight" if they show a lack of good faith on the part of the agency or fail to account for contrary evidence. *See, e.g., King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Gardels v. CIA*, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982) (citing *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980)). But in practice courts have not made any findings of bad faith and have generally not treated counter-affidavits favorably. *See id.* at 1104-05 (rejecting the plaintiff's use of a former CIA agent's affidavit to challenge the government's affidavit with regard to potential harm).

181. *See Mot. for Revised Vaughn Index, Nat'l Sec. Archive v. CIA*, Civil No. 99-1160 (CKK) (D.D.C. 2000) (arguing for the National Security Archive's right to a new *Vaughn Index*), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/ciacase/Vaughnmotion.doc>.

marked “U” for “unclassified” that were based on unclassified, secondary literature. The court denied the CIA’s claim that it could refuse to confirm or deny the existence of the biographies, explaining:

To hold that the CIA has the authority to deny information that it has already admitted would violate the core principles of FOIA without providing any conceivable national security benefit. Indeed, national security can only be harmed by the lack of trust engendered by a government denial of information that it has already admitted.¹⁸²

But, the agency faced no consequence for the filing of an inaccurate declaration. Ultimately the court held the CIA could withhold the now-acknowledged biographies.

In a subtle but telling shift of nomenclature, the D.C. Circuit in *Halperin v. CIA* called the standard of review in Exemption 1 and 3 cases “the substantial weight standard” rather than the de novo standard of review mandated by Congress.¹⁸³ The case involved a request for CIA attorney retainer agreements, fee agreements, bills and statements, and related correspondence between the CIA and any attorneys or law firms retained by the CIA to perform legal services for the Agency or its employees since June 17, 1972. The court reasoned that as long as the agency filed an adequate affidavit, the court should not inquire as to whether it agrees with the agency’s opinion because deference should be given to the agency’s expert opinion.¹⁸⁴ And in a FOIA lawsuit seeking information regarding the CIA’s ties to the University of California, the court reiterated the point that the issue is simply whether the Agency’s judgment is reasonable, performed in good faith, and made with adequate specificity and plausibility.¹⁸⁵

Further support for deference to agency expertise in FOIA cases came from the Supreme Court in *CIA v. Sims*,¹⁸⁶ in which the Court broadly construed the CIA’s authority to withhold information concerning “intelligence sources” under Exemption 3. *Sims* concerned a request for the names of the institutions and individual researchers who had participated in a CIA-financed project established to counter perceived Soviet and Chinese advances in brainwashing and interrogation techniques. Invoking the mosaic theory—that even “superficially innocuous information” could aid enemies of the United States in piecing together

182. *Nat’l Sec. Archive v. CIA*, Civil No. 99-1160, Memorandum Opinion (D.D.C. July 31, 2000).

183. 629 F.2d 144, 147-48 (D.C. Cir. 1980).

184. *See id.* (stating further that judges do not have the knowledge of national security necessary to second guess agency opinions).

185. *See Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (noting that the test is not whether the court agrees with the agency’s decision but rather if the agency’s judgment meets these objective standards).

186. 471 U.S. 159 (1985).

compromising intelligence data—the Supreme Court concluded, “The decisions of the Director, who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.”¹⁸⁷ There has been considerable criticism of the *Sims* decision.¹⁸⁸

Since *Sims*, judicial deference has been the norm in FOIA cases involving national security. Relying on *Sims*, the D.C. Circuit expanded the breadth of judicial deference even further in *Center for National Security Studies v. Department of Justice*.¹⁸⁹ The government withheld the requested names of individuals detained after the September 11th attacks, relying primarily on Exemption 7. The district court ordered some of the information regarding the detainees be disclosed. A divided panel of the D.C. Circuit reversed this part of the district court’s decision. Citing the Conference Report’s reference to “substantial weight,” the prior cases granting deference to agency expertise, separation of powers, and the judiciary’s general tendency to defer to the Executive on matters affecting national security, the appeals court extended the concept of deference relied upon in FOIA Exemption 1 and 3 cases to cases involving Exemption 7(A), which exempts information that, if disclosed, could interfere with law enforcement proceedings.¹⁹⁰

187. *Id.* at 178-79.

