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Secrecy and Democracy: Who Controls Information in the National Security State?

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http://lsr.nellco.org/nyu_plltwp/217

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**Secrecy and Democracy:
Who Controls Information in the National Security State?**

Stephen J. Schulhofer*

Abstract:

Formulating policy and overseeing its execution require access to information. Yet in national security matters, we give executive officials largely unchecked power to conceal from the public and even from Congress whatever information they choose to consider sensitive. We thus disconnect part of the essential machinery of democracy. Secrecy is nothing new, but in an era of transnational terrorism and expanded conceptions of what “national security” means, secrecy’s potential for eroding checks and balances is growing, even under a President ostensibly committed to greater openness in government. Democratic values and sound national security policy both suffer as a result.

This Article argues that information access is central to legitimate governance and that in matters involving classified information, we have needlessly constrained democratic processes, as a result of misdirected fears and misplaced reverence for executive expertise. Many capabilities necessary for sound secrecy decisions can be found only in Congress or the courts.

Discomfort with the executive information monopoly is increasingly evident in judicial decisions and legislative initiatives, but these acts of resistance remain halting and uneven. This Article attempts to give coherence to the oft-tentative efforts by the other branches to claim a coordinate role. Building on congressional and judicial strengths, it develops an oversight framework more consonant with our constitutional design – an information democracy that combines robust national security safeguards with maximum feasible transparency and accountability.

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Secrecy and Democracy: Who Controls Information in the National Security State?

Stephen J. Schulhofer*

Managing access to government information is an exercise of official power no less important than setting tax rates, searching the homes of suspected spies or building a missile shield – all areas subject to robust checks and balances. Yet, in a suspension of constitutional principle, we allow the executive branch unilateral control over national security secrets.

Though widely taken for granted, this executive monopoly is pervasively damaging to the structures of our democracy. Its acceptance rests not on genuine necessity but on fear, misplaced reverence for executive expertise and the failure to appreciate that access to national security information is no less in need of oversight than expenditure decisions and substantive actions such as the deployment of military force. This Article seeks to place information access at the center of national security debate and to show that new approaches are needed to assure legitimate governance and sound policy.

Unilateral executive control over sensitive information presumes a unique and highly specialized executive expertise, a notion not only touted by the intelligence community but widely accepted by members of Congress, judges and the general public. Yet this common conception involves a mixture of truth, hyperbole, misunderstanding and myth.

The executive branch is *not* the exclusive repository of national security knowledge and experience. Congress has considerable expertise in military, foreign policy and intelligence matters. While judges typically do not, courts have solid *institutional* capacities to elicit relevant expertise. Nor is national security expertise the only proficiency required. Information-access judgments demand an appreciation for the value of both secrecy and transparency. Members of Congress and judges may not have deep familiarity with the former, but they thoroughly understand the latter. National security officials, in contrast, are predisposed by training and experience to abhor transparency; in this crucial expertise they are remarkably deficient.

Moreover, classification decisions necessarily reflect a balance, implicit or explicit, between these two competing interests. The capacity for fine-grained

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accommodation of conflicting claims is again one that national security officials typically lack; judges are the quintessential specialists in this necessary form of expertise. The proper – indeed indispensable – role of courts in a sound system for making information-access decisions has been strikingly neglected.

This Article argues that two distinct problems – congressional access to information and broader public disclosure – are both crucial for prudent national security policy and that they cannot be approached through a one-dimensional picture of relevant incentives and expertise. Drawing on a broader institutional and structural analysis, it identifies the grave flaws of executive unilateralism and develops ways to make checks and balances a reality in the arena of national security information.

Part I sketches the debates about executive power in times of crisis and their failure to confront the dilemmas posed by desirable and undesirable secrecy. Part II describes the existing executive secrecy apparatus and the incentives that shape its operation. Part III turns to outside checks, examining the extent to which Congress and the courts can prevent unjustified secrecy. As Part III shows, these outside institutions currently operate under severe legal and structural constraints; their ability to thwart improper secrecy is episodic and feeble. The executive thus enjoys *de facto* monopoly control. Part IV puts in focus the costs of this situation. Part V looks ahead. Though acceptance of executive information control remains the norm, Congress and the courts have begun to resist. Part V attempts to give coherence to these increasing but tentative efforts by the other branches to claim a coordinate role. Building on congressional and judicial strengths, it develops an oversight framework more consonant with our constitutional design – an information democracy that combines robust national security safeguards with maximum feasible transparency and accountability.

I. Executive Authority in Times of Crisis

Emergencies and other unusual threats almost invariably prompt nations to free their executive authorities from many ordinary constraints. But when are such moves really wise? The ancient problem, as old as Western political thought, has been in the forefront of debate since the onset of the “global war on terror.” Contrasting paradigms have been proposed: restrict judicial oversight or strengthen judicial oversight;¹ rely on

¹ Compare ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007) 30-31 (restrict judicial oversight); Mark Tushnet, *Controlling Executive Power in the War on Terror*, 118 HARV. L. REV. 2673, 2679 (2005) (same), with David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003) (strengthen judicial oversight).

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political checks or be skeptical of political checks;² depend on the press or rein in the press.³ At nearly all points of this debate, however, the dilemmas of secrecy are minimized or simply overlooked.

Information is the fulcrum on which every form of accountability turns.⁴ We cannot consider how to allocate emergency power, we cannot even think coherently about what any approach to the issue actually entails, until we know when sensitive material will be accessible, and to whom. To the surprise of many, the Obama administration has endorsed many of its predecessor's controversial secrecy practices,⁵ confirming what decades of recent history should have made clear – that the problem is persistent and structural, not merely an artifact of aggressive secrecy claims over the past eight years.

Yet most of the literature on emergency powers quickly bypasses the secrecy problem. Proposals to rely on legislative or judicial checks seldom acknowledge the probability that the executive, regardless of political party, will refuse to share essential information with Congress or the courts. More realistic approaches sometimes mention the need to override presidential control but rarely offer more than a hope that some mechanism will make this possible.⁶ Proposals to maximize executive discretion

² Compare RICHARD A. POSNER, NOT A SUICIDE PACT 36-37, 150 (2006) (Congress can provide checks; courts cannot); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 1-2, 28-29 (2004) (courts should focus on requiring congressional endorsement), with Posner & Vermeule, *supra* note 1, at 170 (Congress cannot provide effective check; urging reliance on executive), and Cole, *supra* note 1, at 2568 (Congress cannot provide effective check; urging reliance on courts).

³ Compare Barton Gellman, Lecture at Princeton University: Secrecy, Security and Self-Government: An Argument for Unauthorized Disclosures (Sept. 17, 2003) (press should decide whether public interest warrants publication) and GEOFFREY R. STONE, TOP SECRET 57-59 (2007) (press should have stronger privilege to conceal sources), with POSNER, *supra* note 2, at 13 (publishing official secrets should be criminalized) and Jack Goldsmith, *Secrecy and Safety*, THE NEW REPUBLIC, Aug. 13, 2008, at 31-35 (press decisions to reveal secret surveillance lack accountability, constitute a criminal offense).

⁴ In James Madison's classic formulation, "A people who mean to be their own Governors, must arm themselves with the power which knowledge gives. A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Quoted in ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA 1 (1998).

⁵ See pp. xxx & xxx, *infra*.

⁶ Most notable in recognizing the problem of executive information control are DANIEL PATRICK MOYNAHAN, SECRECY (1998); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 170-72, 200-02 (1990); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 364-67 (1973). Yet even these valuable accounts suggest only vague solutions. *E.g.*, MOYNAHAN, *supra* at 217 (proposing only to codify criteria while leaving decisions under executive control). Ackerman, an exception in this literature, is more concrete. See BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 84-86 (2006). For discussion of his approach and its difficulties, see pp. xxx-xxx *infra*.

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typically don't provide means to prevent excessive, counter-productive secrecy. Or, to counteract that risk, they sometimes assume secrecy and transparency simultaneously.

A few examples can mark the scope of these gaps and contradictions. Consider Thomas Jefferson, a proponent of executive prerogative in times of crisis. “[E]very good officer,” he wrote, “must be ready to risk himself in going beyond the strict lines of law, when the public preservation requires it.”⁷ The constraint that Jefferson considered essential would flow from transparency: Officials who go beyond the law must “throw themselves on their country for doing . . . what we know [the people] would have done for themselves.”⁸ Justice Robert Jackson, commenting on the military order removing West Coast Japanese-Americans to concentration camps, declared: “The chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries.”⁹ Several post-9/11 proposals for unilateral executive power require that officials “acknowledge the nature of their actions” and then “throw themselves on the judgment of the people.”¹⁰

This conception of executive prerogative unfortunately ignores the fact that what the executive does in the name of “public preservation” (or the justifications for it) are often secret. The Japanese-American internments were highly public acts,¹¹ but if executive prerogative is conditioned on transparency, it can't be invoked over much of the domain where emergency powers are necessary. If it is not conditioned on transparency, what justifies and constrains it?

Some supporters of executive power take a diametrically opposed line. Where for Jefferson and Robert Jackson, transparency was essential, recent defenses of executive autonomy stress the need to act “swiftly [and] secretly.”¹² Because “the

⁷ Quoted in SCHLESINGER, *supra* note 6, at 24.

⁸ Quoted in *id.*

⁹ *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

¹⁰ *E.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1114 (2003); Mark Tushnet, *Defending Korematsu?: Reflections On Civil Liberties In Wartime*, 2003 WIS. L. REV. 273, 306 (contending that emergency powers should be visible, to permit political checks).

¹¹ The claim of political accountability breaks down even then, if the reasons for action are secret or are contradicted by information withheld. The rationale for the internments presented to the public and to the Supreme Court was belied by government documents that came to light only decades later. *See Korematsu v. United States*, 584 F.Supp. 1406, 1416-19 (N.D. Cal. 1984).

¹² Gross, *supra* note 10, at 1029.

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executive alone has the [necessary] information,”¹³ oversight by Congress or the courts can only impede effective responses to danger. Taking this view a step further, Judge Richard Posner supports strong sanctions against newspapers that publish classified information, an approach that would leave the public even more in the dark than it is now.¹⁴

But if the executive branch controls much of the relevant information, what safeguards will prevent overreaching? In decisions protecting secrecy in certain judicial proceedings, Justice Potter Stewart, Chief Justice Warren Burger and several judges in post-9/11 cases answered that puzzle by pointing to “the powerful check of political accountability.”¹⁵ Left unexplained is how political accountability can be engaged when the executive, with judicial support, is permitted to keep the pertinent facts confidential. Another approach posits that officials remain accountable because “[g]overnmental decisionmaking is often more visible during emergencies than during normal times.”¹⁶ Thus, “politics sharply constrains their opportunities for aggrandizement, especially in times of emergency.”¹⁷ In this instance, the proponents of executive prerogative argue simultaneously that unilateral executive power offers great benefits during emergencies because “the executive alone has the [necessary] information”¹⁸ and does not pose great risks because “decisionmaking is often more visible.”¹⁹

This desire to have the matter both ways is unusually explicit, but ambivalence about secrecy or avoidance of the problem is evident throughout the literature on emergency powers, and not only among those who support executive autonomy.

Consider a second approach – perspectives advocating some form of executive-legislative partnership. If emergency measures carry the imprimatur of the two political branches, this approach holds, courts should defer to that assessment, or at least should

¹³ POSNER & VERMEULE, *supra* note 1, at 170.

¹⁴ POSNER, *supra* note 2, at 13.

¹⁵ *New Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion); Potter Stewart, “Or of the Press,” 26 *Hastings L.J.* 631, 636 (1975).

¹⁶ POSNER & VERMEULE, *supra* note 1, at 55.

¹⁷ *Id.* at 54.

¹⁸ *Id.* at 170.

¹⁹ *Id.* at 54.

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do so to a greater extent than they would in ordinary times.²⁰ Others see no special reason to defer to preferences that emerge from majoritarian politics in times of acute public fear.²¹ But even granting maximum weight to choices made in the political arena, the significance of congressional action (or silence) presumably depends on whether Congress knew about the executive practices it supposedly endorsed and was able to evaluate the need for them.²² Absent access to information, Congress cannot make the necessary assessments; an uninformed Congress cannot be seen as having made any trade-offs or political value judgments at all.

Many “partnership” advocates don’t mention the secrecy problem, perhaps assuming that Congress can obtain whatever it wants to know. Sometimes that is true. More frequently, when national security is implicated Congress cannot get the information many members believe they need.²³ Even on the highly visible problem of Guantánamo detainees, appropriate solutions depend on knowing their dangerousness, the nature of the evidence against them and the risks of judging their cases in ordinary courts. Yet for years no member of Congress had access to the relevant files; all were asked to accept on faith the administration’s portrayal of the difficulties. In such cases, Congress can refuse to vote its approval, at least when it knows what it doesn’t know. Usually, however, “Congress has no alternative but to go along.”²⁴ Of course its decision to do so is itself a political choice. Should courts defer to the judgments of a political “partnership” when one partner is merely accepting unknown trade-offs made unilaterally by the other? Or is the partnership concept inapt when Congress acts in an information vacuum?

The principal competing approach to checking emergency power assigns a leading role to courts. But can courts get the information required to perform this role? Supporters of judicial oversight often don’t consider that detail or assume (incorrectly)

²⁰ For versions of this approach, see, e.g., POSNER, *supra* note 2, at 36-37; ACKERMAN, *supra* note 6, at 77-100; Issacharoff & Pildes, *supra* note 2; Cass Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 76.

²¹ E.g., Cole, *supra* note 1, at 2568 (reliance on political process is “fundamentally misguided”).

²² See Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (absent delegation to the executive, policy choices are made by “institution with a superior democratic pedigree”).

²³ See SCHLESINGER, *supra* note 6, at 373; STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT* 49 (2005) (describing Senators’ complaints about inability to obtain information necessary for oversight). See also note xxx, *infra* (describing refusal of various Presidents to provide information to Congress).

²⁴ SCHLESINGER, *supra* note 6, at 161.

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that courts have access to all the relevant facts. The reality is that even in litigation alleging grave governmental misconduct, courts often cannot force disclosure of classified information; if the executive branch refuses to cooperate, courts may be required to dismiss the case.²⁵

The Supreme Court's recent decisions on executive prerogative suffer from a similar limitation. *Hamdi*²⁶ and *Boumediene*²⁷ come down squarely on the side of judicial oversight, and *Boumediene* does so in a striking manner, rejecting a complex oversight alternative that the political branches had jointly endorsed. Yet after mandating a factual hearing, neither decision reached the question whether the detainees, their lawyers or the trier of fact will have access to sensitive secrets relevant to the matter the hearing exists to determine. Both decisions are important, but the extent to which they will serve civil liberties or constrain executive power depends on the extent to which the executive will control access to classified information, and the Court left that crucial issue unresolved.²⁸

To begin unpacking these difficulties, the next Part describes the existing executive secrecy system.

II. The Executive Secrecy Apparatus

Cynics sometimes claim that in Washington, nothing important stays secret for long. The apparent ubiquity of leaks makes this view plausible, but the reality is more nearly the opposite. Most “leaks” involve selected details that high officials disclose to further their own policy agenda. Secrets that the executive branch *wants* to keep often remain concealed for years.²⁹ Thus, the executive secrecy system is powerful and effective. Its gaps are narrow and difficult to exploit.

²⁵ See pp. xxx-xxx, *infra*.

²⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²⁸ In subsequent *habeas* hearings, the issue was unavoidable. The order structuring those hearings requires classified material to be provided to detainee attorneys but not to the public or to detainees, and not even to their attorneys if the government establishes *in camera* that “in the interest of national security, the information should not be disclosed.” *In re Guantánamo Bay Detainee Litigation*, Case Management Order, § I.F., Nov. 6, 2008. The order also denies detainees access to classified portions of the hearing itself. *Id.* at §III.B.3. These framework principles remain subject to challenge in individual hearings and on appeal. In short, the crucial information-access problems still await definitive resolution.

²⁹ See generally MOYNAHAN, *supra* note 6.

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For many, this is exactly as it should be. The fact that individuals outside the executive branch (members of Congress, judges, reporters) cannot nullify classification decisions simply reflects the supposed fact that outsiders inherently lack the capacity to make such decisions wisely. Yet the hypothesis of executive expertise and the converse hypothesis of outsider incompetence are often made with little understanding of how the classification system works. This Part seeks to fill in the details.

Two crucial points emerge. First, at all levels, the secrecy apparatus is designed for *over*-classification. Second, the decision to prefer over-classification as a matter of principle drives a wedge between the expertise of the executive branch and its performance. Officials' ability to make optimal judgments is undercut by their obligation to disregard many relevant concerns and by their largely unchecked freedom to base conclusions on political and personal self-interest.

A. Overview of the Secrecy System

The secrecy system we know today rests on an elaborate apparatus created by executive order.³⁰ Millions of individuals are allowed to classify documents in which they insert classified material,³¹ and an intricate subsystem governs the distribution of such information to the several million individuals who hold security clearances.³² "Secret" documents cannot be shared with all officials cleared at the "secret" level but only with those who have a "need to know."³³ For exceptionally sensitive material, "special access programs" (SAPs) and "Sensitive Compartmented Information"(SCI) impose even more elaborate controls. Buried even deeper are "black" programs, considered so sensitive that only a few Congressional leaders are ever notified of their existence.³⁴ In one pre-9/11 count, there were roughly 150 SAPs and 300 SCIs; even the exact numbers are classified.³⁵

³⁰ See COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, REPORT, S. DOC. NO. 105-32, at 4 (1997) [hereinafter PRESIDENT'S COMM'N.].

³¹ PRESIDENT'S COMM'N, *supra* note xx, at 31.

³² Daniel Patrick Moynahan, *Introduction* to EDWARD A. SHILS, THE TORMENT OF SECRECY xxiii (paperback ed. 1996).

³³ See PRESIDENT'S COMM'N, *supra* note xx, at 25-27.