188. See, for example, Justice Marshall’s concurrence in *Sims*, which argued that the Court’s broad reading of the CIA’s “sources and methods” exemption was inconsistent with the intent of Congress:

The result [of the majority opinion] is to cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be detrimental to national security, and to rid the Agency of the burden of making individualized showings of compliance with an executive order. Perhaps the Court believes all Agency documents should be susceptible to withholding in this way. But Congress, it must be recalled, expressed strong disagreement by passing, and then amending, Exemption 1.

Id. at 191 (Marshall, J., concurring); see also Michael H. Hughes, Note, *CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATH. U. L. REV. 279, 304-05 (1985) (“The Court’s expansive reading of the term [“intelligence sources”] essentially negates the review function Congress prescribed for the judiciary in the original statute and refined in subsequent amendments to the Act.”); Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT. L.J. 79 (2004) (attacking the deference accorded to the CIA in *Sims* both because it is contrary to legislative intent and because the “long history of CIA troubles and embarrassments” calls into question the agency’s supposed expertise); *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (agreeing with the lower court that the *Sims* precedent seems contrary to legislative intent but adhering to it because “nothing in statute or case precedent permits us to reach a different result than *Sims* If Congress did not intend to give the CIA a near-blanket FOIA exemption, it can take notice of the courts’ incremental creation of one, and take the necessary legislative action to rectify the matter.”).

189. 331 F.3d 918 (D.C. Cir. 2003); see *supra* notes 107-12 and accompanying text.

190. 331 F.3d at 927-28.

Judge Tatel filed a vigorous dissent in which he criticized the majority's extreme deference. His opinion argues both that the majority extended the circuit's traditional deference beyond its proper bounds by invoking it in the context of Exemption 7 and that the government's affidavits failed to merit deference even were a more deferential standard to apply.¹⁹¹ The majority's opinion has elicited considerable criticism from academia as well.¹⁹²

Center for National Security Studies is remarkable not only because it extended the concept of deference beyond its traditional domain in Exemptions 1 and 3—the Conference Report's mention of “substantial weight,” upon which the D.C. Circuit's deference doctrine is based, refers, after all, only to Exemption 1 cases—but also because it invoked the concept of separation of powers as a basis for the court's deference. Notwithstanding the dicta in *Center for National Security Studies*, however, it appears that a separation of powers argument for deference based on executive preeminence in national security matters is not well founded.¹⁹³

Outside the FOIA context, courts have been equally reluctant to question government secrecy claims, principally in cases in which the government invokes the state secrets privilege.¹⁹⁴ The government has used the state secrets privilege in response to discovery requests and in motions to dismiss entire suits. The Supreme Court first recognized the privilege in *United States v. Reynolds*, where widows of three civilians killed in a crash of an Air Force plane brought a tort suit against the federal government.¹⁹⁵ The plaintiffs sought in discovery the official accident investigation report.

191. See *id.* at 939-40 (Tatel, J., dissenting) (proclaiming boldly that “by accepting the government's vague, poorly explained allegations, and by filling in the gaps in the government's case with its own assumptions about facts absent from the record, this court has converted deference into acquiescence”).

192. See, e.g., Erwin Chemerinsky, *The Lower Federal Courts and the War on Terrorism*, 39 VAL. U. L. REV. 607, 611-13 (2005) (concluding that “[t]he court of appeals decision is wrong as a matter of law and policy” because the court accepted inadequate agency explanations, because the court's extreme deference is inconsistent with FOIA, and because the court gave no weight to the strong public policy interest in learning how government uses its power to detain individuals); see also Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 479-81 (2005) (arguing that the decision is contrary to congressional intent: “Yet, in affording such deference to the DOJ's assertions of fact and probability the District of Columbia Circuit neglected more than merely the logic of the situation—it ignored the balance of interests Congress had enshrined within FOIA”); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 68-69 (2005) (noting that this decision “returns the public's right of access to its unfortunate status before FOIA, when the Executive could withhold information on the basis of his unreviewable determination that it was ‘in the public interest’ to do so”).