³⁴ *Id.* at 26.

³⁵ *Id.* at 27.

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B. Classification Criteria

Information controlled by the U.S. government can be classified whenever its disclosure “reasonably could be expected to cause damage to the national security,”³⁶ provided that the information relates to:³⁷

- (a) military plans, weapons systems, operations; . . .
- (b) . . . ;
- (c) . . . intelligence sources or methods . . . ;
- (d) foreign relations or foreign activities of the United States, including nonconfidential sources;
- (e) scientific, technological, or economic matters relating to the national security . . . ;
- (f) . . . programs for safeguarding nuclear materials . . . ;
- (g) vulnerabilities or capabilities of systems, installations, infrastructures, or . . . protection services relating to the national security . . . ; or
- (h) weapons of mass destruction.

To prevent abuses of secrecy, the regulations prohibit classification to “conceal violations of law, inefficiency or administrative error.”³⁸ Of course, that restriction can easily be ignored in practice. But even on paper, the regime doesn’t work against overclassification and in fact serves to enable it. One reason is its *all or nothing* approach. Government memoranda are notoriously verbose, but classifiers need not distinguish within each document between the sensitive and the banal; it is common to classify the entirety of any document that contains the smallest sensitive detail.³⁹

Absolute risk avoidance is a second factor driving overclassification. Classifiers are charged with reducing possible national security damage to the lowest achievable

³⁶ Exec. Order No. 13526, 75 Fed. Reg. 707 (January 2, 2010) at §1.2(a)(3).

³⁷ *Id.* at §1.4.

³⁸ *Id.* at §1.7(a)(1).

³⁹ Classification actions target *the document* in which sensitive information appears. *Id.* at §1.6(a). Some agencies require employees to designate classified portions of each document, but employees “continue to mark materials ‘Entire Text Classified,’ increasing the difficulty of distinguishing which parts truly need protection.” President’s Comm., at 20; *id.* at 36 (giving numerous examples).

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minimum, suggesting zero tolerance for risk. Yet secrecy entails obvious costs, not only for society at large but for the classifying agency itself.⁴⁰ Classified documents are not only expensive to handle but multiple inefficiencies arise when officials with a need to know cannot get access to relevant information. Official studies have repeatedly urged replacing zero-tolerance with a risk-management approach, “to concentrate limited resources on those assets the loss of which would have the most profound effect.”⁴¹ Nonetheless, “absolute risk avoidance” remains prevalent.⁴²

A distinct problem is the disregard not only of the internal management costs of secrecy but of its broader *public-interest costs*. With one exception, classifying officials are not required – and probably are not even permitted – to consider the public-interest advantages of transparency.⁴³ The executive order declares that cases in which “the need to protect information [is] outweighed by the public interest in disclosure,” are “exceptional” and it limits the avenues for accommodating them. Public-interest balancing is permitted only when a classification is appealed to the head of the agency, who alone is permitted to weigh the relative benefits of secrecy and disclosure.⁴⁴ Thus, public-interest balancing cannot occur at the time of initial classification, and in cases that aren’t “exceptional,” the value of disclosure cannot be considered at any point at all. This decision to constrain public-interest balancing is intentional, reflecting the intelligence community’s view that “[i]f this weighing of interests were required for every decision to keep classified information secret, it would bring the . . . process to a virtual halt.”⁴⁵

⁴⁰ PRESIDENT’S COMM’N, *supra* note xx, at 35 (“[R]esources will be spent . . . to protect, distribute, and limit access to information that would be unnecessary if the information were not classified.”).

⁴¹ *Id.* at 19.

⁴² *Id.* at 37, 53.

⁴³ *Id.* at 27.

⁴⁴ Exec. Order 13526, *supra* note xx, at § 3.1(b):

“It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure . . . [Such questions] shall be referred to the agency head or the senior agency official [responsible for its classification program]. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not . . . create any substantive or procedural rights subject to judicial review.”

⁴⁵ PUBLIC INTEREST DECLASSIFICATION BOARD, IMPROVING DECLASSIFICATION: A REPORT TO THE PRESIDENT FROM THE PUBLIC INTEREST DECLASSIFICATION BOARD 29 (Dec. 2007) [hereinafter PIDB REPORT], <http://www.archives.gov/declassification/pidb/improving-declassification.pdf> (last visited July 9, 2009).

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The situation is not much better in “exceptional cases” involving a strong interest in disclosure. According to a 2007 government study, the authority to make information available in the public interest is “rarely” invoked, and when used, it “has more often been [exercised] because the department or agency wants to get its own position out rather than because the agency head . . . has found the public interest compelling.”⁴⁶

Finally, overclassification results from the extraordinarily elastic *substantive classification criteria*. The category of “intelligence sources or methods,” for example, is infinitely expandable. An undercover agent is a source of intelligence, but so is an article in *The Times* of London. The way we recruit our spies is a method of gathering intelligence, but so is a Google search. Facts from “open sources” (publicly available newspapers, magazines and websites) constitute up to 95% of the information collected by intelligence analysts,⁴⁷ but agencies often classify documents as Secret or even Top Secret when they contain only open-source material. Courts routinely endorse this practice, on the theory that knowing what information the government collects can reveal the methods by which analysts process information.⁴⁸ Yet sources and methods can be sensitive or banal; there is no plausible justification for the common practice of concealing both.

The “*infrastructure*” category is a more recent example, added only in 2003. After the 9/11 attacks, the motivation for the addition is easy to understand, but its stopping point is not. The executive order does not define the concept, but it would certainly include information relating to bridges and tunnels, ports, and nuclear power plants. The Department of Homeland Security defines “critical infrastructure” to include highways, financial institutions and computer networks.⁴⁹ An infrastructure concept of this sort makes it possible to classify almost anything.

The principal source of this attitude is the steady expansion of our understanding of “national security” – from an idea associated with national *survival* to one now routinely equated with the national *interest*. During World War II, there was no effort to

⁴⁶ *Id.*

⁴⁷ PRESIDENT’S COMM’N, *supra* note xx, at 23.

⁴⁸ *E.g.*, *CIA v. Sims*, *supra*; *Bassiouni v. CIA*, 392 F.3d 244 (7th. Cir. 2004).

⁴⁹ 6 C.F.R. §29 (2004).

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impose secrecy of comparable scope, even after Nazi saboteurs charged with disabling American factories had infiltrated our shores.⁵⁰ Ironically, as America has grown stronger and as we have projected our military power to all corners of the world, we have come to see more distant threats and more attenuated dangers as challenges to our global hegemony and our sense of national well being.⁵¹ Once security is understood in these terms, the range of relevant information expands exponentially. If any economic disruption is included, transparency in government can be suspended at will.

From all these directions, the classification system opts for over-classification as a matter of principle. It does not, even in theory, aim to generate the degree of secrecy that would optimally serve the wider public interest.

C. Incentives and Dynamics

Whatever the formal structures, their significance depends on the incentives of individuals and institutions. In the case of national security, all the relevant executive agencies and officials face powerful pressure to withhold information inappropriately.

Secrecy, as Max Weber showed, is a consequence of bureaucracy and one of its favorite tools.⁵² Officials withhold information to shield themselves from oversight. A further dimension, from an economic perspective, is that secrecy magnifies the advantages of incumbency:⁵³

If outsiders have less information, voters may feel less confident that they will be able to take over 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. . . . By increasing the mean cost of transition and increasing the subjective variance, secrecy puts incumbents at a distinct advantage over rivals. . . .

⁵⁰ See *Ex parte Quirin*, 317 U.S. 1 (1942).

⁵¹ See CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* (2004). The problem has been building for years. See Arnold Wolfers, “National Security” As an Ambiguous Symbol, 67 *POL. SCI. Q.* 12 (1952).

⁵² See Max Weber, *Bureaucracy*, in *ESSAYS IN SOCIOLOGY* 233-34 (H. H. Gerth & C. Wright Mills eds., 1946).

⁵³ Joseph Stiglitz, Columbia Univ., Oxford University Lecture: On Liberty, the Right to Know, and Public Discourse (Jan. 27, 1999), quoted in Moynahan, *supra* note 6, at xv. See also KIM LANE SCHEPPELE, *LEGAL SECRETS* 24-53 (1988).

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Bureaucrats withhold information not only from the public but also from fellow officials, both to insulate themselves from scrutiny and to guard their turf and protect their freedom of action.⁵⁴ A presidential commission, reviewing secrecy practices in the 1990s, noted that a persistent problem “has been the intermingling of secrecy used to protect carefully defined national interests with secrecy used primarily to enhance such political or bureaucratic power.”⁵⁵ Weber, writing in peaceful times before World War I, observed the same phenomenon:⁵⁶

Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. . . ., and nothing is so fanatically defended by the bureaucracy as this attitude In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament – at least in so far as ignorance somehow agrees with the bureaucracy’s interests.

The history of intelligence is replete with examples of matters kept confidential not to mislead the enemy but solely to keep Americans and their elected officials in the dark. The aim of secrecy in such matters as the American bombing of Cambodia in the early 1970s or the mining of Nicaragua harbors in the late 1980s was certainly not to hide information from our enemies, who were all too aware of what we were doing. Rather the aim was to avoid public discussion and prevent legislative debate, even in confidential closed session, over policies that might have been blocked if democratic decision-making had been allowed to operate.⁵⁷

Secrecy is a kind of currency, moreover. Secrets can be doled out to favored journalists to cultivate support or to acquire chits that can be called in at opportune moments. Selective disclosure, moreover, is a powerful method of shaping public opinion. The executive branch habitually declassifies or “leaks” information supportive

⁵⁴ See PRESIDENT’S COMM’N, *supra* note xx, at 8 (“Information is power, and it is no mystery to government officials that power can be increased through controls on the flow of information.”).

⁵⁵ See *id.* at 8.

⁵⁶ Weber, *supra* note xx, at 233-34. Weber’s essay, published in 1920, is thought to have been written in part before 1914. See MOYNAHAN, *supra* note 6, at 143.

⁵⁷ See SCHLESINGER, *supra* note 6, at 356-57.

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of its position, while preserving secrecy for facts and analysis that are no more sensitive but point in the other direction.⁵⁸ As the presidential commission observed, “The anonymous leak, often at a senior level, has become an important tool of governing.”⁵⁹

But even if an official can put aside ignoble motivation, her incentives are skewed in the direction of over-classification. It is almost costless to wield the “Secret” or “Top Secret” stamp, but risky to withhold it. Employee performance reviews do not give adverse marks for improper decisions to classify, nor do they count appropriate decisions to release information as instances of good work.⁶⁰ The executive branch imposes no penalties on agencies and individuals who classify too much.⁶¹

The impetus to over-classify, even when acting from legitimate motives, is heightened by the psychology of response to danger; “the ease with which disasters are imagined need not reflect their actual likelihood.”⁶² A wealth of experimental evidence suggests that individuals overestimate the likelihood of catastrophic harm and accordingly overreact to it.⁶³ In some settings, individuals may *under*-react when the risk is low and the potential harm is difficult to deal with.⁶⁴ But in the secrecy system, the tendency to *overestimate* risk consistently dominates. For the official charged with the classification decision, the risks of disclosure are always salient – she is specifically charged with assessing them. And responding to those risks is easy: she need only complete a small amount of paperwork. The countervailing harm of too much secrecy, in contrast, is remote, abstract and outside the scope of her assignment.

⁵⁸ See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006); Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 910-14 (1990).

⁵⁹ PRESIDENT’S COMM’N, *supra* note xx, at 8.

⁶⁰ See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 AD. L. REV. 131, 148 (2006).

⁶¹ *Id.* at 148 n. 89.

⁶² AMOS TVERSKY & DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY 3, 13 (1982).

⁶³ *Id.* at 11. A related distortion can occur when decision-makers disregard probabilities entirely and focus solely on avoiding some very bad outcome. See Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003).

⁶⁴ See Cass R. Sunstein, *The Catastrophic Harm Precautionary Principle*, 2007 Issues in Legal Scholarship, Berkeley Electronic Press (2007); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 930 (2004).

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“Groupthink” reinforces this over-classification dynamic.⁶⁵ To counteract the dangers of groupthink, the intelligence community itself uses a variety of procedures for vetting assessments that bear on operational issues. But there is no comparable process to insure skepticism about decisions to impose secrecy.⁶⁶

In sum, national security officials face strong incentives and strong psychological pressures to withhold information unnecessarily. Secrecy affords freedom to pursue policies that would be controversial if known, it gives officials the ability to exaggerate or invent justifications for policies that would otherwise lack support, it prevents public awareness of inefficiency and misconduct, it enables government to shape public perceptions of its actions and their justification, and where abuses become known or suspected, secrecy blocks litigation and other authoritative efforts to substantiate them.

Review within the executive branch is the first place to turn for a means to counteract these distortions.

D. Oversight and Declassification within the Executive Branch

In an effort to counterbalance the over-classification dynamic, the executive branch has instituted several mechanisms to push back.⁶⁷ All of them, however, are structurally weak, and they have had little impact. For example, when material is initially classified, the classifying official must set a date for *automatic declassification*, normally after ten or 25 years. But the 25-year limit becomes inapplicable when information is placed within an “exempt” category.⁶⁸ Government archives contain billions of pages of classified material that is more than 25 years old.⁶⁹

Any individual, private group or government agency can request *mandatory declassification review* (MDR) within the classifying agency.⁷⁰ MDR amounts to a non-judicial version of the Freedom of Information Act and has become an attractive

⁶⁵ See IRVING L. JANIS, GROUPTHINK 9, 176-77 (1992); Wells, *supra* note xx, at 925-28.

⁶⁶ Declassification review is arguably analogous but very ineffectual. See p. xxx, *supra*.

⁶⁷ See PIDB REPORT, at 13-14.

⁶⁸ Exec. Order 13526, *supra* note xx, at §3.3(a),(b).

⁶⁹ INFORMATION SECURITY OVERSIGHT OFFICE, 2008 ANNUAL REPORT TO THE PRESIDENT (January 12, 2009) [hereinafter ISOO 2008 REPORT], at 9-11; MOYNAHAN, *supra* note 6, at 55-56.

⁷⁰ Exec. Order 13526, *supra* note xx, at §3.5.

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alternative to FOIA, because it is generally faster.⁷¹ Yet MDR declassification remains trivial in relation to the volume of classified material. The pages declassified in 2008 represent less than 1% of the pages classified that year.⁷²

A challenger dissatisfied with intra-agency review can appeal to an *Interagency Security Classification Appeals Panel* (ISCAP) consisting of senior officials from the principal national security agencies. By majority vote, ISCAP can order declassification over the objection of the classifying agency.⁷³ But ISCAP appeals are rare (less than 100 per year), in part because public-interest balancing is permitted only by the head of the classifying agency. Thus, ISCAP cannot declassify when disclosure benefits outweigh risks; it must assume that such benefits are always trumped by national-security dangers, no matter how slight.

Although executive branch oversight has reduced the volume of classified material (and thus has mitigated the expense of handling national security files), over-classification is not just a problem of administrative cost; it involves impediments to accountability and to democracy itself. From that perspective it is hard to consider the current declassification structures successful.

By almost every measure, including appraisals by the agencies themselves, oversight within the executive branch affords only a slight counterweight to the built-in preference for over-classification.⁷⁴ Intra-agency review can overcome some initial misjudgments, but risk aversion, “groupthink,” and turf-protection are the dominant forces within the classifying agency. ISCAP is well placed to counteract agency turf protection, but it has limited capacity to resist over-classification, and its impact (relative to the stock of classified information) has been miniscule.⁷⁵ The operational reality is simply that “agencies face very little internal pressure [from within the executive branch] to minimize secrecy.”⁷⁶

⁷¹ Nonetheless, MDR challenges often take up to a year to resolve. *Id.* at 14.

⁷² Twenty-three million documents were newly classified in 2008. *Id.* The number of *pages* classified each year is not reported but obviously is larger than the number of documents. If each document consisted only of a single page, declassification still would constitute only 1% of the pages classified in 2008.

⁷³ The agency can ask the President to overturn ISCAP’s decision, but from 1996 through 2008, no agency invoked this right of appeal.

⁷⁴ PIDB REPORT, at 8-12.

⁷⁵ See p. xxx, *supra*.

⁷⁶ Fuchs, *supra* note xx, at 149.

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Presidential control of the secrecy system and the entrenched tradition of deference to presidential judgment are premised on the hypothesis of executive expertise and the converse hypothesis of outsider incompetence.⁷⁷ Comparable assumptions are strengthened, in most domains of executive action, by the many safeguards of the administrative state, which provide layer upon layer of review to guarantee attention to a wide range of potential consequences.⁷⁸ But these mechanisms, so elaborate in most areas of executive decision-making, are under-staffed and structurally feeble in the domain of national security classification. Reinforcing that difficulty, the prerequisite to well-founded government action – an effort to balance benefits against costs⁷⁹ – is largely precluded. Thus, a classification decision that survives all phases of executive branch reassessment does not, even in theory, reflect an expert judgment that secrecy is in the public interest, all things considered. The process within the executive branch does not permit – and is not designed to permit – an optimal degree of public access to national security information.

Conventional wisdom nonetheless dictates deference to the executive. The decision to classify carries an almost insurmountable presumption of validity,⁸⁰ even though secrecy is typically advantageous for executive officers, whether legitimate concerns require it or not. Absent pressure for disclosure from outside the executive branch, too much information inevitably will be concealed; accountability as well as national security itself are bound to suffer. The next Part examines two institutions that have the potential to supply countervailing pressure – Congress and the courts.

III. Checks on the Executive Branch

⁷⁷ See *supra* p. xxx.

⁷⁸ E.g., 5 U.S.C. §553 (notice and comment rule-making); Exec. Order 12866, 3 C.F.R. 638 (1994) (oversight of agency actions by Office of Information and Regulatory Affairs); see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

⁷⁹ Compare Executive Order 12866, 58 Fed. Reg. 51735, at §1(b)(6) (Sept. 30, 1993) (requiring agencies to assess costs and benefits), with *id.* §1(d)(2) (exempting military and foreign affairs). Preclusion of balancing can be justified, despite its disregard of disclosure benefits, if it minimizes the sum of decision costs and error costs. This reasoning seems implicit in intelligence community opposition to balancing. See p. xxx, *supra*. But that calculus is plausible only if we attribute little harm to unnecessary secrecy and assume the impossibility of efficiently considering transparency values (at the ISCAP stage, for example).

⁸⁰ For discussion of case law and practice, see pp. xxx-xxx, *infra*.

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At least on paper, the executive branch does not have unchallenged control over national security secrets. The law sometimes requires disclosure of classified information to a judge or to certain members of Congress. Social and political realities generate leaks and sometimes force the executive branch to disclose information that outsiders have no legal right to see. Informal factors also can push in the opposite direction, neutralizing checks that the law supposedly affords. That tempering effect may prevent excessive oversight, but it also may render necessary oversight inoperative.

The press plays a large but easily exaggerated role in this process. Reporters have a first amendment right to publish what they know but no constitutional right to obtain information or to shield sources who leak information confidentially. In national security matters, moreover, potential sources are largely confined to security-cleared officials, an exceptionally reticent group, and those responsible for unwelcome leaks, if identified or suspected, face exclusion from both government and most private employment in the areas of their expertise; they may face criminal prosecution as well. The press deserves credit for many legendary national security revelations, and its capacities no doubt could be enhanced, at least at the margins.⁸¹ But even if the press is energetic, its contributions inevitably will be episodic and (relative to the stock of classified material) rare. On national security matters, its principal contribution is to transmit information made available in other ways. Formal information-access powers are therefore indispensable, in their own right and as enabling mechanisms that permit the press to function.⁸²

This Part examines the two institutions that have formal authority to pierce the executive information monopoly – Congress and the courts. Congressional and judicial oversight exists to a degree but is seldom effective. And this situation of feeble non-executive checks has become self-justifying and self-sustaining. It seems plausible to exclude outside institutions from involvement in national security matters because they are perceived to lack the necessary expertise, and they are perceived to lack expertise in part because it is assumed that they are seldom involved. Yet despite the conventional assumption of outsider incompetence, Congress and the courts are often deeply immersed in assessing national security secrets. Although they presently play only a limited role, that arrangement is by no means inevitable.

⁸¹ See, e.g., STONE, *supra* note xx, at 57-59 (proposing press privilege to conceal certain sources).

⁸² See Bill Keller, *The Times & the Internet*, N.Y. REV. BOOKS, Sept. 24, 2009, at 93 (noting importance of FOIA to reporters).

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A. Congress

Congress has formidable tools for obtaining access to classified information. But it often lacks sufficient leverage or political will to deploy its tools effectively. Though critics of “rights-based” litigation typically consider the political process a preferable source of accountability,⁸³ they often idealize its potential,⁸⁴ overlooking limitations that can make congressional oversight pallid in national security matters.

1. *The formal framework.* Two select committees on intelligence, one in the House and one in the Senate, have budget authority and broad oversight jurisdiction over the intelligence community.⁸⁵ In addition, statutes require the executive branch to report certain matters to particular officials in Congress as they arise.⁸⁶ Secrets shared with the leaders and committee members seldom go further, however. Senators and Representatives who are privy to classified information have little freedom to share it with other members of Congress,⁸⁷ and classified information can be made public only through an onerous process.⁸⁸ Congress’s authority to release classified information over the President’s objection reportedly has never been used.⁸⁹

Buttressing Congress’s direct powers are other sources of leverage, including Government Accountability Office audits, subpoenas, and the power to confirm

⁸³ *E.g.*, Issacharoff & Pildes, *supra* note 2, at 5, 14, 42-44 (rights-based adjudication is often “abstract,” in contrast to legislative endorsement, often made in “informed, deliberative manner”).

⁸⁴ Compare Sunstein, *supra* note xx, with Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (questioning premises of separation-of-powers model).

⁸⁵ See FREDERICK M. KAISER, CONG. RESEARCH SERV., RL 32325, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES 2-3 (2007) [hereinafter KAISER, STRUCTURE].

⁸⁶ See, e.g., 50 U.S.C. §413a(a)(1)(2009) (requiring reports to intelligence committees on “all intelligence activities”); 50 U.S.C. §413b (2009) (requiring reports on “covert actions”). See also SCHULHOFER, *supra* note xx, at 50, 74 (discussing required statistical reports).

⁸⁷ See Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 215 (1992); FREDERICK M. KAISER, CONG. RESEARCH SERV., RS 20748, PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 4 (2008) [hereinafter KAISER, PRACTICES].

⁸⁸ In the Senate, public disclosure requires an affirmative vote of the Intelligence Committee, followed by full Senate debate in closed session and a majority vote for disclosure. Comparable requirements apply in the House. See KAISER, STRUCTURE, *supra* note xx; Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1082-83 (2008).

⁸⁹ KAISER, PRACTICES, *supra* note xx, at 8; DENIS McDONOUGH ET AL., NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 27 (2006).

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presidential appointees.⁹⁰ In addition, Congress has acted to protect national security whistleblowers, so that intelligence community employees may convey classified information to Congress under some circumstances without approval of their superiors.⁹¹

Individually and in combination, these powers are impressive, at least on paper. When a congressional majority is united, aware of what it doesn't know, and determined to find it out, Congress can almost always succeed in forcing disclosure, at least to members of its key committees.⁹² But these conditions are seldom realized in practice. The reality is that in the intelligence area, congressional checks have often failed to operate. Though some attribute this problem to one-party government during Republican control of Congress from 2003-2007,⁹³ the phenomenon has been persistent and is deeply rooted. Both before and after September 11, 2001, "current and former intelligence committee members and a broad swath of intelligence experts" agreed that congressional oversight was poor.⁹⁴

2. *Structural problems.* Some of the impediments to oversight are structural and, to a degree, curable. The size of the intelligence committees (21 members on the House side and 15 in the Senate) tends to diffuse responsibility. Their staffs are kept small, to discourage leaks, but this select group must support budget and oversight responsibilities not only in regard to the CIA but also for the intelligence components of the State, Defense, Treasury, Justice and Homeland Security Departments, along with other sizable agencies. Adding to these problems, committee members, unlike those appointed to the standing committees of Congress, serve only for short terms and then rotate out, a practice that makes it all but impossible for them to accumulate expertise.⁹⁵ The 9/11

⁹⁰ See Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L. J. 323 (2002).

⁹¹ Intelligence Community Whistleblower Protection Act of 1998, P.L. 105-272, 112 Stat. 2413, Title VII, §§ 701-702 (1998); see LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS (2005).

⁹² See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal – Do Nothing*, 48 ADMIN. L. REV. 109, 134 (1996).

⁹³ E.g., Levinson & Pildes, *supra* note xx, at 2371.

⁹⁴ Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST, Apr. 27, 2004, at A1. See also 9/11 COMMISSION REPORT, *supra* note xx, at 419 (among experts of both parties "dissatisfaction with congressional oversight remains widespread"); McDonough, et al., *supra* note xx, at 15 (2006) ("[T]he record is rife with evidence that congressional oversight is completely lacking today."); Marvin C. Ott, *Partisanship and the Decline of Intelligence Oversight*, 16 INT'L J. INTEL. & COUNTERINTEL. 69, 70 (2003) ("[A] once robust mechanism is . . . badly broken.")₂

⁹⁵ See KAISER, STRUCTURE, *supra* note xx, at 3-4.

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Commission concluded that “House and Senate intelligence committees lack the power, influence, and sustained capability to meet [the oversight] challenge” and that as a result, “Congressional oversight for intelligence . . . is now dysfunctional.”⁹⁶

Many recent blue-ribbon panels have recommended structural reforms.⁹⁷ As yet Congress has shown no interest in even modest, organization-chart cosmetics such as those the 9/11 Commission proposed.⁹⁸ But apart from that detail, some of the problems are not easily fixed.

3. *Partisan politics.* Whatever the formal structures, political dynamics often impede oversight. The strength of the President’s party in Congress is obviously a relevant factor, but not a simple one. Intelligence oversight was probably at its best from the mid-1970s through the late-1980s, a period with intervals of divided and one-party government.⁹⁹ Thereafter, polarization in Congress increased dramatically. Oversight broke down during the 2003-2007 period because government was not divided, but oversight broke down during the late 1990s because it was. Starting in 1997, in an atmosphere of intense partisanship, divided government led not to constructive oversight but to intelligence committee investigations largely unrelated to intelligence matters¹⁰⁰ and to a “focus on tiny aspects of the authorization process for political gain [leaving] the larger issues of oversight unaddressed.”¹⁰¹

Several scholars have suggested steps to strengthen legislative checks when the President’s party controls Congress, by conferring special prerogatives on the congressional minority.¹⁰² Such proposals, though certainly worth study, seem premised

⁹⁶ U.S. NAT’L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 420 (2004).

⁹⁷ *E.g.*, McDonough, et al., *supra* note xx.

⁹⁸ 9/11 COMMISSION REPORT, *supra* note xx, at 420-21 (committee members should have ‘the time and reason to master the subject’; they “should serve indefinitely, . . . thereby letting them accumulate expertise”; and “committees should be smaller . . . so that each member feels a greater sense of responsibility”).

⁹⁹ *Compare* McDonough et al., *supra* note xx, at 13-15 (attributing successful oversight in this period to stature of committee members and professionalism of staff), *with* Shane, *supra* note xx, at 217 (oversight was overly deferential even during divided government).

¹⁰⁰ *See* Gregory C. McCarthy, *GOP Oversight of Intelligence in the Clinton Era*, 15 INT’L J. INTEL. & COUNTERINTEL. 26, 31 (2002) (describing focus on scandal rather than programmatic oversight).

¹⁰¹ McDonough, et al., *supra* note xx, at 14. *Cf.* David J. Barron & Martin S. Lederman, *The Commander in Chief at its lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 999-1000 (2008) (describing failures of national security oversight during other wartime periods).

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on a conception of responsible opposition-party behavior that does not accord with recent experience of divided government. More basically, those proposals do not fully account for other kinds of incentives that are difficult to change.

4. *Other incentives.* If unseemly partisan maneuvers could be subtracted from the equation, the inherent demands of representative democracy would still make effective oversight elusive. Even in areas not obscured by classified information, political scientists have long noted that congressional oversight is frequently weak or misdirected. “Police patrol” oversight (constant supervision of agency activity) requires a heavy investment of staff time, often with little political payoff.¹⁰³ “Fire alarm” oversight (initiated when media or interest groups spotlight agency abuse) is more attractive politically and thus more highly motivated. But fire-alarm oversight gets skewed by desires for publicity and electoral advantage, it can direct disproportionate attention to problems that are minor but dramatic and easily understood, and it is dependent on external triggers that may be weak where they are most needed – among poorly organized groups, for example.¹⁰⁴ And fire-alarm oversight is by definition episodic, lacking the broad perspective of systematic review.¹⁰⁵

All these difficulties are compounded in the case of national security oversight. Where secrecy prevails – and that is where external checks are most needed – the “fire alarms” are disconnected; Congress cannot rely on external triggers. Meanwhile, police-patrol oversight of the national security establishment is unusually time-consuming for staff, and even more so for members because much of the work cannot be delegated. For all forms of oversight, moreover, political rewards are almost always nil, because intelligence community activity has little economic impact on members’ districts, and because members can rarely make their contributions public.¹⁰⁶ In any case, members of Congress worry that public awareness of their oversight efforts would be a mixed

¹⁰² *E.g.*, ACKERMAN, *supra* note xx, at 84-86; Levinson & Pildes, *supra* note xx.

¹⁰³ Compare Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984), with Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 296-97 (2006) (discussing political rewards from police-patrol oversight).

¹⁰⁴ See McCubbins & Schwartz, *supra* note xx.

¹⁰⁵ See Cuéllar, *supra* note xx, at 297-98.

¹⁰⁶ With recent growth of high-tech intelligence gathering, committee members sometimes use their positions to steer contracts to constituents or contributors. McCarthy, *supra* note xx, at 30. Generally, however, “[t]he Intelligence Committee is . . . one . . . where you can’t do anything for your constituents.” *Id.* (quoting former CIA Director Robert Gates).

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blessing. In national security matters the public's need to put its trust in the President, and its converse suspicion of congressional "interference," almost always dominate the political dynamic.¹⁰⁷ Congress therefore has few incentives to undertake skeptical scrutiny, and its members may pay a steep price for doing so.

5. *The whistleblower solution.* Whistleblower protection is one way to mitigate these problems. A national security whistleblower can become a confidential surrogate for the public fire alarms that operate in more visible areas.

Unfortunately, whistleblower protection statutes are notoriously porous and ineffective, even in the domestic agencies.¹⁰⁸ National security whistleblowers are vastly more vulnerable. The legislation that protects domestic whistleblowers expressly excludes the intelligence community from its coverage.¹⁰⁹ And presidents have fiercely resisted efforts to permit direct contact between national security employees and Congress, even when confined to its security-cleared staff or senior leaders.¹¹⁰ When the Republican Congress sought to enact safeguards for national security whistleblowers in 1998, the Clinton administration insisted that the proposals were unconstitutional.¹¹¹ Nonetheless, using a rider to budget legislation, that Congress succeeded in enacting the Intelligence Community Whistleblower Protection Act of 1998.¹¹²

That measure, the first to protect national-security whistleblowers, declares that "Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of . . . allegations of wrongdoing in the Intelligence Community."¹¹³ The Act allows intelligence community employees to report wrongdoing to the Inspector General of their

¹⁰⁷ See Wells, *supra* note xx, at 947; KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT 150-55, 182-85 (1996) (describing public antipathy for national security oversight even in absence of crisis).

¹⁰⁸ See Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999).

¹⁰⁹ FISHER, *supra* note xx, at 7-8, 20. Military personnel, however, are permitted to communicate directly with members of Congress under some circumstances. *Id.* at 22-23.

¹¹⁰ The arguments have been based on policy, statutory interpretation and constitutional grounds. *Id.* at 29-38, 40. For discussion of the constitutional issues, see p. xx, *infra*.

¹¹¹ FISHER, *supra* note xx, at 31.

¹¹² 112 Stat. 2413-14, §701 (1998).

¹¹³ *Id.* §701(b)(3).

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agency, and if the IG does not pursue the matter, the employee may submit the issue directly to one of the congressional intelligence committees.¹¹⁴

Despite this step, however, the safeguards remain feeble. Some important components of the intelligence community remain ineligible for whistleblower protection, and in agencies that are covered, safeguards are triggered only for “urgent” complaints.¹¹⁵ Eligible whistleblowers are now protected from prosecution for disclosing classified information to an appropriate member of Congress, but unlike the statutes that shield domestic whistleblowers, the 1998 Act establishes no procedures by which whistleblowers subjected to retaliation can seek relief. And under current law, the grant or revocation of a security clearance lies entirely within the discretion of each agency,¹¹⁶ so this method of lethal retribution against a national security whistleblower is completely unreviewable. In any event, whistleblowers are at best a highly contingent source of fire-alarm information. And of course, even when a fire alarm does reach Congress, what happens next can be no better than the skewed incentives and dysfunctional structures of current intelligence oversight permit.

6. *Mandatory notification.* Statutes which instruct the executive branch to report certain matters to Congress are another device to mitigate the difficulties of conventional police-patrol and fire-alarm oversight. The reporting requirement in effect replaces the whistleblower and the public fire alarm with an in-house warning mechanism that has a secret trigger and a silent bell.

Notification, however, has not proved effective in stimulating useful oversight. One impediment is a degree of uncertainty in the scope of the statutory mandates.¹¹⁷ But even where the reporting obligation is unambiguous, Presidents sometimes flout it anyway.¹¹⁸ Usually, they can do so with impunity, in part because without notice,

¹¹⁴ *Id.* §702.

¹¹⁵ See Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41, U. RICH. L. REV. 759 (2007).

¹¹⁶ *Dep’t. of the Navy v. Egan*, 484 U.S. 518 (1988).

¹¹⁷ Notification must give “due regard for the protection [of] exceptionally sensitive matters.” 50 U.S.C. §413a(a). The Bush administration claimed that this clause authorized exemptions from required notification. See Kitrosser, *supra* note xx, at 1055-57 (criticizing that argument).

¹¹⁸ See *id.* at 1049-50, 1055 (Bush administration refusals to properly notify Congress); Jody Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1 (notice was more limited than law required); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 KAN. L. REV. 579, 627 (2009) (same; administration argued that obligation to disclose laws deemed unconstitutional was itself unconstitutional); Shane, *supra* note xx, at 216 (Reagan administration disregard of notification obligations).

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congressional leaders remain unaware of what they don't know. Compounding this problem is the public's comparatively low esteem for Congress and its reverence for military and Presidential leadership in national security matters. Thus, despite momentary spikes in public enthusiasm for congressional oversight, the usual situation is one in which Congress lacks the political muscle to insist on its prerogatives if disagreements with the President become known.¹¹⁹ And without public support, Congress can rarely sustain the unity and resolve necessary to face down a determined Commander in Chief.

When notification is given, Congress is still poorly situated to exercise meaningful oversight. In fact, it is far from clear what options are available to congressional leaders notified about intelligence activities they consider troublesome or illegal. The right to notification is not a right to approve. In theory, Congress can prohibit the expenditure of funds for a problematic activity. But this step is usually not a realistic option, in part because the leaders cannot freely share their knowledge with other members (much less with the general public),¹²⁰ making it difficult for Congress as a body to assess, much less resist executive actions about which the leadership learns. Sometimes, as in the case of the recent National Security Agency program of warrantless surveillance, the leaders have been barred from discussing the matter with intelligence committee staff, whose help may be essential to evaluate the wisdom and legality of the activities.¹²¹

Congress has only mixed enthusiasm for notification in any event. With regard to many sensitive matters, members of Congress notoriously do not want to know.¹²² Though Congress is sometimes portrayed as craven or irresponsible in this regard, its ambivalence about notification makes sense in a world where Congress has little or no capacity to act on what it learns. For congressional leaders, notification may be worse

¹¹⁹ OLMSTED, *supra* note xx, at 182-89 (support for national security oversight evaporated quickly during 1970s).