193. See *supra* notes 144-51 and accompanying text (arguing that separation of powers concerns do not appear to have a strong basis).

194. A helpful analysis of the implications of the state secrets privilege appears in Weaver & Pallitto, *supra* note 15.

195. 345 U.S. 1 (1953).

The district court ordered the government to produce the document, and when the Air Force refused, the court entered an order finding in the plaintiffs' favor on the merits of the suit. The Court of Appeals affirmed the ruling, but the Supreme Court reversed, citing the government's state secrets privilege.

In 2000, the daughter of one of the deceased civilians obtained the declassified accident investigation report when researching the incident on the Internet. The government based its 1953 claim of privilege on the fact that the aircraft had "carried confidential equipment" in a "confidential mission."¹⁹⁶ Today, we know that the accident report at issue in *Reynolds* contained no details about secret military equipment.¹⁹⁷

While a case involving a secret military mission will likely always involve some sensitive security information, such claims should not be simply taken on faith. Had the Supreme Court permitted the lower court to require an *in camera* review of the accident investigation report, it would have enabled the court to ask the military to explain its rationale. Even if the court would have upheld the state secrets privilege on that explanation, the decision to extinguish a plaintiff's legal rights would have been based on the actual rationale for the secrecy and not on a vague claim that the matter involved a secret mission.

VII. THE NEED FOR GREATER JUDICIAL SCRUTINY OF SECRECY CLAIMS

The purpose of this Article is not to argue against the government keeping proper secrets, but rather to discuss the role of the judiciary in assessing claims of national security secrecy. Given the significant values fostered by the right of access to government information, this right should only be sacrificed when a legitimate need for secrecy exists. As discussed above, neither Congress nor the public (on its own) is in a position to challenge excessive secrecy. Independent review constitutes a part of the judiciary's Article III responsibility to ensure that government action is properly authorized.

Without serious judicial review, the executive branch can easily abuse its secrecy powers. By taking the time to examine agency decisions, courts pose at least some threat to agencies; for even the necessity of having to explain oneself to a federal judge has some salutary effect. As the Honorable Patricia M. Wald, formerly a judge on the United States Court of Appeals for the District of Columbia Circuit, has commented:

¹⁹⁶ Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *17 (E.D. Pa. Sept. 10, 2004).

¹⁹⁷ See *id.* at *26 (noting that the accident report does not refer to newly developed or secret electronic equipment).

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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, most of whom do not like the FOIA one whit, the message that they are being held to account.¹⁹⁸

Further, as we have seen in the recent cases in which the government invoked the mosaic theory or the state secrets privilege, these theories have no defined limits.¹⁹⁹ Every report, indeed almost every bit of information, possessed by intelligence agencies originated from some sensitive source or using some intelligence-gathering method. Even the most innocuous information, when released by an intelligence agency, adds to the quantum of information in the public record and the potential mosaic. The government could claim that every person who worked in an intelligence or law enforcement agency intrudes on state secrets by bringing a lawsuit against that agency to allege wrongdoing. By forcing agencies to articulate the true rationale for claims of secrecy, courts can stem the expansion of these limitless theories.

Moreover, as noted above, the government has a tendency to overclassify.²⁰⁰ Despite congressional hearings on this problem over many years, the problem has proven largely intractable. Some legislative and executive initiatives have tried to address historical materials that remain classified today, but these measures have had little effect on the conservative tendency to overclassify.²⁰¹ The court can properly check such overreaching by insisting on better explanations from the executive branch when there are allegations of overclassification or excessive secrecy. For example, courts can be more skeptical in cases involving very old information, when the impact on present day security is attenuated, or demand that agencies define the limits of their mosaic theories so that case

198. Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760-61 (1988).

199. See generally David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005); see also Weaver & Pallitto, *supra* note 15, at 27.

200. See *supra* notes 5-7 and accompanying text (discussing the government's inclination to over-classify documents, especially in the Department of Defense and CIA).