¹²⁰ Shane, *supra* note xx, at 215; KAISER, STRUCTURES, *supra* note xx, at 21-22 ("The secrecy imperative . . . results in a system that is often closed to outsiders – not just the general public but also Representatives and Senators who do not have seats on the select committees on intelligence.").

¹²¹ Kitrosser, *supra* note xx, at 1058-59; Warrick & Eggen, *supra* note xx; Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1.

¹²² SCHLESINGER, *supra* note xx, at 373; Loch K. Johnson, *Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee*, in STRATEGIC INTELLIGENCE 415, 421 (Loch K. Johnson & James J. Wirth eds., 2004).

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than ignorance. When notified, they are prohibited from sharing what they know; yet if the matter ever becomes public, the administration can paint their silence as acquiescence or approval. When the NSA surveillance activity became known, years after its inception, the Bush administration portrayed congressional critics of the program as hypocrites for not objecting earlier and made the politically potent (though absurd) charge that if the leaders had really considered this top-secret initiative illegal, they should have been “screaming from the mountaintops.”¹²³

7. *Assessing congressional oversight.* An appraisal of national security oversight must untangle three strands of activity – expenditures, substantive policy, and information access. A congressional report card would show an A- in the first, a B- in the second and a D in the third.

Congress controls the aggregate intelligence community budget and has substantial influence over amounts spent for particular activities. Under present conditions, however, Congress cannot effectively oversee the substance of those activities. Its committees know too little, and they lack the capacity and the motivation to critically examine whatever they learn. Under divided and unitary government alike, oversight of substantive policy has been weak, misdirected or both. Among those who have studied national security oversight, there is no significant dissent from this view.¹²⁴

Expenditure levels and the substance of agency activity are understandably the salient areas of national security policy. Indeed much discussion assumes that national security policy involves nothing else. Information access is intertwined with these two but distinct in both its principles and their micro-level application. Though more abstract, it is often more important, because decisions about what the public can know govern its ability to hold the executive branch accountable on budgetary and substantive matters. Executive determinations about public disclosure are therefore as much in need of oversight as decisions about expenditures and activities. Yet in this third area of national security policy, congressional oversight is virtually non-existent. Legally, Congress has claimed no role; it has left the classification process to the president’s discretion. Although Congress may press an agency to declassify documents, the decision

¹²³ Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5 (quoting White House spokesman Dan Bartlett).

¹²⁴ See, e.g., 9/11 COMMISSION REPORT, *supra* note xx, at 419 (unanimous finding that congressional oversight of intelligence is dysfunctional); Ott, *supra* note xx (condemning partisanship and decline of constructive oversight). For Senate Republican staffer’s milder but still-critical account of misdirected oversight during Republican control, see McCarthy, *supra* note xx.

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whether to disclose – the *sine qua non* of public accountability – has not been subject to formal oversight at all.

In one respect, this executive monopoly need not arouse concern. Although the executive branch controls the flow of information to the public, Senators and Representatives with a “need to know” have considerable (though not unlimited) access to classified secrets, and thus congressional oversight of expenditures and activities does not always occur in an information vacuum. Accountability need not disappear; it simply operates through the surrogate of elected legislators. And Congress is increasingly determined to challenge presidential control by enhancing its rights to obtain classified information. Congress circumvented a veto threat to enact elementary whistleblower protection in 1998, and in 2007 both houses passed stronger bills, though they died in the face of presidential opposition. Tellingly, resistance to the executive monopoly and presidential insistence on preserving it continue despite the shift to one-party control of both branches and a new administration ostensibly committed to greater transparency. The current Congress has moved to authorize intelligence committee chairs to share certain classified information with their own committee members, while President Obama has announced his intention to veto even this modest enhancement of congressional oversight capacity.¹²⁵

But whatever Congress’s own access to information, public access remains crucial. The existing system at best gives Congress only the *opportunity* for oversight; it does not supply the *motivation*. And in politics, the only reliable source of motivation (apart from self-interested lobbyists) is an engaged public. Bentham put the point clearly: “[I]n comparison to publicity, all other checks are of small account.”¹²⁶ Executive management of public disclosure therefore places many incentives for legislative oversight under presidential control. Technically, the executive does not oversee itself, but it can regulate what its ostensibly independent overseer cares about. In the absence of public access to information, impressive structures of accountability can easily become an empty shell.

A more basic defense of unilateral executive control is simply that the citizenry likes it that way. Congressional checks remain weak primarily because at decisive pressure points, the public sides with the President and regards oversight as interference.

¹²⁵ Paul Kane, *House Intelligence Chairman Says CIA Lied*, WASH. POST, July 9, 2009.

¹²⁶ Quoted in ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 88 (2007).

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Far from being evidence of dysfunction, the absence of effective checks can be considered the genuine product of prevailing political preferences.

Even if that is so, however, the weakness of congressional oversight poses two large problems. One is that majority approval cannot by itself to confer legitimacy on unilateral executive government. The debate about emergency powers has remained difficult precisely because it is normally unacceptable and indeed undemocratic for the executive to rule by decree, even if most citizens consider that arrangement acceptable. The legitimate exercise of political authority requires more fine-grained public participation in specific policy choices.

The second problem is more practical. Accountability is essential for producing good decisions and preventing abuse of power. Yet secrecy – even necessary secrecy – inevitably dilutes accountability. And a close look at the executive secrecy apparatus makes clear that it generates a high volume of unnecessary, injurious secrecy.¹²⁷ In the absence of countervailing pressure for disclosure, too much information will be concealed and accountability will suffer more than it inevitably must. But Congress, under present conditions, does not and cannot supply sufficient countervailing pressure.

B. The Courts

As in the case of Congress, two concerns are salient with regard to the judiciary – its competence in matters of national security information and the extent to which it has the necessary formal and practical tools. Like Congress, the courts have many ways to challenge executive control and impressive, though seldom recognized experience and expertise. But the courts also resemble Congress in another respect, for they are typically unwilling or unable to deploy their checking powers effectively. Judicial resistance to executive information control is increasingly evident, and in criminal cases it has become especially assertive. But deference to supposed agency expertise still predominates, leaving the executive monopoly largely intact.

This section explores the issues of judicial expertise and executive monopoly power in the three contexts where they arise most often: criminal litigation, civil damage suits, and the Freedom of Information Act. Many deplore courts' lack of impact in these areas, while others consider their subordinate role appropriate or inevitable; either way, most observers take it as given that judges are and always will be at the periphery. In fact,

¹²⁷ See pp. xxx-xxx, *supra*.

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the situation is more complex. Judicial checks do not always falter, and where they do, the situation can be remedied if Congress wishes to do so.

1. *Criminal cases.* The criminal defendant's multiple rights – to have a jury and a public trial, to confront and cross-examine witnesses, and to subpoena witnesses in his favor – would, if unchecked, afford numerous avenues for exposing classified secrets. The public's first amendment right of access to criminal trials¹²⁸ compounds the potential for disclosure. In practice, however, the executive largely retains control.

For starters, first amendment access rights give way when required to protect a compelling government interest.¹²⁹ The defendant's due process rights are less elastic; even when the public can be excluded from a portion of the trial, the defendant and her counsel retain an unqualified right to see all evidence placed before the trier of fact.¹³⁰ The government can deflect that rule and preserve secrecy simply by choosing not to offer the classified material. But if a prosecution cannot succeed without it, the government will be forced to choose between tolerating disclosure or dropping the case.

Other due process rights have even greater potential to threaten the secrecy system. Through cross-examination, compulsory process and discovery, the defendant may seek access to extensive information that the government doesn't need for its own case. In *Roviaro v. United States*, the Supreme Court gave the government a bit of a shield by requiring courts to “balanc[e] the public's interest in protecting . . . information against the individual's right to prepare his defense.”¹³¹ But the Court also held that such balancing becomes impermissible, and disclosure obligatory, whenever the information would be “relevant and helpful” to the defense or “essential to a fair determination of a cause.”¹³² That limitation can quickly nullify the “balancing” safeguard, because at the discovery stage a great deal of information has potential value to the defense. In espionage and international terrorism cases, the government could face a mandate for wide-ranging disclosure that could be averted only by dismissing the prosecution.

¹²⁸ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

¹²⁹ *Id.* at 608-09 (privacy of child witness).

¹³⁰ *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987). That right is so well settled that attempts to qualify it “apparently have never even been considered.” SERRIN TURNER & STEPHEN J. SCHULHOFER, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 32, 91 n.101 (2005). In contrast, in Guantánamo *habeas* litigation, district courts excluded detainees from their hearings when classified evidence was presented. *See* note xx, *supra*.

¹³¹ *Roviaro v. United States*, 353 U.S. 53, 59-61 (1957).

¹³² *Id.*

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To mitigate that dilemma, Congress passed the Classified Information Procedures Act in 1980.¹³³ CIPA provides detailed procedures to reduce the conflict between secrecy needs and due process requirements. It also deals with security clearances for court personnel (other than judges and jurors), storage and transmittal of documents, and the security of courthouse quarters where proceedings involving classified material occur.¹³⁴

Under CIPA, when a defendant seeks classified information for pre-trial preparation or when either party seeks classified material for use at trial, the judge reviews the information in a closed pre-trial hearing, to determine if it can be excluded as irrelevant. If not, CIPA permits the government to avoid the disclose-or-dismiss dilemma by replacing sensitive information with an unclassified “substitution” – for example, a redacted version or an unclassified summary. But substitution is permissible only when it “provide[s] the defendant with substantially the same ability to make his defense”¹³⁵; the judge must compare the original documents with the proposed substitution, to insure that an effective defense is not compromised.

If no substitution can meet legitimate defense needs without risk to national security, CIPA provides other devices for avoiding a secrecy/due process conflict. The judge may order that classified material be made available to the defense under a protective order, to prevent public disclosure. Or the judge may accept the government’s refusal to disclose but take steps to insure that secrecy will not adversely impact the defense – for example, striking particular counts of the indictment.¹³⁶ Finally, if the government is unwilling to accept disclosure under a protective order, and if no other remedy will adequately protect defense interests, the judge can dismiss the prosecution.

Since its enactment CIPA has affected hundreds of espionage and terrorism prosecutions. There were 62 espionage prosecutions during the 1980s alone,¹³⁷ and there

¹³³ Classified Information Procedures Act, Pub. L. 4 Stat. 2025, *reprinted at* 18 U.S.C. app. 3 [hereinafter cited as CIPA].

¹³⁴ *See* Security Procedures Established Pursuant to Pub. L. 96-456, *reprinted following* 18 U.S.C. app. 3.

¹³⁵ CIPA, *supra* note xx, at §6(c).

¹³⁶ *E.g.*, *United States v. Moussaoui*, 282 F. Supp. 2d 480, 483-87 (E.D. Va. 2003) (barring death penalty, as sanction for government refusal to make relevant witnesses available for deposition), *rev’d*, 382 F.3d 453, 476 (4th. Cir. 2004) (substituting a different sanction).

¹³⁷ TURNER & SCHULHOFER, *supra* note xx, at 22.

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have been over 100 international terrorism prosecutions since September 11, 2001, most of them with the potential to expose considerable amounts of classified information.¹³⁸

These developments call into question many conventional assumptions about judicial expertise. It is common to suppose that judges cannot gauge the national security implications of disclosing classified facts. Yet, CIPA practice has drawn many judges deeply into the details of classified files. Judges have evaluated reams of material, including highly sensitive intelligence sources and methods, assessing its relevance, determining when asserted secrecy needs are overbroad, and crafting fine-grained substitutions. In this iterative process, government claims about the need for secrecy often shrink or collapse, while the judge's less specialized but more independent perspective prevails. Although the intelligence community "has a deep-seated distrust of the judiciary" and believes that "judges could not be trusted to handle sensitive national security information,"¹³⁹ there are no known instances in which a significant security breach attributable to CIPA has ever occurred.¹⁴⁰ Complex CIPA cases are far from routine, but they are now sufficiently frequent to be seen as a normal, if difficult, adjudicatory assignment. In criminal litigation, federal judges seem especially cognizant of their Article III responsibility to serve as the independent buffer between government and the individual, and they have become increasingly self-confident in performing this familiar role, even when national security concerns are implicated.¹⁴¹

In theory, CIPA leaves disclosure decisions entirely within executive hands;. But unless the government is willing to forego prosecution entirely, CIPA procedures for assessing evidence before trial force the limited but involuntary disclosure of classified files to the judge and sometimes to defense counsel. And that breach of secrecy, together with the process of arguing the issues of relevancy and national security impact, provides a degree of accountability and a deterrent to completely self-serving classification decisions. CIPA also has a more tangible effect because it requires the government to pay a price for withholding relevant information. CIPA sanctions thus oblige the executive to internalize part of the social cost of secrecy. Inevitably that dynamic will

¹³⁸ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE 84-85 (2009) (discussing CIPA issues in post-2001 cases).

¹³⁹ GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 104-05 (1982). In reporting that concern, former Attorney General Bell made clear that he considered it baseless. *Id.*

¹⁴⁰ ZABEL & BENJAMIN, *supra* note xx, at 88.

¹⁴¹ *See id.* at 84-85.

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lead the government to realize that some information need not have been classified and to accept that some properly classified material nonetheless can be released.

In these ways CIPA has generated voluminous disclosures that the government, if given an unfettered choice, would normally resist. When a matter is sufficiently sensitive, however, the executive branch will no doubt opt to pay the price and preserve secrecy, by either accepting a CIPA sanction, shaping its criminal charges to render the sensitive material irrelevant, or declining to prosecute at all. Thus, although CIPA has exposed staggering amounts of classified information to the court, to defense counsel and even to the public, CIPA does not promise accountability when the executive is determined to avoid it. And those, of course, are the times when accountability may be most needed.

2. *Civil litigation.* Civil suits against the government are the natural place to look to fill that gap. Yet judicial power to restrain executive secrecy currently is even more limited in civil than in criminal cases. “State secrets privilege” gives the government a wide-ranging license to veto unwanted disclosures in any civil case having national security implications. As usually interpreted, moreover, the doctrine allows judges only limited capacity to restrict the impact of the privilege and no power to impose costs on the government for invoking it. As a result, state secrets privilege affords the government broad discretion to make inconvenient civil suits disappear. So devastating are its effects that it is sometimes called the “nuclear option.”¹⁴²

a. *Foundations of state secrets privilege.* The leading modern authority on the privilege, *United States v. Reynolds*,¹⁴³ is a puzzling Supreme Court decision now more than 50 years old. Three widows whose husbands had died in the crash of a B-29 bomber sued under the Tort Claims Act, alleging that the crash was the result of Air Force negligence. In discovery they sought a copy of the government’s accident report. The government claimed that the plane had been on a confidential mission and that disclosure of details about the flight “would not be in the public interest.”¹⁴⁴ The district judge ordered production of the report for his inspection *in camera*, to determine whether it did contain privileged material. When the Air Force refused, the judge resolved the

¹⁴² Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 99 (2007).

¹⁴³ 345 U.S. 1 (1953).

¹⁴⁴ *Reynolds v. United States*, 192 F.2d 987, 996 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

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negligence issue against the United States.¹⁴⁵ The Third Circuit affirmed, stressing that the question of privilege could not be left to a self-interested party; otherwise, the executive would be “transferring to itself the power to decide judiciable questions which arise in cases or controversies submitted to the judicial branch for decision.”¹⁴⁶

The Supreme Court reversed. While agreeing that “the court itself must determine whether the circumstances are appropriate for the claim of privilege,” the Supreme Court held that the judge must “do so without forcing a disclosure of the very thing the privilege is designed to protect.”¹⁴⁷ The Court therefore struck a “compromise”:¹⁴⁸

Judicial control over the evidence cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. [When] there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged[,] the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

This approach ostensibly balances the needs for secrecy and judicial control, but the Court gave both sides of that equation a tilt in favor of the government. The Court treated *in camera* inspection as in itself a dangerous breach of secrecy and assumed that the competing interest in judicial control could be served in a regime where the judge would have to accept a litigant’s characterization of a document, without ever seeing it.¹⁴⁹ And the Court said that the constraint in criminal litigation – that the government can “invoke its evidentiary privileges only at the price of letting [the opposing party prevail]” – “has no application in a civil forum where the Government is not the moving

¹⁴⁵ LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY* 57-58 (2006).

¹⁴⁶ *Reynolds*, 192 F.2d, at 997.

¹⁴⁷ *Reynolds*, 345 U.S., at 8-9.

¹⁴⁸ *Id.* at 9, 11.

¹⁴⁹ See FISHER, *supra* n. xx, at 113 (“Without access to evidence, federal courts necessarily rely on vapors and allusions. Through that process, judicial control was ‘abdicated to the caprice of executive officers.’”)

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party, but is a defendant only on terms to which it has consented.”¹⁵⁰ The district judge therefore should have upheld the claim of privilege without ever examining the accident report, leaving plaintiffs to make their case without it.¹⁵¹ By holding the *in camera* inspection order improper, *Reynolds* established that in some settings, the mere “possibility that military secrets [are] involved . . . [is] a sufficient showing of privilege,”¹⁵² and the courts will have no power to probe that claim, beyond confirming its surface plausibility. And the Court declined to require that military and diplomatic concerns be weighed against other values or addressed in ways less restrictive of other interests.

These features give the executive even greater power to control classified information in civil than in criminal cases. Two contrasts are especially important. First, criminal courts do everything possible to make relevant material available to the defense – by filtering out sensitive matter, by crafting substitutions, and by permitting defense access to the classified material itself, both for discovery purposes and for use at trial. State secrets privilege is not so fine-grained; material that contains any sensitive information can be removed from the case entirely. Second, state secrets privilege is cost-free. In criminal cases, when less restrictive alternatives are not available, the government must internalize some of the social costs of secrecy by accepting sanctions designed to make the defendant whole. In contrast to this *disclose-or-dismiss* dilemma, state secrets privilege does the opposite, giving the government a prerogative to *withhold and win*.

b. Developments since Reynolds. Compounding *Reynolds*’ original flaws, subsequent developments have made its approach more and more of an anachronism. Although the *Reynolds* Court gave some credence to the government’s claim of an executive prerogative to withhold documents in their custody, any doubt about the authority of the courts to compel the production of executive papers was put to rest in *United States v. Nixon*.¹⁵³ Appreciation for the judicial checking function has led the Court to recognize an implied jurisdiction to entertain suits against executive officers

¹⁵⁰ *Id.* at 12.

¹⁵¹ *Id.*

¹⁵² *Id.* at 11 (emphasis added).

¹⁵³ 418 U.S. 683 (1974).

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for violation of constitutional rights.¹⁵⁴ That appreciation has also led to statutes like CIPA,¹⁵⁵ the Freedom of Information Act (FOIA)¹⁵⁶ and the Foreign Intelligence Surveillance Act (FISA),¹⁵⁷ all endorsing judicial oversight in matters touching national security.

Finally, and as a by-product of such legislation, judicial administration has evolved to address logistical issues and anxieties about possible leaks. The 1974 amendments to FOIA encouraged judges to examine national security material *in camera*, to determine if it was properly classified.¹⁵⁸ In the particularly sensitive area of clandestine surveillance of foreign agents, FISA, enacted in 1978, provided for Article III oversight through specially designated judges meeting under tight security in a sealed room at the Department of Justice.¹⁵⁹ Two years after FISA, Congress in enacting CIPA felt able to entrust classified material to any federal judge drawing a case assignment in the ordinary course, under security procedures that could be implemented at any federal courthouse.¹⁶⁰ Judicial access to classified material became more common, yet the sky did not fall. Limited disclosure *in camera* lost the unfamiliar, frightening qualities the *Reynolds* Court had attributed to it.

But while the justifications for *Reynolds* have eroded, its scope has not. To the contrary, its deferential, broad-brush approach has been reaffirmed and extended.

Reynolds was merely a suit for negligence, and the litigation supposedly implicated electronic devices of great military value, at a time of daily air combat during the Korean War.¹⁶¹ The case thus juxtaposed a weak private interest with an allegedly strong military concern. In addition, the government was “a defendant only on terms to

¹⁵⁴ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹⁵⁵ CIPA, *supra* note xx.

¹⁵⁶ 5 U.S.C. §552 (2009).

¹⁵⁷ 50 U.S.C. §1801, et seq.

¹⁵⁸ *See* pp. xxx-xxx, *infra*.

¹⁵⁹ *See* 50 U.S.C. 1801 (2009).

¹⁶⁰ *See* p. xxx, *supra*.

¹⁶¹ *See Reynolds*, 345 U.S., at 10 (“[N]ewly developing electronic devices have greatly enhanced the effective use of air power [and] must be kept secret if their full military advantage is to be exploited.”).

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which it has consented”¹⁶²; *Reynolds* was not a suit where judicial power is conferred by Article III and it did not allege a constitutional violation for which the courts have an implied constitutional obligation to provide relief.¹⁶³

In the years since *Reynolds*, however, the government has invoked the privilege in increasingly aggressive ways,¹⁶⁴ and the pattern has continued in the Obama administration.¹⁶⁵ Until recently, moreover, even the most extravagant privilege claims have met little judicial resistance. Cases have excluded crucial evidence when plaintiffs allege grave abuses of executive power,¹⁶⁶ and when the government asserts only marginal administrative or diplomatic concerns.¹⁶⁷ Even when the balance of interests has been the reverse of that in *Reynolds*, the state secrets claim has prevailed.¹⁶⁸ With rare exceptions, moreover, courts have not sought to mitigate the impact of the privilege by CIPA-like devices such as redaction or substitution; courts considering such alternatives have read *Reynolds* to preclude them.¹⁶⁹ Instead the privilege has removed the affected evidence entirely, often making government victory inevitable.¹⁷⁰

¹⁶² *Id.* at 12.

¹⁶³ *Bivens, supra*; *Webster v. Doe*, 486 U.S. 592 (1988) (“[S]erious constitutional question’ would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”).

¹⁶⁴ Compare *PALLITTO & WEAVER, supra* note xx, at 117 (2007) (George W. Bush asserted state secrets privilege “more times than any president in history”) and J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 584 (1994) (state secrets privilege invoked ten times more often during 1970-94 than during 1951-70), with Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1291-1307 (2007) (arguing that increase after 1973 resulted from changed circumstances).

¹⁶⁵ See, e.g., *Despite Obama Pledge, Justice Defends Bush Secrets*, ASSOCIATED PRESS, Feb. 16, 2009. The Justice Department has promulgated guidelines designed to limit government resort to the privilege. OFFICE OF THE ATTORNEY GENERAL, *POLICIES AND PROCEDURES GOVERNING INVOCATION OF THE STATE SECRETS PRIVILEGE*, Sept. 23, 2009. It remains to be seen whether the new procedures will prove merely cosmetic. In litigation to date, the Obama administration has continued to assert the privilege aggressively. See, e.g., note xx, *infra*.

¹⁶⁶ E.g., *Hepting v. AT & T Corp.*, 439 F.Supp.2d 974 (N.D. Cal. 2006) (surveillance abridging First and Fourth Amendment rights); *El-Masri v. United States*, 479 F.3d 296 (4th. Cir. 2007) (abduction for interrogation under torture).

¹⁶⁷ E.g., *Moliero v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) (personnel assignment practices); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (“diplomatic relations with foreign governments”).

¹⁶⁸ See *Lyons, supra* note xx, at 6.

¹⁶⁹ E.g., *el Masri*, 479 F.3d at 311 (trial *in camera* “is expressly foreclosed by *Reynolds*”).

¹⁷⁰ E.g., *ACLU v. Nat’l Security Agency*, 2007 WL 1952370 (6th. Cir. 2007) (standing denied because government refused to confirm or deny surveillance).

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The “state secrets” concern becomes especially ephemeral under the “mosaic” theory, which maintains that “foreign intelligence . . . is more akin to the construction of a mosaic [W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.”¹⁷¹ Paradoxically, the apparent insignificance of the information becomes a reason for heightened deference, because the alleged danger is one that “the uninformed” supposedly cannot appreciate.¹⁷² Armed with this unfalsifiable analysis, the government has successfully invoked state secrets privilege to protect the most banal sorts of material.¹⁷³ By blocking plaintiffs from using allegedly sensitive evidence already in their possession, the government has even won dismissal when plaintiffs themselves had the means to prove constitutional abuse.¹⁷⁴ And if “the very subject matter” is considered a state secret, courts will simply dismiss on the pleadings, positing that any effort to litigate will inevitably expose protected information.¹⁷⁵

Countless opinions insist that when material is a privileged state secret, the consequence “is simply that the evidence is unavailable, as though a witness had died.”¹⁷⁶ In the case of most privileges, this principle means that parties who successfully invoke the claim must live with the effects of suppressing the evidence. They may face liability in a suit they could otherwise win, or they can try to avoid liability by waiving the privilege and accepting disclosure. In state secrets cases, however, courts have been unwilling to impose this choice on the government. Instead,

¹⁷¹ *Halkin v. Helms*, 598 F.2d 1, 8-9 (D.C. Cir. 1978), quoting *Marchetti v. United States*, 466 F.2d 1309, 1318 (4th Cir. 1972). *Cf. Kasza v. Browner*, 133 F.3d 1159, 1166 (“seemingly innocuous information”).

¹⁷² *Cf.* David E. Pozen, Note, *The Mosaic Theory, National Security and the Freedom of Information Act*, 115 YALE L.J. 628, 652-58 (2005) (describing similar deference in FOIA cases).

¹⁷³ *See* Christina E. Wells, *CIA v. Sims: Mosaic Theory & Government Attitude*, 58 AD. L. REV. 1, 18 (2006).

¹⁷⁴ *E.g.*, *Maxwell v. First Nat. Bank*, 143 F.R.D. 590, 598 (D. Md. 1991) (plaintiff barred from proving harassment through “documents already in his possession or his own testimony.”); *Hepting*, *supra*.

¹⁷⁵ Dismissal on the pleadings originally was available only in suits on contracts to perform espionage, where the Court assumed mutual consent to forego litigation. *Totten v. United States*, 92 U.S. 105, 106 (1875). But many courts extend this doctrine to situations far removed from this context of mutual consent. *E.g.*, *el Masri, supra* (abduction and rendition to torture). *Compare* *Jeppesen v. DataPlan, Inc.*, 579 F.3d 943, 954-55 (9th Cir. 2009) (limiting such dismissals to suits between contracting parties), *rehrg. en banc* granted, 2009 U.S. App. LEXIS 23595 (Oct. 27, 2009).

¹⁷⁶ *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007).

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when the privilege deprives government officials of a potentially valid defense, courts dismiss the suit.¹⁷⁷

Thus, despite statements that “the privilege results in no alteration of pertinent substantive or procedural rules,”¹⁷⁸ this is correct only when privileged evidence would support a challenge to the government. But conversely, when sensitive material might help defend against such a challenge, the official who can claim state secrets need not choose between disclosure and a burden in litigation; she can avoid both. Indeed she is better off having weak exculpatory evidence shielded by privilege than having strong exculpatory evidence that is fully available. In the latter situation she may have a good chance to prevail but in the former, victory is guaranteed. The privilege thus ceases to operate as a rule of evidence and becomes a substantive rule of law, with the effect of absolute immunity.¹⁷⁹ Instead of facing incentives to minimize its privilege claims and enhance the flow of information, the party who can claim state secrets has every reason to *maximize* its privilege claims; it can simultaneously shield information and succeed in litigation as well.

The comparison to CIPA is telling. In criminal cases CIPA permits judges to restrain secrecy by insisting on less restrictive alternatives and by using *in camera* review to filter out sensitive details. Even better, CIPA is a partially self-executing process, encouraging the executive to opt for disclosure by imposing a price for withholding information. In civil cases, state secrets privilege does the opposite. With government officials already motivated to over-classify, the privilege compounds the problem by creating incentives to over-claim with respect to state secrets, simply to gain tactical advantages and to make inconvenient lawsuits disappear.

These effects are troubling enough in ordinary personal injury litigation, where they enable the government to brush aside allegations of negligence. The effects are doubly disturbing when officials stand accused of abusing executive power. Constitutional rights would have virtually no meaning if freedom of speech or other protections were acknowledged in principle but severed from any enforcement mechanism. Yet that is precisely the result of the current privilege, whenever the

¹⁷⁷ *E.g.*, *el Masri*, 479 F.3d at 307; *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140-41 (5th Cir. 1992).

¹⁷⁸ *Ellsberg*, 709 F.2d at 64.

¹⁷⁹ Absent state secrets privilege, government officials have qualified immunity but remain liable for actions that violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). State secrets privilege can in effect confer immunity even for actions violating clearly established law.

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government can claim that classified information or “seemingly innocuous” mosaic details are relevant.¹⁸⁰ If state secrets allegedly lie in the background, accountability can be made to evaporate.

The resulting regime of unchecked executive power is beginning to prompt judicial resistance. Complete deference to the government remains the dominant pattern, but discomfort is increasingly evident, as courts grope for ways to prevent exploitation of secrecy while respecting national security imperatives. In recent decisions, some courts have rejected the rule mandating dismissal when “the very subject matter” implicates a state secret;¹⁸¹ others have required detailed explanation of why particular documents are sensitive¹⁸² or insisted on examining the classified material directly.¹⁸³

But the executive branch remains determined to push back. The struggle surfaces starkly in *Mohamed v. Jeppesen DataPlan, Inc.*, one of many suits by individuals subjected to “extraordinary rendition” and torture. The district court dismissed on the pleadings, treating “the very subject matter” as a state secret. The court of appeals reversed, refusing to be forced into “an unnecessary zero-sum decision between the Judiciary’s constitutional duty to say what the law is . . . and the Executive’s constitutional duty to preserve the national security.”¹⁸⁴ Instead that court required “balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives,” to be accomplished by “excising secret evidence on an item-by-item basis, rather than foreclosing litigation altogether.”¹⁸⁵ Challenging broader understandings of state secrets doctrine, the court declared that those conceptions “effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.”¹⁸⁶ Yet the Obama administration, insisting on presidential prerogative, successfully petitioned for rehearing,

¹⁸⁰ Habeas corpus would remain available for constitutional claims involving ongoing detention. *Boumediene v. Bush*, 553 U.S. 723 (2008). But even here, the government may be able to invoke national security to withhold information. *See* note xx, *supra*.

¹⁸¹ *E.g.*, *Terkel v. AT&T Corp.*, 441 F.Supp.2d 899, 907 (N.D. Ill. 2006).

¹⁸² *E.g.*, *el Masri*, 479 F.3d at 312; *Sterling v. Tenet*, 416 F.3d 338, 347 (4th. Cir. 2005).

¹⁸³ *E.g.*, *Al-Haramain*, 507 F.3d at 1203.

¹⁸⁴ *Jeppesen*, 579 F.3d at 955.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

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arguing that the court’s reasoning “would dramatically restructure government operations by permitting any district judge to override the Executive Branch’s judgments in this highly sensitive realm.”¹⁸⁷ The conflict over judicial and executive responsibilities in the domain of sensitive information poses dilemmas that *Jeppesen* and other state secrets cases have yet to resolve.

3. *The Freedom of Information Act (FOIA)*. FOIA establishes the principle that all government records must be publicly available, unless specifically exempted.¹⁸⁸ Several exemptions potentially apply in national security matters, most centrally *Exemption 1*, which protects all information that “in the interest of national defense or foreign policy [is] properly classified.”¹⁸⁹ But requests for disclosure under FOIA are not encumbered by the powerful state secrets privilege available to the government in ordinary civil litigation. Exemption 1 procedures, developed long after *Reynolds*, require much closer judicial oversight. There are at least six significant differences:

1) FOIA requires agencies to identify classified material page-by-page and section-by-section;¹⁹⁰ they cannot, as in a state secrets case, claim protection for an entire document simply because the subject matter involves national security.

2) Specificity is taken a step further because FOIA imposes a CIPA-like filtering process, requiring that “[a]ny reasonably segregable portion of a record shall be provided. . . after deletion of the portions which are exempt.”¹⁹¹

3) Judges are not discouraged from scrutinizing classified material. Although *in camera* examination is also permitted in state secrets cases, the *Reynolds* Court signaled that judges should use that procedure sparingly. FOIA carries no similar presumption against *in camera* inspection, even in national security matters.¹⁹²

¹⁸⁷ *Jeppeson*, Petition for Rehearing or Rehearing En Banc, at 2-3.

¹⁸⁸ 5 U.S.C. §552(a),(b) (2009).

¹⁸⁹ 5 U.S.C. §552(b)(1) (2009). For technical or tactical reasons, the government sometimes invokes other exemptions as well. Because these largely duplicate Exemption 1 in national security cases, they will not be discussed separately.

¹⁹⁰ *See, e.g.*, *Allen v. CIA*, 636 F.2d 1287, 1293 (D.C. Cir. 1980); *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (“agency cannot justify withholding an entire document simply by showing that it contains some exempted material”).

¹⁹¹ 5 U.S.C. §552(b) (2009); *See Ctr. For Int’l Envtl. Law v. Office of U.S. Trade Rep.*, 505 F.Supp.2d 150, 158 (D.D.C. 2007) (“Even if Exemption 1 is [applicable], USTR may not automatically withhold the full document as categorically exempt without disclosing any segregable portions.”).

¹⁹² 5 U.S.C. §552(a)(4)(B) (2009); *see p. xxx, infra*.

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4) In considering FOIA exemption issues, the court must “determine the matter *de novo*, . . . and the burden is on the agency to sustain its action,”¹⁹³ requirements that again extend specifically to national security matters.¹⁹⁴

5) The FOIA mandate to segregate non-exempt material is bolstered by “a detailed and strictly enforced set of procedural requirements.”¹⁹⁵ Exemption claims must be explained in a so-called *Vaughn* index, a meticulous log of requested documents, with a specific, non-boilerplate rationale for exemption in each case.¹⁹⁶

6) *Ex parte* determinations are disfavored. FOIA courts insist that the *Vaughn* index provide “as complete a public record as is possible”¹⁹⁷ and reject the index where, due to lack of specificity, it “does not permit effective advocacy.”¹⁹⁸ In contrast, courts uphold state secrets privilege on grounds never disclosed to the plaintiff, occasionally acknowledging that this procedure “is no doubt frustrating” to the plaintiff.¹⁹⁹

But despite these features, FOIA cannot fully overcome the barriers posed by state secrets privilege. FOIA cannot be used to compel testimony, and FOIA cannot defeat state secrets doctrine when it operates as a substantive rule of law, shutting down litigation where “the very subject matter” involves a state secret or where state secrets allegedly are relevant to a defense. And most important, the attitude underlying *Reynolds* – the perceived imperative to grant utmost deference to the executive – often migrates into FOIA cases, despite Congress’s subsequently expressed preference to the contrary. Although FOIA can still be a formidable weapon in national security matters, its procedures have softened with regard to both *in camera* inspection and *de novo* review.

¹⁹³ 5 U.S.C. §552(a)(4)(B) (2009).

¹⁹⁴ See p. xxx, *infra*.

¹⁹⁵ *Ellsberg*, 709 F.2d at 63.

¹⁹⁶ *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). See *Wiener v. FBI*, 943 F.2d 972, 978-79 (9th Cir. 1991) (holding “boilerplate” *Vaughn* index inadequate).