201. See Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995), amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,313 (Mar. 28, 2003) (calling for more declassified materials originally, however the amended Order curtails much of this and allows for more secrecy); see *supra* notes 83-127, 188, and accompanying text (discussing the government's persistent over-classification despite efforts to rectify the situation).

law does not inadvertently encourage new extreme claims for secrecy. A few decisions against agencies may persuade agencies to adopt best practices, improve training, and make better secrecy decisions.

The courts are certainly competent to scrutinize the need for secrecy. Interestingly, while the judiciary has taken a deferential approach when faced with unknown secrets, it has taken a very different approach when faced with known “secrets.” The *Pentagon Papers Case* discussed above,²⁰² in which the Court was asked to impose a prior restraint on publication, is a perfect example. No clear reason explains why the Court would judge itself more competent to assess the need to keep information secret simply because the information had already been leaked to the press. When faced with the government’s request to enjoin publication, however, the Court had to directly confront the First Amendment. Had the Pentagon Papers not been leaked, there would have been no First Amendment clash to resolve—secrecy for the purpose of covering up government misrepresentations would have triumphed.²⁰³

The concern about the lack of expertise is particularly odd given the courts’ experience in examining facts for the sorts of warning signs that are sometimes present in secrecy cases and that should trigger increased pressure on the government. Federal courts deal with a wide range of civil rights cases brought against private and public entities concerning employment, housing, education, and other basic rights. Judges have had no problem recognizing when a matter possibly involves improper targeting of minorities or infringement on constitutional rights. The federal courts hear a wide range of cases involving alleged violations of law by government personnel and private individuals. Judges are familiar with the motivations behind such conduct and can assess the adequacy of checks against wrongdoing. Federal courts at all levels hear First Amendment cases in a wide range of contexts, and the judges are well-suited to recognize interference with the flow of information about government affairs. As Congress recognized when it amended FOIA in 1974, judges are not likely to order release against executive demands for secrecy.²⁰⁴ But judges can set up a process that gets the executive branch to limit secrecy to situations in which there is a true risk of harm.

202. See *supra* notes 128-32 and accompanying text.

203. See *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (refusing on First Amendment grounds to restrain publication of an article about confidential inquiry). The leak itself is not dispositive of the Court’s decision because there are other prior restraint cases in which the courts have enjoined publication.

204. See *Ray v. Turner*, 587 F.2d 1187, 1213-14 (D.C. Cir. 1978) (Wright, J., concurring) (“The Conference Committee . . . register[ed] its anticipation that rational judges conducting *de novo* reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy.”).

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Moreover, the courts have a substantial array of procedures available to help them assess secrecy claims. A central tool that courts have used somewhat effectively in FOIA litigation is the so-called “*Vaughn* Index.” In *Vaughn v. Rosen*,²⁰⁵ Vaughn sought disclosure of evaluations and reports concerning federal agency personnel policies. The government refused disclosure because the records were internal agency matters and could disclose deliberative process or violate privacy interests. The court noted the classic problem faced by a FOIA requester is that only the agency is in the position of confidently categorizing the content of the documents, leaving the requester merely able to plead that the documents do not contain material, such as personal information, that should be kept secret.²⁰⁶

In the national security arena, the lack of an adversarial nature is magnified. The classification system, which provides strong incentives to overclassify, strictly controls information. The courts question agency assertions reluctantly because of concerns that only the agency has sufficient knowledge and expertise to understand the significance of the secret information. Moreover, because the government requires a security clearance to review the records, the court has no access to impartial expert witnesses to aid in consideration of the matter.

The *Vaughn* court recognized that “existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity.”²⁰⁷ In order to better satisfy its responsibility to conduct a de novo review and to push the government to justify its denial, the court fashioned the following requirements: (1) that the agency submit a “relatively detailed analysis” of the material withheld,²⁰⁸ (2) that the analysis be provided “in manageable segments,”²⁰⁹ and (3) that the analysis include “an indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government’s justification.”²¹⁰ These measures would, in the court’s view, ensure “adequate adversary testing” by providing opposing counsel access to the information included in the agency’s detailed and indexed justification and by *in camera* inspection, guided by the detailed affidavit and using special

205. 484 F.2d 820 (D.C. Cir. 1973). Editor’s Note: Robert G. Vaughn is a longtime faculty member of the American University, Washington College of Law. Professor Vaughn serves as an invaluable member of the *Administrative Law Review* Faculty Board.