¹⁹⁷ *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

¹⁹⁸ *Wiener*, 943 F.2d at 979; see also *Ellsberg*, 709 F.2d at 63 (index must permit “adversarial testing”).

¹⁹⁹ *E.g.*, *el Masri*, 479 F.3d at 312; cf. *Ellsberg*, 709 F.2d at 63 (FOIA requirement of adversarial testing does not apply in assessing state secrets privilege).

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a. *In camera inspection.* When the Supreme Court held in 1973 that FOIA did not authorize judicial review of Exemption 1 claims,²⁰⁰ Congress amended the statute to require courts to decide whether records “are in fact *properly* classified.”²⁰¹ The 1974 FOIA amendments encouraged *in camera* inspection,²⁰² but Congress indicated a degree of ambivalence from the start. Although the legislative history is replete with statements describing such review as crucial for “the accountability necessary for Government to function smoothly,”²⁰³ the Conference Committee also stated that “[b]efore 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.”²⁰⁴

In the first decade following the 1974 amendments, courts frequently examined material *in camera*,²⁰⁵ but then many courts began deploying a presumption against it.²⁰⁶ Under one test, if “agency affidavits . . . demonstrate that material withheld is *logically within the domain* of the exemption claimed, and . . . are neither *controverted by contrary record evidence* nor impugned by bad faith on the part of the agency,” then *in camera* inspection is unnecessary, and summary judgment should be granted for the government.²⁰⁷ This standard almost returns the law to its pre-1974 bar on judicial oversight, because a petitioner has little hope of demonstrating that documents held by the intelligence community are not “logically within the domain” of national security and has no way to provide “record evidence” contradicting the agency affidavit. Some courts have made the petitioner’s burden even more difficult by accepting *Vaughn* indexes and

²⁰⁰ EPA v. Mink, 410 U.S. 73 (1973).

²⁰¹ 5 U.S.C. §552(b)(1)(B) (2009) (emphasis added); see S.REP. 93-1200, 93d Cong., 2d Sess., *Conference Report on the 1974 Amendments*, at 8-9 (declaring “Congressional intent to override the Supreme Court’s holding in the case of E.P.A. v. Mink”).

²⁰² *Id.* at 8-9 (in many situations involving classified information, *in camera* inspection “will plainly be necessary and appropriate.”); Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (district court can inspect classified material *in camera* “without anxiety that the law interposes an extraordinary hurdle to such inspection.”).

²⁰³ Ray v. Turner, 587 F.2d 1187, 1195 n.18 (quoting Senator Muskie).

²⁰⁴ *Conference Report*, *supra* note xx, at 9.

²⁰⁵ *E.g.*, Dunaway v. Webster, 519 F. Supp. 1059, 1064 (N.D. Cal. 1981) (340 classified documents); Hamlin v. Kelley, 1980 U.S. Dist. LEXIS 11547, 1-5 (N.D. Ill. 1980) (several cartons of classified documents).

²⁰⁶ *E.g.*, Halpern v. FBI, 181 F.3d 279, 295 (2d. Cir. 1999) (*in camera* review “the exception, not the rule”).

²⁰⁷ King v. Dept. of Justice, 830 F.2d 210, 217-18 (D.C. Cir. 1987) (emphasis added).

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agency affidavits under seal, so that the judge never sees the allegedly sensitive material and the petitioner never even sees the government's description of it.²⁰⁸

Compounding these obstacles to *in camera* review is the “*Glomar* response,” in which an agency refuses to confirm or deny the existence of the documents sought, on the theory that merely acknowledging their existence could disclose protected information.²⁰⁹ Courts have permitted a *Glomar* response even when they find it hard to credit the factual basis for the claim.²¹⁰ When upheld, of course, the *Glomar* response moots any possibility of *in camera* inspection, because there are no longer any known documents to inspect.

Although *in camera* inspection has by no means disappeared,²¹¹ it occurs far less often than a system of assertive oversight would seem to require.

b. De novo review. As in the case of *in camera* inspection, Congress's commitment to *de novo* review was ambivalent. The 1974 amendments, when originally proposed, limited Exemption 1 review to determining whether classification had a “reasonable basis.” But on the Senate floor that language drew strong opposition and was stricken, with the effect of extending to Exemption 1 the same *de novo* standard applicable to review of other exemption claims.²¹² After that version passed both houses, President Ford vetoed it, calling judicial oversight of classification an unconstitutional infringement on executive authority. He also proposed in the alternative that courts “would have to uphold the classification if there is a reasonable basis to support it.”²¹³ Congress ignored Ford's compromise proposal and overrode the veto, enacting the bill

²⁰⁸ *E.g.*, *N.Y. Times Co. v. Dept. of Justice*, 499 F.Supp.2d 501, 519 (S.D.N.Y. 2007); *Wheeler v. Dept. of Justice*, 403 F.Supp.2d 1, 5 (D.D.C. 2005).

²⁰⁹ *Phillippi*, 546 F.2d at 1012-13 (petitioners sought documents relating to the *Glomar Explorer* – a ship allegedly built to recover a sunken Soviet submarine).

²¹⁰ *E.g.*, *ACLU v. Dep't. of Defense*, 389 F. Supp.2d 547, 564-66 (S.D.N.Y. 2005) (noting “concern that the purpose of the CIA's *Glomar* responses is less to protect intelligence activities . . . than to conceal possible violations of law . . . I am not given enough information to make the *de novo* determinations that FOIA would seem to require. [N]otwithstanding FOIA's clear statutory command [for *de novo* determination], there is small scope for judicial evaluation in this area.”).

²¹¹ *E.g.*, *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 994 (D.C. Cir. 1998); *Public Citizen v. Dep't. of State*, 787 F. Supp. 12, 14 (D.D.C. 1992). For more recent examples, reflecting emerging discomfort with executive control, see p. xxx, *infra*.

²¹² See *Freedom of Information Act and Amendments of 1974*, 94th Cong., 1st Sess. (1975), at 302-328.

²¹³ Message from President Gerald R. Ford Vetoing H.R. 12471, H.R.DOC. 93-383, 93d Cong., 2d Sess. (1974), quoted in *Ray v. Turner*, 587 F.2d at 1195 n. 16.

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with the *de novo* review standard intact.²¹⁴ As the D.C. Circuit explained shortly after the enactment:²¹⁵

[T]he Administration . . . argued that *de novo* responsibility . . . could not properly be assigned to judges, in part because of logistical problems, and in part because of their lack of relevant experience and meaningful appreciation of the implications of the material involved. Those who prevailed in the legislature . . . [rejecting that view,] 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.

But while Congress rejected “reasonable basis” review, it left room for some shading of the *de novo* standard. The Conference Committee report noted that:²¹⁶

the Executive departments . . . have unique insights into what adverse effects 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 . . . will accord substantial weight to an agency’s affidavit concerning the . . . classified status of the disputed record.

Early decisions applying the new standard hewed closely to the spirit of *de novo* review.²¹⁷ But most moved quickly to a deferential approach, and deference has remained

²¹⁴ See *Freedom of Information Act Amendments*, *supra* note xxx, at 484-485.

²¹⁵ *Ray v. Turner*, 587 F.2d at 1193-94.

²¹⁶ *Conference Report*, *supra* note xx.

²¹⁷ *E.g.*, *Allen*, 636 F.2d, at 1294; *Nuclear Control Inst. v. Nuclear Reg. Comm.*, 563 F.Supp. 768 (D.D.C. 1983).

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the dominant pattern,²¹⁸ The “reasonable basis” standard expressly rejected by Congress has become “ironically, a good summation of post-1974 practice.”²¹⁹

When agencies invoke “mosaic” arguments, even “seemingly innocuous”²²⁰ information – in other words, *any* information – can be shielded, with essentially no judicial review at all. In *Halperin v. CIA*, the theory was used to support a refusal to reveal amounts the agency paid for legal fees. Acknowledging that there was no apparent way this information could endanger national security, the D.C. Circuit nonetheless found Exemption 1 applicable. “[M]uch like a piece of a jigsaw puzzle,” the court said, this bit of information “may aid in piecing together other bits When combined with other small leads, [it] could well prove useful for identifying a covert transaction.”²²¹

After *Halperin*, mosaic arguments proliferated,²²² and with few exceptions, courts have acquiesced, even in cases involving exceptionally far-fetched claims.²²³ The mosaic theory is so elastic that it can encompass dangers the experts themselves do not perceive. In a Seventh Circuit decision, Judge Frank Easterbrook upheld the CIA position that all of its information from “innocuous” public sources was exempt from disclosure, on the ground that if the agency were required to identify and release non-sensitive items, “whoever makes the decision on the behalf of the CIA may miss some clue that foreign intelligence services would catch and thus may inadvertently reveal secrets.”²²⁴ The theory of unseen but perilous mosaic inferences thus required

²¹⁸ See Christina E. Wells, “National Security Information” and the Freedom of Information Act, 56 AD. L. REV. 1195, 1207 (2004); Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 82-86 (1992); Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U.PITT. L. REV. 753, 760 (1988) (former Chief Judge of D.C. Circuit noting that review in Exemption 1 cases “often seems to be done in a perfunctory way.”).

²¹⁹ Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 911, 940 (2006).

²²⁰ *CIA v. Sims*, 471 U.S. at 179.

²²¹ *Halperin*, 629 F.2d at 150.

²²² See Pozen, *supra* note xx, at 643-45 (in the only pre-9/11 case to reject the argument, mosaic claim was “too baldly pretextual to be taken seriously”).

²²³ E.g., *Aftergood v. CIA*, 355 F. Supp.2d 557 (D.D.C. 2005) (aggregate amount of CIA budget for 1947); *Berman v. CIA*, 378 F. Supp.2d 1209, 1217-18 (E.D. Cal. 2005) (Presidential Daily Briefs from Lyndon Johnson administration).

²²⁴ *Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004).

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eliminating not only dangers an unsophisticated judge cannot appreciate but even dangers a trained intelligence expert might overlook.

As in the state secrets context, mosaic theory in FOIA cases shuts down any possibility of review, deferential or otherwise, because it attributes reality to risks that only an intelligence expert – or not even an intelligence expert – can detect. And it implies extreme but one-sided risk aversion: zero-tolerance for any risk of imprudent disclosure but unlimited tolerance for unnecessary secrecy. Because the theory can't be falsified, deference becomes abdication, an abdication many courts make no effort to disguise.²²⁵

The reasons for judicial resistance to *de novo* review, despite the statutory mandate for it, are not mysterious. Congress may have concluded that federal courts, after giving “substantial weight” to the agency’s view, can then make a sound independent assessment, but many judges think otherwise. They do not believe they are competent to disagree with national security experts.²²⁶ Compounding that concern is anxiety about the magnitude of the harm if they should err in discounting the dangers of disclosure.²²⁷ Nonetheless, most courts have simply ignored the congressional judgments that motivated the 1974 legislation. Congress found that decisions of “experts” were often guided by bureaucratic self-interest, not by their expertise. It found that insufficient oversight had led to abuses and to a weakening of national security itself. And Congress expressed a foundational political value, that just as too much disclosure can be dangerous, too much secrecy can harm the nation as well. Federal judges confronting Exemption 1 claims typically give little or no weight to these concerns.²²⁸ They posit that agency decisions are motivated solely by concern for national security harm, even when circumstances strongly suggest the contrary.²²⁹ And they assume that any risk of

²²⁵ E.g., *Halperin*, 629 F.2d at 148 (judges may not “second-guess”). Compare Cntr. for Nat. Security Studies, 331 F.3d, at 951 (Tatel, J., dissenting) (mosaic reasoning “drastically diminish[es], if not eliminat[es] the judiciary’s role”).

²²⁶ See, e.g., *Halperin*, 629 F.2d at 148 (judges lack necessary expertise); Wald, *supra* note 260, at 760 (judges “often feel inadequate or incompetent to address either the factual predicates or the policy judgments involved”).

²²⁷ See *CIA v. Sims*, 471 U.S. at 178-79.

²²⁸ For exceptions, see Pozen, *supra* note 212, at 652.

²²⁹ E.g., *ACLU v. Dept. of Defense*, 389 F.Supp.2d 547, 564-66 (S.D.N.Y. 2005) (upholding exemption despite “concern that CIA’s purpose . . . is less to protect intelligence activities . . . than to conceal possible violations of law”).

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imprudent disclosure is intolerable, while imprudent secrecy is assumed to impose little or no social cost.

c. Assessing FOIA's impact. Although FOIA remedies are far from robust, the statute remains a significant vehicle for oversight. *In camera* inspection, if less frequent than Congress expected, is by no means rare,²³⁰ and it provides a significant check even if it merely confirms the agency's position.²³¹ Review *de novo* is often an empty fiction, but a minority of judges insist on taking a hard look,²³² another valuable check regardless of its outcome.²³³ And because FOIA requests trigger intra-agency review and settlement pressure, FOIA indirectly generates voluminous national security disclosures that almost certainly would not occur otherwise,²³⁴ with important revelations concerning Justice Department legal opinions, FBI surveillance of public officials, CIA behavioral experimentation on human subjects, use and abuse of the Patriot Act, and countless other matters of legitimate public concern.²³⁵

Recently, moreover, judicial oversight has become increasingly vigorous. Many FOIA decisions signal discomfort with executive demands for deference, mirroring the uneasiness emerging in Congress and in state secrets cases. Indeed it is in FOIA litigation that judicial resistance to the executive has become most frequent and most emphatic. Acquiescence in intelligence community assessments remains common, and departures from that pattern can be hesitant and unpredictable. Where such departures occur, moreover, the executive branch under President Obama continues to push back tenaciously.²³⁶ But growing judicial assertiveness is unmistakable. Courts often insist on

²³⁰ See note xxx *supra*.

²³¹ Wald, *supra* note xxx, at 760-61 (“[I]n most cases the court ends up agreeing with the Executive But [by making] the inquiry, [judges can transmit] to the security agencies . . . the message that they are being held to account.”).

²³² E.g., *Goldberg v. Dept. of State*, 818 F.2d 71, 77 (D.C. Cir. 1987); *Nuclear Control Inst.*, 563 F.Supp.2d at 768.

²³³ See STEPHEN DYCUS, et al., NATIONAL SECURITY LAW 1013 (4th ed. 2007).

²³⁴ *Id.* at 1014; James X. Dempsey, *The CIA and Secrecy*, in ATHAN G. THEOHARIS, A CULTURE OF SECRECY 41 (1998); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1051-56 (2008) (documenting disclosures under threat of litigation).

²³⁵ See Kreimer, *supra* note xxx, at 1051-56; THEOHARIS, *supra* note xxx, at 17-19, 41-42.

²³⁶ E.g., *Petition for Certiorari* (Aug. 7, 2009), in *ACLU v. Dept. of Defense*, 543 F.3d 59 (2d Cir. 2008), at 14-15.

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in camera inspection,²³⁷ and orders to release classified documents are no longer unusual.²³⁸ In a striking but not isolated example, the Second Circuit recently mandated the release of photographs that vividly document the abuse of Abu Ghraib detainees, rejecting impassioned administration claims that the disclosure would endanger the lives of American troops.²³⁹ In the past six years, tens of thousands of pages of previously classified material have been released in response to FOIA litigation.²⁴⁰

That said, current FOIA practice often does little to challenge the executive's information monopoly. And more important, FOIA's value, though not trivial, is fragile. The survival of judicial oversight, even in its currently episodic form, depends on the forbearance of the executive, which retains wide discretion to neutralize FOIA through obfuscating mosaic arguments and unrelenting appeals. Equally worrisome, effective oversight depends on the wavering commitment of the judges themselves and on the extent to which they are willing to resist the mystique of agency expertise.

C. Complementarity and Gaps in External Oversight

The information-access powers vested in Congress, the courts and the press can have significant bite, but they function only in limited areas, subject to significant constraints. In an ideal system, oversight bodies might be designed to complement one another, each operating where it is best suited and filling oversight gaps left by the others. If this is the aspiration, however, our system falls far short of meeting it. The oversight mechanisms leave wide spaces where executive control of information is unrestrained.

Although the press, for example, plays an indispensable role, its successes in ferreting out secrets represent a minute percentage of the classified material that the

²³⁷ E.g., *ACLU v. Dept. of Defense*, 389 F.Supp.2d 547, 573 (S.D.N.Y. 2005) (inspecting photos of detainee abuse and ordering release of most items); *Fla. Immigrant Advocacy Ctr. v. NSA*, 380 F.Supp.2d 1332 (S.D.Fla. 2005) (judgment for government but only after inspecting top-secret document *in camera*).

²³⁸ E.g., *Assoc. Press v. Dept. of Defense*, 395 F.Supp.2d 17, 18 (S.D.N.Y. 2005) (rejecting government position as "hypocritical"); *Gerstein v. Dept. of Justice*, 2005 U.S. Dist. LEXIS 41276 (N.D. Cal. 2005) (rejecting mosaic argument); *ACLU v. Dept. Of Defense*, 389 F.Supp.2d 547, 566 (S.D.N.Y. 2005) (rejecting *Glomar* response).

²³⁹ *ACLU v. Dept. of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated as moot*, 2009 U.S. LEXIS 8714 (Nov. 30, 2009).

²⁴⁰ Over 100,000 pages of classified material have been released in just one subset of these cases, those seeking records relating to abuse at detention centers overseas. For an overview, with links to the cases and documents, see <http://www.aclu.org/national-security/aclu-v-department-defense-torture-foia>.

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public deserves to see.²⁴¹ Unlike the press, which is highly motivated but lacks dependable means for obtaining information, Congress has potent tools but usually lacks the motivation to use them constructively. As a result, oversight often has been weak or misdirected, even when control of Congress and the Executive Branch is politically divided. And at best, Congress's tools operate only in one direction. They give Congress power to obtain sensitive information for itself but virtually no authority to determine when classified documents and testimony will be released to the public.²⁴² Thus, Congress cannot convey noteworthy material to the press, which must (but normally cannot) obtain it elsewhere. And that gap weakens the significance of the privileged access Congress itself enjoys, because Congress's motivation to seek information and to act on it is a function of political incentives, which in turn are a function of the public awareness that neither the press nor Congress can normally supply.