206. *See id.* at 823-24 (stating that the agency’s “factual characterization may or may not be accurate” but the requester “cannot state that, as a matter of his knowledge, this characterization is untrue”).

207. *Id.* at 826.

208. *Id.*

209. *Id.*

210. *Id.* at 827.

masters appointed by the court whenever the burden proved to be especially onerous.²¹¹ The purpose of the detailed *Vaughn* Index and affidavit is to require the agency to make as full a public record as possible and to enable a more adversarial process in the FOIA context in which considerable asymmetry of information exists. A *Vaughn* Index can only serve this purpose and allow the court to perform a de novo review if it is sufficiently detailed and specific.²¹² The legislative history of the 1974 amendments indicates that Congress “supports this approach.”²¹³

The *Vaughn* Index concept has not been extended beyond the FOIA context despite efforts to encourage courts to use it as a broader tool.²¹⁴ It has proved useful, forcing agencies to review each withheld document and specifically justify withholding. The format has made it possible for judges to review agency claims in an organized way, without being overwhelmed by generalities. The *Vaughn* Index also enables the FOIA requester to make specific arguments against the disclosure based on the requester’s knowledge of surrounding facts and circumstances, which may be a distinct advantage over *in camera* review.²¹⁵ When courts expect detail, agencies can deliver. When courts are unwilling to insist on a serious specification and indexing of exemption claims, by contrast, agencies take the easy route of relying on boilerplate justifications. The fact that the agency’s affidavits failed to meet the standard for specificity ranks as the most likely reason for a circuit court to reverse the judgment of a district court in favor of the agency in a FOIA case involving national security information.²¹⁶ For

211. 484 F.2d 820, 828 (D.C. Cir. 1973).

212. See *King v. Dep’t of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987) (requiring the agency’s explanation to be “full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding”). In addition, the court reasoned that government affidavits justifying its claims of exemption “must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation.” *Id.*

213. S. REP. NO. 93-854, at 15 (1974).

214. See, e.g., Brief Amicus Curiae in Support of Respondents Sierra Club and Judicial Watch, Inc., *In Re Richard B. Cheney*, Case No. 02-5354 (D.C. Cir. filed Nov. 29, 2004) (proposing the court employ a log in a Federal Advisory Committee Act case that identifies certain basic information that the government may divulge without undue burden or compromise of confidentiality), available at <http://www.gwu.edu/~nsarchiv/news/20041130/index.htm>.

215. See, e.g., *Founding Church of Scientology v. NSA*, 610 F.2d 824, 833 (D.C. Cir. 1979) (“Indeed, the District Court’s uncritical acceptance of the affidavit deprived appellant of the full de novo consideration of its records-request to which it is statutorily entitled.”); see also *supra* note 213.

216. See *King*, 830 F.2d at 225 (rejecting a DOJ *Vaughn* Index that used a conclusory code system); see also *Ray v. Turner*, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (reversing the grant of summary judgment and remanding because “the CIA again has not been responsive to the requirement that it provide specific affidavits that segregate each of its claims”); *Founding Church of Scientology*, 610 F.2d at 830-33 (reversing the grant of summary judgment because the NSA’s “affidavit was far too conclusory to support the summary judgment awarded”); *Campbell v. Dep’t of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998)

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these reasons, it is incumbent on courts to enforce true specificity, separation, and indexing requirements in government affidavits.²¹⁷

Another useful tool, which seems to have fallen into disfavor in recent years, is *in camera* inspection of documents. FOIA explicitly provides for *in camera* inspection—this was an important part of the 1974 amendments—and the Conference Report states clearly that “[w]hile *in camera* examination need not be automatic, *in many situations* it will plainly be necessary and appropriate.”²¹⁸ Justice Marshall’s concurrence in *Sims* understood this language to mean that “[t]he legislative history unequivocally establishes that *in camera* review would often be necessary and appropriate.”²¹⁹ An early D.C. Circuit opinion, however, concluded that “[w]hen the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate.”²²⁰ This language implies an assumption that Congress did not make, in other words that “in many situations” the agency will “meet[] its burden by means of affidavits.”²²¹ Congress clearly intended to provide courts with the means to test an agency’s claim to national security secrecy by requiring the agency to submit the withheld documents *in camera*.²²² As the D.C. Circuit recognized upon extensive review of the legislative history of the 1974 FOIA Amendments, “*In camera* inspection does not depend on a finding or even a tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a *de novo* determination.”²²³ Courts should not shy away from this responsibility if *in camera* review is needed for the court to perform a true *de novo* review of the agency

(reversing the grant of summary judgment based on an FBI affidavit “because a conclusory assertion that material is exempt and nonsegrable is insufficient to support nondisclosure”).

217. See Deyling, *supra* note 154, at 98-102 (describing and critiquing the content of *Vaughn* Indices).

218. S. REP. NO. 93-1200, at 9 (1974) (emphasis added).

219. 471 U.S. 159, 190 (1985) (Marshall, J., concurring).

220. *Hayden v. N.S.A.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

221. See *Ray*, 587 F.2d at 1212 (Wright, J., concurring) (“[A]n *in camera* inspection is ‘in many situations’ essential to *de novo* review and is an indispensable incentive to assure the accuracy of agency affidavits and testimony.”).

222. See *Mead Data Cent., Inc. v. Dep’t of Air Force*, 566 F.2d 242, 262, n.59 (D.C. Cir. 1977) (suggesting selective *in camera* inspection in cases involving segregation challenges “to verify the agency’s descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible”); see also *Krikorian v. Dep’t of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (remanding to the district court with the instruction that the district court should determine “whether more detailed affidavits are appropriate or whether an alternative such as *in camera* review would better strike the balance between protecting sensitive foreign relations information and disclosing non-exempt information as required by the FOIA”); *Ray*, 587 F.2d at 1210 (“Even ‘good faith’ interpretations by an agency are likely to suffer from the bias of the agency, particularly when the agency is as zealous as the CIA has been in its responsibility to protect ‘national security.’”).

223. *Ray*, 587 F.2d at 1195.

withholding. The cases show that *in camera* review, though rarely used in recent years, often can result in greater disclosure of information.²²⁴

A more novel tool, used once with great success, is the appointment of a special master to evaluate the government's secrecy claims. The *Vaughn* court highlighted special masters as a tool for cases in which the court's review might prove burdensome.²²⁵ Congress also anticipated the use of special masters in specific cases.²²⁶ Nonetheless, Judge Louis Oberdorfer of the United States District Court for the District of Columbia is the only judge who has employed this tool.

The case involved a request by a *Washington Post* reporter under FOIA for documents from the Department of Defense regarding American efforts to rescue hostages in Iran.²²⁷ The Department of Defense claimed partial or entire exemptions for 2,000 documents totaling approximately 14,000 pages. Over the government's objection²²⁸ (and after already reviewing detailed government affidavits), the District Court appointed a special master skilled in the classification of national security documents to compile a meaningful sample of these documents for the court to review.²²⁹ The special master reviewed a sample of the withheld records and issued summaries of the legal issues raised by the withholdings. By limiting the special master to these tasks and not authorizing the master to recommend which documents should be withheld or disclosed, the court avoided an unauthorized delegation of judicial authority.²³⁰

The special master reviewed a sampling of 28 records that would be representative of the legal issues raised in the case. The parties submitted comments, including four volumes of evidence by the plaintiff concerning information in the withheld records already in the public domain. After a number of conferences and hearings, the Department of Defense requested

224. See, e.g., *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (acknowledging that the district court had reviewed records *in camera* to determine applicability of Exemption 1 and had found some information meaningful and segregable); see also *Washington Post v. Dep't of Def.*, 766 F. Supp. 1 (D.D.C. 1991) (using a special master to review classified records *in camera*).

225. See *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) (noting that special masters are especially helpful when "the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court").

226. S. REP. NO. 93-854, 93d Cong., at 15 (1974).

227. *Washington Post*, 766 F. Supp. at 3-4.