That leaves the courts. But in national security matters the courts, like Congress, lack the will to use most of their oversight powers. In criminal cases, courts have been relatively assertive, and CIPA gives them authority to subject secrecy claims to fine-grained inspection. But CIPA courts cannot override government insistence on maintaining secrecy, and in any case prosecutors' charging discretion gives them substantial control over the scope of the material that faces CIPA scrutiny.

Civil suits could fill some of these gaps. Private plaintiffs determine the subject matter of the suit, and in civil discovery, courts can force disclosure by rejecting government claims of national security risk. But state secrets privilege erases most of this potential, because it bars CIPA-like less restrictive alternatives and gives government litigants a strong incentive to extend their privilege claims to the outer limits of plausibility.

FOIA is more promising because courts can force disclosure when they conclude that alleged secrecy needs are overblown and because FOIA judges can make fine-grained judgments, filtering out sensitive material and requiring release of the remainder. FOIA, of course, is concerned only with access to information, not with formal remedies for executive abuse. But if FOIA makes the facts available, the press, the public, and then Congress can do the rest, at least on matters that arouse majoritarian concern.

Nonetheless, FOIA has one limitation that does much to offset its potential. FOIA judges can override improper classification decisions, but the substantive standard

²⁴¹ See p. xxx, *supra*.

²⁴² See note xxx, *supra*.

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for classification is exceedingly permissive – national security interests are defined broadly and the most slender national security concern can qualify, without regard to the public value of disclosure.²⁴³ As a result, a national security exemption from FOIA is typically easy to justify, regardless of its real motivation. Mosaic theory compounds this difficulty, with its premise that security dangers are plausible precisely because they aren't apparent to the untrained eye.

Beyond these formal obstacles, many courts, reluctant to honor the statutory mandate for *de novo* review, grant the executive a degree of latitude equivalent to *carte blanche*. In some recent cases, FOIA has become a powerful disclosure tool. But its impact is easily neutralized by executive willingness to advance aggressive mosaic arguments or by the willingness of judges themselves to be seduced by calls for deference to supposed agency expertise. Overall, the statute, as currently applied, offers only a modest, unreliable means to challenge executive information control.

In sum, each of our checking institutions – the press, Congress and the courts – has only feeble tools for gaining access to national security secrets. And because their weaknesses reinforce one another, the overall apparatus of information oversight is weaker than the sum of its parts. It does not provide dependable mechanisms for assuring accountability and democratic governance in matters that touch the national security.

IV. Consequences

Exclusive executive control over national security secrets is harmful to all the institutions concerned. Without access to relevant information, Congress cannot wisely decide whether or how to legislate, courts cannot accurately adjudicate disputes or enforce the rule of law, and citizens cannot intelligently participate in public affairs.

The unchecked monopoly is a mixed blessing even for the executive branch. Over-classification generates a staggering volume of paper and electronic files in need of protection. In 1997, more than 6.6 million new secrets were created,²⁴⁴ and by 2007 the pace of classification had tripled.²⁴⁵ Yet most assessments suggest that “roughly nine-tenths” of classified material does not need to be so treated.²⁴⁶ Blatantly unnecessary

²⁴³ See p. xxx, *supra*.

²⁴⁴ INFORMATION SECURITY OVERSIGHT OFFICE, 1997 REPORT TO THE PRESIDENT 4, 6 (May 30, 1998).

²⁴⁵ In that year 23 million new documents were added to stock of classified material. See note xx, *supra*.

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classification could no doubt be documented more extensively, but the secrecy apparatus shields the facts from view. A memo from a member of the Joint Chiefs of Staff complaining about over-classification was in its turn promptly classified – at the Top Secret level, no less.²⁴⁷

Over-classification hampers the intelligence community itself. Elaborate secrecy and the need-to-know principle lead to counter-productive “stove-piping” – information is so highly compartmentalized that decision-makers are partially blinded, seeing only part of the relevant data.²⁴⁸ Constrained vision has been a notorious cause of major blunders, not least the intelligence failures leading up to September 11, 2001.²⁴⁹ Moreover, secrecy dilutes oversight *within* the Executive Branch. Absent accountability for bad choices and incompetence, incentives atrophy and quality control withers.²⁵⁰

The implications for democratic processes are more fundamental. That secrecy impedes political deliberation is self-evident. Moynahan insisted, moreover, that this consequence often is not a side-effect of secrecy but its very purpose: “The classification system . . . is used too often to deny the public an understanding of the policymaking process, *rather than* for the necessary protection of . . . highly sensitive matters.”²⁵¹

A former Solicitor General observed that “any person who has considerable experience with classified material [knows] that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment.”²⁵² A retired C.I.A. analyst stressed the same point, noting that when officials defend classification decisions in court, “national security is only the

²⁴⁶ PRESIDENT’S COMM’N, *supra* note xx, at 36; KOH, *supra* note xx, at 201; SCHLESINGER, *supra* note xx, at 344 (Pentagon official stated that “less than one-half of 1 percent [of classified documents] actually contain information qualifying even for the lowest defense classification.”).

²⁴⁷ See SCHLESINGER, *supra* note 6, at 344.

²⁴⁸ MOYNAHAN, *supra* note 6, at 79.

²⁴⁹ See SCHULHOFER, *supra* note xx, at 17-19 (identifying failures to share crucial information); 9/11 COMMISSION, *supra* note xx, 268-69, 276, 400, 539 n.83 (same); MOYNAHAN, *supra* note xx, at xx-xxi (discussing CIA blunders in the 1950s and 1960s).

²⁵⁰ PRESIDENT’S COMM’N, *supra* note xx, at 7-8 (“Secrecy has the potential to undermine well-informed judgment by limiting the opportunity for input, review, and criticism.”). For in-depth discussion of ways secrecy interferes with development and execution of national security policy, see Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Cal. L. Rev. 301 (2009).

²⁵¹ Moynahan, *Preface*, in PRESIDENT’S COMM’N, *supra* note xx, at xxi (emphasis added).

²⁵² Erwin Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989.

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ostensible reason for using the state secrets privilege The real reason usually has more to do with national embarrassment.”²⁵³

Occasionally, litigation and hindsight afford opportunities to test the dire predictions made in efforts to justify secrecy. A notorious example is the Japanese internment during World War II. The spurious claim that West Coast citizens of Japanese descent were sending signals to Japanese submarines offshore was attributed to secret reports that were knowingly misrepresented in government briefs to the Supreme Court.²⁵⁴ In the *Pentagon Papers* case during the Vietnam War, the government warned of disastrous effects on our troops in the field if the Papers were published. When the Court permitted publication to proceed,²⁵⁵ none of the predicted effects materialized. Solicitor General Griswold later learned there was no merit to the descriptions of national security danger presented to him and passed on to the Court.²⁵⁶

The same thing has happened even in the absence of high political stakes. *United States v. Reynolds*²⁵⁷ remains the linchpin of state secrets privilege, but documents released fifty years after the fact establish that the government deliberately misrepresented the accident report that the Court protected as a “state secret”; it confirmed the plaintiffs’ claim of negligence, while revealing nothing remotely capable of damaging national security.²⁵⁸ In *Jencks v. United States*,²⁵⁹ another instance not distorted by high visibility and political pressure, ominous predictions again proved to have no substance. At issue was the defendant’s attempt to obtain discovery of testimony that trial witnesses had previously given before the grand jury. Despite warnings from law enforcement experts who predicted catastrophic consequences,²⁶⁰ the Court required disclosure, and Congress subsequently codified the ruling.²⁶¹ The *Jencks* disclosure

²⁵³ Melvin A. Goodman, *Letter to the Editor*, N.Y. TIMES, August 7, 2009.

²⁵⁴ See note xx, *supra*.

²⁵⁵ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

²⁵⁶ See Griswold, *supra* note xxx.

²⁵⁷ 345 U.S. 1 (1953).

²⁵⁸ See FISHER, *supra* note xxx, at 166-69.

²⁵⁹ 353 U.S. 657 (1957).

²⁶⁰ See *id.* at 681-82 (Clark, J., dissenting) (making this point and quoting FBI Director J. Edgar Hoover to same effect).

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obligation has become a staple of criminal practice, routinely followed for the past fifty years. The Republic, of course, has survived. Neither the predicted calamity nor substantial negative effects of any sort ever materialized.

Many acknowledge these problems, at least in general terms, but argue that in times of national danger, unilateral executive control of sensitive information is beneficial on balance, or that any alternative would be worse. The next Part turns to that question.

V. Toward Information Democracy

Debates over access to national security secrets – whether they concern the broad principle or just a particular document – ultimately center on conflicting judgments about competency. Is the executive branch, with all its imperfections, better qualified than any other institution to make the assessments? Can Congress or the courts contribute to better decisions, or will granting oversight powers to those branches put the nation at risk?

Prior to these pragmatic issues is the question of constitutional structure. Advocates of executive power often insist with great conviction that Article II gives the President exclusive authority to control national security information.²⁶² Yet the claim is far-fetched. The Constitution expressly assigns *to Congress* the power to “provide for the common Defence” and “make Rules for the Government and Regulation of the land and naval Forces.”²⁶³ In its leading decision on the classification system, the Supreme Court held that the President has inherent power to protect national security secrets “unless Congress specifically has provided otherwise.”²⁶⁴ Since the beginning of the Republic, statutes enacted pursuant to Article I section 8 have constrained the President’s authority to manage the national defense,²⁶⁵ and the Supreme Court has consistently upheld such laws, most recently in *Hamdan v. Rumsfeld*.²⁶⁶

²⁶¹ 18 U.S.C. §3500.

²⁶² See, e.g., p. xx, *supra* (discussing presidential attempt to veto FOIA amendments).

²⁶³ U.S. CONST., art. I, sec. 8, cl. 1 & 14.

²⁶⁴ *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

²⁶⁵ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 17-20, 73-75, 275-77 (2d ed. 2004) (citing examples).

²⁶⁶ 548 U.S. 557 (2006) (upholding provisions of Uniform Code of Military Justice that precluded President from establishing certain procedures for military commission trials).

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Turning to the decisive prudential issues, this Part examines the relative capabilities of the executive, legislative and judicial branches as arbiters of access to national security information. It then proposes remedies to end executive unilateralism and move the nation toward a workable system of checks and balances.

A. Prospects for Oversight: Institutional Assets and Liabilities

1. *Congress.* Despite the potential benefits of legislative oversight, Congress supposedly has significant shortcomings in the national security arena. It is said that secrets are not safe in congressional hands (they can leak too easily) and that Congress lacks the necessary expertise. Finally, for many observers, political accountability – Congress’s strength – entails (or degenerates into) a low politics of partisanship and pettiness, distorting policy rather than improving it.

The first misgiving, the danger of leaks, has little substance. Secret documents do not simply float around the halls of Congress. Each chamber has an infrastructure and detailed procedures to securely store and handle classified material.²⁶⁷ Congressional staff who need access to classified information must obtain clearances and sign formal nondisclosure agreements;²⁶⁸ there is no reason to consider them less trustworthy than security-cleared employees of the executive branch.

For members of Congress the situation is different. Even when they serve on armed services and intelligence committees, they are not required to hold security clearances, and there has been intense resistance to imposing that obligation, in part because of fear that a clearance process could jeopardize their independence.²⁶⁹ But there is no indication that security breaches emanating from Congress have ever been a significant problem.²⁷⁰ Although the executive branch repeatedly cites the risk of

²⁶⁷ If a document cannot leave a given location, special arrangements for access could be made.

²⁶⁸ KAISER, STRUCTURE, *supra* note xx, at 3.

²⁶⁹ KAISER, PRACTICES, *supra* note xx, at 5-6.

²⁷⁰ KOH, *supra* note 6, at 173. POSNER & VERMEULE, *supra* note 1, at 170, assert the opposite but offer no basis for that charge. An argument in support of it appears in Eric A. Posner & Adrien Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 885 (2007) (“[T]here are many more legislators than top-level executive officials”; therefore “[a]ware of the relative safety that the numbers give them, [congressional] leakers are all the more bold.”) But in tension with this analysis, the article argues that Congress lacks expertise and monitoring capacity because its staff is much smaller than the executive’s. *Id.* at 888. The claim seems to be that Congress is vulnerable to leaks because it is larger than its relevant executive counterpart but lacks expertise and monitoring capacity because it is smaller. The latter size differential is the accurate one, and it applies equally to leaks; any classified document is accessible to far more individuals in the executive branch than in Congress.

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congressional leaks as a reason to withhold information (and the charge is occasionally echoed in academic literature),²⁷¹ leaks almost invariably originate with the executive agencies. The track record suggests that Congress may even be *more* secure than the executive,²⁷² and because any given secret is known to far more executive officials than to individuals on the Hill, leaks from Congress are more easily identified and deterred. In any event, given the protections in place, limited congressional access will not make secrets more vulnerable than they already are.

The charge of incapacity in national security matters is more justified but highly exaggerated. Every administration presses that complaint when doing so suits its purposes, and the public largely accepts the point as self-evident. But intelligence committee staff, some of whom serve for decades, develop specialized knowledge and considerable experience, often more than enough to put them on a par with their counterparts in the executive branch. It is not even accurate to picture Congress and the executive as distinct teams with distinct backgrounds. Intelligence committee staff often are recruited from the executive agencies and vice versa.

Two recent instances are telling. George Tenet had spent almost his entire career in congressional staff positions before President Clinton named him to lead the C.I.A.²⁷³ Porter Goss, his immediate successor, had high-level national security experience only during his seven-year stint as chair of the House Intelligence Committee.²⁷⁴ Yet both were widely seen to have impressive intelligence expertise. They were not transformed from novices into national security authorities the moment they left Congress to join the executive branch.

In any case, whatever Congress's lack of expertise, it remains a mystery why its deficiencies are so widely considered incurable. Members tend to lack expertise because

²⁷¹ See note xxx *supra*.

²⁷² The scarcity of leaks from Congress could, however, be a consequence of its relatively limited access to classified information; executive agencies have many more opportunities to leak.

²⁷³ Tenet served as a congressional staffer for 11 years (4 of them as Staff Director of the Senate Intelligence Committee) before moving to the National Security Council, where he served for two years before being named Deputy Director and then Director of Central Intelligence. See [http://www.sourcewatch.org/index.php?title=George J. Tenet](http://www.sourcewatch.org/index.php?title=George_J._Tenet), visited 8-17-09.

²⁷⁴ Goss served in Army intelligence and the CIA for 11 years following college graduation and left in 1971. After 18 years in the private sector, he was elected to Congress, where he served for 15 years before being named to head the CIA. See <http://www.infoplease.com/biography/var/portergoss.html>, visited 08-17-09. His CIA experience was more than three decades old when he left Congress to lead the agency and was certainly not the primary basis on which he was deemed qualified. To mention Tenet and Goss is not to suggest that their CIA tenures were ideal; both drew harsh criticism. But regardless of whether they were optimally qualified to *lead* the C.I.A., they were widely seen to have solid intelligence expertise.

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their tenure on the intelligence committees is limited. The reason – fear about accumulation of power – is legitimate, but in tension with their need for experience. In striking the balance, Congress has long rejected term limits for other security-sensitive committees, such as Armed Services and Judiciary. And however the term limits issue is best resolved, larger staffs can to some extent offset lack of expertise among members. Instead, Congress has opted for the worst of both worlds, saddling the intelligence committees with the combined burden of small staffs (to limit the danger of leaks) and rotating committee assignments (to prevent members from amassing too much power). The resulting oversight structure is dysfunctional but not beyond repair.

Justified mistrust of Congress in these matters must therefore rest less on concerns about its capabilities, which are solid and easily improved, but more on its incentives, which are highly flawed and very hard to fix. The difficulties, canvassed above,²⁷⁵ broadly center on two problems – incentives to act in bad (non-public regarding) ways and incentives not to act at all. The President’s party has strong reasons to protect the executive branch and help it shield embarrassing information.²⁷⁶ The opposition party should (in theory) be motivated to restrain the administration, for example by challenging unwarranted claims for secrecy and by focusing attention on the liberty costs of accretions of executive power. This is the role that Bruce Ackerman seems to foresee in proposing to grant the congressional opposition special means to obtain classified information and to veto grants of emergency power.²⁷⁷

But the opposition party is also – and more strongly – motivated to win elections. And that goal often imposes different priorities. The opposition may use information access simply to expose embarrassing but inconsequential executive actions – precisely what happened under divided government during the late 1990s.²⁷⁸ Conversely, the goal of electoral success may push the opposition to ignore its national security prerogatives.²⁷⁹ Its optimal strategy may instead be to avoid confronting the President on

²⁷⁵ See p. xxx, *supra*.

²⁷⁶ See Levinson & Pildes, *supra* note xx.

²⁷⁷ ACKERMAN, *supra* note xx, at 85 (“Minority control means that the oversight committees will be not lapdogs for the executive but watchdogs for society.”). Similar though more cautious expectations are expressed in Levinson & Pildes, *supra* note xx.

²⁷⁸ See p. xxx, *supra*.

²⁷⁹ See SCHLESINGER, *supra* note 6, at 252-53 (describing congressional passivity); Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L. J. 931, 946-1004 (1999) (same).

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issues of national security, almost always his safest terrain, in an effort to turn public attention toward a subject more likely to be politically fruitful – precisely what happened under divided government in the years immediately following the 9/11 attacks. Either way, Congress, whatever its capabilities, often will have no appetite for the kind of scrutiny that national security oversight requires.