228. Appointment of the special master was upheld by the D.C. Circuit on mandamus. *In re Dep't of Def.*, 848 F.2d 232, 239 (D.C. Cir. 1988) (denying a writ of mandamus and finding that the district judge acted within his discretion in appointing a special master).

229. Kenneth C. Bass III, a Washington, D.C. attorney who had served as counsel for intelligence policy in the Department of Justice and who in that capacity held top-secret security clearance, served as the special master.

230. See *Vaughn*, 848 F.2d at 236, 237 ("Judge Oberdorfer carefully cabined the master's authority. He expressly forbade the master from making any recommendations, charging him instead with the more limited task of developing a representative sample and summarizing each party's arguments or potential arguments.").

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that it be permitted to re-review the records in light of the special master's comments and the materials submitted by the plaintiff to determine whether it could release additional materials. In the end, the Department released approximately 85 percent of the records that it originally had denied as secret. These "secret" documents included an after action report asking the military not to include milk in the box lunches for the helicopters because it spoiled.²³¹ Thus, a critical impact of the procedure resulted in pressure on the government to conduct a better review of the records to determine what could be released.

The Iran rescue mission case represents a success for all parties. The plaintiff obtained important records concerning a matter of strong public interest, the court adopted a procedure that caused the agency to seriously review the records, and the Department of Defense made good decisions about releasing records to the public rather than resting under the protection of its overclassification. The value of this sort of approach can be seen in a range of recommendations that have been made over the years, both in Congress and in scholarly analyses, for a special secrecy panel or secrecy court to decide this unique brand of cases.²³² While certainly imaginative, these recommendations would not be necessary if courts would exercise their full powers in these secrecy cases. The use of a special master, for example, could assist in better decisionmaking outside the FOIA context, such as in cases in which the government has invoked the state secrets privilege. A neutral and experienced master with the appropriate security clearances could add some balance to the currently distorted non-adversarial process and could relieve the court of its expertise and burden concerns. Alternatively, courts could examine the feasibility of having specialized panels of security-cleared experts who could make the Vaughn process or the *in camera* review process more rigorous, without imposing the high cost of retaining a special master. An independent person with knowledge of security risks could help minimize the unevenness of the adversarial system in secrecy cases.

231. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations, H. Comm. on Gov't Reform*, 109th Cong. 20 (2005) (statement of Thomas Blanton, Dir., Nat'l Sec. Archive), available at <http://www.fas.org/sgp/congress/2005/030205overclass.html>.

232. See, e.g., Letter from Representatives of Various Advocacy Groups to the House Appropriations Committee (Apr. 29, 2005), available at <http://www.pogo.org/p/government/gl-050401-secrecy.html> (urging funding for the Public Interest Declassification Board, an advisory body created in the FY 2001 Intelligence Authorization Act); see also Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101 (2003) (suggesting the establishment of a national security court).

CONCLUSION

Secrecy becomes a danger when it undermines the very values the government invokes it to protect: democratic self government, informed debate, accountability, and security. All the available data suggests that secrecy is on the rise. In part, the September 11th attacks are to blame. Even more, the wars in Afghanistan and Iraq, and the efforts to stem the threat posed by terrorism, have led to an increase in secrecy. These excuses for increased secrecy, however, exist within the context of a system with a penchant for secrecy and where the incentives are dramatically skewed in favor of secrecy. The courts are empowered to act as a counterbalance to these tendencies, but they have refused to accept that role. All too often, courts easily accept the argument that the executive needs unquestioning adherence to its judgments and that the court is not competent to assess those judgments in the realm of national security.

Yet judges have stemmed executive overreaching in other contexts involving national security claims. Judges have discretionary tools—such as the *Vaughn* Index, *in camera* review, and special master—available to help them do the same in the secrecy context. By demonstrating a willingness to examine the right to government information and the need for secrecy, courts will satisfy their constitutional checking function. In the absence of stronger judicial willingness to scrutinize secrecy claims, secrecy can be expected to continue to expand and undermine the public's ability to influence governmental policies.