The challenge for Congress is to serve its institutional interest in sustaining checks and balances, and thus to protect the nation from the dangers of unilateral executive government, in the face of distorting incentives and deficits in expertise. In the emergency powers literature, this difficulty is usually attributed to distinctive features of national security affairs, but such predicaments pervade the modern legislative agenda. Incapacities (lack of time or knowledge) and unwelcome political pressures exist throughout. And Congress, recognizing these obstacles, often finds ways to overcome them – delegating authority to independent agencies and transferring many oversight responsibilities from the committee structure to its own specialized cadre of auditors, the Government Accountability Office.²⁸⁰

Problems arising from incapacity and flawed incentives therefore need not disqualify Congress from playing an active oversight role. When a legislative check is important – as it is for national security secrets – the appropriate response to oversight obstacles cannot be for Congress simply to withdraw from the field. Rather, as in other areas where expertise and incentives are problematic, Congress can craft mechanisms that address its deficiencies and permit accountability to be restored.

2. *The courts.* In the case of judges, oversight raises not only pragmatic doubts but also objections of principle. Congress's political accountability may be a mixed blessing, but critics charge that courts have no political mandate at all. The same feature that many see as a virtue – judicial independence – represents for others the sin of undemocratic power. The concern is heightened, of course, when the safety and even the survival of the nation may be at stake.

Several factors narrow this concern. First, courts have their own mandates, not necessarily political but constitutional – for example, their mandates to entertain applications for writs of habeas corpus, to resolve cases and controversies between individuals, and (by implication) to uphold the rule of law in such cases, by affording some remedy when officials exceed statutory or constitutional bounds. The Court in *United States v. Nixon*, followed just that approach in limiting the President's

²⁸⁰ See 31 U.S.C. §712(1) (2009) (GAO authority to examine all matters relating to disbursement of public funds).

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constitutionally based executive privilege, in order to enable the judiciary to carry out its adjudicative responsibilities under Article III.²⁸¹

Two other points are simpler and should be uncontroversial. First, courts often do have a political mandate, in the form of duties conferred by Congress. FOIA and CIPA are obvious examples. Second, Congress can at any time instruct the courts to do more. Proposals to enlarge the judicial role in national security oversight can be debated in pragmatic terms. But once those proposals are translated into legislation, the legitimacy of the resulting mandate cannot be in doubt. The decisive questions for reform, then, are ones not of theoretical propriety but of workability and practical effects.

A familiar advantage of courts, relative to Congress, is their *independence*. A second strength, seldom appreciated, is their *attention span*. Congress can exercise oversight if it wishes, and when it does, its actions carry a political imprimatur that courts lack. But Congress's incentives do not generate – and usually undercut – motivations to act with regularity and persistence.²⁸² In that regard, courts have a decisive advantage.

Its dimensions are worth making explicit. If courts were self-contained, self-propelled mechanisms, swinging into action when and as they please, they could hardly provide sustained or legitimate checks. Discussions that disparage judicial review sometimes portray judicial oversight as little more than a right of intervention conferred on certain individuals.²⁸³ But “courts” are not just collections of judges. They represent an institutional practice, involving parties who present specific complaints, which are probed, narrowed and resolved through multi-stage adversarial processes. Citizens concerned about official misconduct may or may not get Congress to take notice, but when a judicial forum is available, they are assured that the oversight agency will not have the prerogative to lose interest or move on to the next day's hot topic. The judiciary offers staying power that Congress can seldom match, even on matters that arouse majoritarian concern.

²⁸¹ *United States v. Nixon*, 418 U.S. 684, 707 (1974) (“[A]n absolute, unqualified [presidential] privilege would [impede] the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions[,] plainly conflict[ing] with the function of the courts under Art. III.”)

²⁸² *See* pp. xxx-xxx, *supra*. *Cf.* PALLITTO & WEAVER, *supra* note xx, at 89 (unlike courts, Congress “cannot subject administrators to the level and frequency of scrutiny necessary to systematically discourage abuse”).

²⁸³ *E.g.*, POSNER & VERMEULE, *supra* note 1, at 240-244 (analyzing “institutional features of the judiciary” solely in terms of selection process and motivations for individuals who hold judicial office); Tushnet, *supra* note 1, at 2679 “[j]udges rarely have the background or the information that would allow them to make sensible judgments”).

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Closely related is the judicial *capacity for detail*. Courts often cannot see, or do anything about, “the big picture.” But they are skilled at examining narrow issues in depth. Congress itself is well aware of courts’ superior attention span and aptitude for specifics; it often delegates oversight functions to the judiciary, to take advantage of this ability to consider discrete questions in a sustained way.²⁸⁴

Two of the principal difficulties for courts are counterparts to their advantages – political insulation and inability to address the big picture. The other major concerns are that they lack expertise and are vulnerable to leaks – assumptions that figure prominently in *United States v. Reynolds*,²⁸⁵ the 1953 decision establishing a broad state secrets privilege, and *E.P.A. v. Mink*,²⁸⁶ the 1973 decision barring judicial review of classified material under FOIA. Many lower courts continue to make the same assumptions, treating them as self-evident. They seldom note that subsequent statutes overruled *Mink* and transformed the environment that prompted the Court’s fears in *Reynolds*.

Since CIPA’s enactment in 1980, judges have often found themselves deeply immersed (and occasionally drowning) in classified material. Document-protection measures have been tested and fine-tuned, without a single recorded mishap. To maximize efficiency and legitimacy, adversarial procedures have been approximated, with the participation of security-cleared defense counsel. Judges, aided by counsel and special masters, have sifted and evaluated reams of classified material, assessing risks, pinpointing sensitive details, and encouraging redactions or substitutions, again with no indication that the process or the outcomes have ever compromised the nation’s security.²⁸⁷

That said, CIPA provides only a partial test of concerns about courthouse security and judicial expertise, because the prosecution can use its charging discretion to insure that the most sensitive matters are never exposed to CIPA processes. FOIA has broader scope, and most importantly, the choice of what classified material to subject to oversight is not under government control from the outset. Thus, FOIA provides a window into judges’ capacity to handle *any* classified material safely and constructively.

²⁸⁴ Examples include the Tort Claims Act and the Administrative Procedures Act. See PALLITTO & WEAVER, *supra* note xx, at 106-07 (Congress transfers oversight to courts, to “make the oversight process more enduring and comprehensive”).

²⁸⁵ 345 U.S. 1 (1953).

²⁸⁶ 410 U.S. 73 (1973).

²⁸⁷ See pp. xxx-xxx, *supra*.

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In that regard FOIA must be counted a success on many fronts. It has exposed self-interested secrecy and made available mountains of improperly classified material. At the same time, there is no known national security damage attributable to such disclosures, and no record of unintended leaks attributable to FOIA review. Those achievements are tempered, however, by the fact that judges typically use FOIA powers cautiously. Current FOIA practice cannot definitively determine whether robust judicial oversight would produce similar benefits on a wider scale or instead generate significant national security costs (or both).

FOIA nonetheless moves the debate about expertise out of the domain of abstraction into the setting of concrete disputes over specific documents. The lessons of that experience are mixed. In most situations, judges do not believe they have the capacity to determine *de novo* whether material is properly classified. The 1974 Congress thought otherwise, but we cannot dismiss the views of the judges themselves; they are, of course, experts in what they themselves know. On the other hand, judges have their own self-interested reasons to avoid confronting the national security establishment. They may therefore overestimate the relevance of their conceded lack of national security expertise.

Indeed, the debate about expertise has been dominated by a misconception. To be sure, judges (with rare exceptions) have no specialized training in intelligence analysis. That fact is routinely cited as the decisive objection to any active judicial role. Yet the observation is largely beside the point.

Judges have no particular training in many, perhaps most, of the subjects they are called upon to adjudicate. Typically, they know nothing about how to perform open-heart surgery, build bridges, design machinery, or diagnose mental illness. But they are proficient in listening. They are skilled in learning from professionals and critically assessing divergent claims. Whether the topic is familiar or arcane, judges specialize in separating well-grounded from self-serving but flimsy contentions. Appropriate decisions about access to sensitive information are no different; they require much more than just an understanding of national security effects. Ultimately they require an ability to assess rival contentions, an appreciation for transparency and robust public debate, and an instinct for fine-grained solutions that leave maximum feasible scope for all competing values.

Intelligence analysts have no claim to excel in these qualities – far from it. If anything, their background and training steer them away from developing such skills. The pervasive assumption that judges lack expertise is therefore either exaggerated or

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irrelevant. In several of the crucial abilities – the *generalist's perspective* and the *capacity to arbitrate between interests in conflict* – judges are the quintessential experts, while the national security professionals have no expertise at all.

Military and foreign policy matters are distinctive in another respect, because they can involve very high stakes. Courts and commentators commonly imagine that disclosure carries grave risks for any classified information,²⁸⁸ but this is not the case, even in the eyes of the classifying officers. Classification at the “confidential” level indicates only that disclosure could cause “damage,” *not* “serious” damage.²⁸⁹ The costs of error can indeed be enormous, however, when information deserves to be classified “top secret.”

Even so, the concern about imprudent disclosure cannot justify the complete suspension of accountability, because unwarranted secrecy can be extremely harmful as well. Judges are aware that unwarranted disclosures may have grave consequences; they can and should be instructed (superfluously) to take that danger into account. It is the other side of this coin that needs emphasis – that national security experts have powerful incentives to seek *unjustified* secrecy, that unjustified secrecy poses a grave threat to the national welfare, and that only the judiciary has the independence and skill necessary to reach appropriate, narrowly tailored conclusions about when and where concealment is needed. Error costs should influence judgment – of course. But they cannot be permitted to displace it, because oversight is essential to insure that official claims are truly based on expertise, not on self-interest.

3. *Inter-Branch Comparative Advantage.* The executive holds the lion’s share of the nation’s national security expertise, and it is uniquely well positioned to appreciate “the big picture” in military matters and foreign affairs. On the debit side, the executive branch has an exceptionally myopic perspective. National security concerns are uppermost (appropriately so), but other important objectives, such as nurturing a well-informed public, normally do not further executive interests and thus command little attention. Disclosure may serve agency goals – and therefore become more likely – when revelations (usually selective) can push public opinion toward one side of a debated issue. But transparency as such is not an interest that national security officials can be expected to value, even when they make secrecy decisions in good faith.

²⁸⁸ *E.g.*, *CIA v. Sims*, 471 U.S., at 178-79.

²⁸⁹ “Top-secret” indicates that disclosure could cause “exceptionally grave damage,” and “secret” indicates a potential for “serious” damage. *See* Exec. Order 13526, *supra* note xx, at §1.3.

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And often (more often than not, according to many specialists) secrecy decisions are not made wisely or in perfectly good faith. Executive officials lack objectivity. Intimate involvement with the issues, the primary source of their expertise, almost inevitably undermines impartiality. Compounding that problem, which pervades public administration, national security officials have a multitude of improper reasons to keep information secret. Secrecy shields error and inefficiency, preserves freedom of action, protects agency turf, enhances status vis-à-vis other bureaucrats or outsiders, and prevents public interference with unpopular or controversial policies. Inappropriate incentives are so many and so strong that credible observers often consider unnecessary classification to be the dominant pattern, not the isolated exception.

Congressional capabilities could offset some of these weaknesses. With its staff and supporting agencies, Congress as an institution is a far different body from the mercurial, unsophisticated amateur portrayed in the common caricature. Congress can bring to bear significant expertise, and through its oversight committees, it sees much of the big picture. Its detachment from operational involvement gives it a degree of objectivity that executive officials lack, while its preoccupation with constituent interests and with the full menu of legislative business gives it accountability, political legitimacy and a broad, generalist's perspective. Detracting from these strengths, however, are Congress's distorted incentives, which impair oversight during divided and unitary government alike.

Courts offer different assets and liabilities. They can claim no national security expertise and typically cannot see the big picture. They arguably lack political legitimacy (at least in some contexts) and are entirely unaccountable. But these endlessly-repeated points convey only part of the story. First, as CIPA experience demonstrates, the adversary process goes far toward mitigating judges' familiar deficiencies in national security expertise. Second, in many of the capabilities required for sound decisions about secrecy, courts are superior to the executive, to Congress or to both.

Courts, together with Congress, have two essential qualities that the executive lacks – a generalist's perspective and the capacity to arbitrate between security needs and public-governance values. The manner in which courts mediate this conflict differs from that of Congress, as judges lack political accountability and sensitivity to voter preferences. But in terms of independence and objectivity courts outrank both the executive and legislative branches. Judicial mechanisms also are less likely to slight the interests of politically weak minorities and are more fine-grained, reflecting courts'

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greater attention span and capacity for detail. Most importantly, the last two qualities, along with judges' comparatively few distorting incentives, increase the likelihood that oversight functions assigned to the courts will actually be performed.

B. Implementing Reform

Proposals to attack over-classification through reform within the executive branch are a perennial favorite, because they escape any need to question conventional wisdom's strong assumptions about executive expertise and outsider incompetence. Despite repeated attempts, however, that path has produced few improvements.²⁹⁰ Further steps in that direction are worth considering,²⁹¹ but the core of the problem is the absence of strong, fully independent checks.

1. Strengthening Congress. Expressions of dismay over the relentless growth of an "imperial presidency" and pleas for restoring a strong Congress are an old story. But the legions of critics devoted to this view focus almost exclusively on executive *actions* – defense measures, foreign policy and uses of military force.²⁹² Congress itself and most advocates of its importance either ignore the need for checks on executive secrecy or acquiesce in the incessant but unsupportable claim that information management is an exclusive presidential prerogative.²⁹³ The crucial first step in any reform effort is to recognize *information access* as a distinct national security domain that requires a distinct set of formal checks and balances.

Through the power of the purse and other sources of leverage, Congress can often succeed in getting information for itself, or at least for its principal leaders. The

²⁹⁰ See generally PRESIDENT'S COMM'N, *supra* note xx; PIDB Report, *supra* note xx.

²⁹¹ For example, a stronger ISCAP would enhance internal executive branch review. A general treatment of internal checks, not focused on classification, is Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). See also Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556 (2008) (suggesting means to monitor without public disclosure, such as appointment of opposition party leader to Cabinet).

²⁹² E.g., KOH, *supra* note xx; JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993).

²⁹³ Two leading critics of presidential dominance, Schlesinger and Moynahan, discuss secrecy at length, but largely resign themselves to urging executive restraint rather than seeking formal checking authority for Congress. SCHLESINGER, *supra* at note x, at 371-76, 445-56; MOYNAHAN, *supra* note x, at 217. KOH, *supra* note xx, at 200-02, notes the importance of public access to information and suggests useful steps to strengthen FOIA, but his brief discussion focuses on assuring access for congressional leaders on a confidential basis. ACKERMAN, *supra* note 6, at 84-86, discusses public access more specifically but likewise focuses primarily on Congress's ability to get information for itself. See p. xxx, *infra*.

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same tools can also be used, though with more difficulty, to force broader disclosure. But final authority over public access to information rests with the executive branch.²⁹⁴

FOIA is an important – though ambiguous – exception to this hands-off attitude. In instructing federal courts to determine *de novo* whether information is properly classified, the 1974 Congress emphatically asserted, and then delegated, its information-access prerogatives, even to the extent of overriding a presidential veto. But subsequent Congresses stood by as courts diluted or ignored the *de novo* mandate.

Judicial reluctance to respect the *de novo* standard reflects some of the inherent deficiencies of the courts – their weak claim to legitimacy in matters touching national security and their inability to muster political support in any confrontation with the executive. To the extent that the legislature is better positioned in those respects, the 1974 Congress probably erred in delegating the entire checking function in this area to the judiciary, retaining no oversight tools for itself in matters concerning public access to information. Yet it would be even less prudent for Congress to chose the opposite approach, taking on the entire responsibility and leaving the courts no role, for then Congress's deficiencies – its short attention span and limited appetite for detail – would make item-by-item declassification review even less effective than it is under FOIA.

Successful reform must mobilize Congress's strengths without giving free reign to its often-unhelpful motivations. Two distinct issues need to be considered – the flow of information to the public and the flow of information to Congress itself.

Even complete elimination of unnecessary secrecy will not meet the need for effective oversight because vast amounts of information are properly classified and inevitably cannot be made public. For such information, congressional access is crucial, but under existing arrangements it is by no means assured. The heart of any response to this problem is for members of Congress *and their constituents* to recognize that the executive information monopoly is profoundly damaging to our system of checks and balances.

One obvious remedy is for Congress to strengthen its oversight structures – for example, by expanding intelligence committee staffs, permitting longer terms of service for committee members, and guaranteeing the right of members to consult with their security-cleared assistants. Another straightforward step is to reinforce safeguards for whistleblowers who turn to Congress when the classification system is used to cover up inefficiency, fraud, and violations of constitutional rights. Under existing law, such

²⁹⁴ Congress' only existing power to declassify is so cumbersome it has never been used. *See* p. xxx, *supra*.

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whistleblowers have scant protection.²⁹⁵ In 2007, bills to remedy the defects were passed by large bipartisan majorities in both houses of Congress but were not reconciled and thus failed to become law.²⁹⁶ New attempts are being made,²⁹⁷ but despite ostensible “change” in the White House, the bills still face lukewarm public support and the possibility of a presidential veto²⁹⁸ – all driven by the dangerous myth that national security information must remain under exclusive presidential control. The failure to provide effective protection for intelligence community employees who, without breaching secrecy, merely alert appropriate members of Congress to matters that warrant their oversight is inexcusable and profoundly undemocratic.

The other area of concern – *over*-classification – is more difficult but fundamental. Without displacing the checking capacity of the FOIA courts, Congress must assure for itself a meaningful role in decisions about when information can be made public. Two issues require attention – the mechanisms for forcing disclosure and the underlying rules for classifying information in the first place.

With respect to the latter, Congress has long been urged to codify the standards and procedures that govern the secrecy system.²⁹⁹ In doing so, Congress could easily tighten the classification criteria – for example by clarifying “sources and methods” to preclude classification of open-source material, and by narrowing such manipulable categories as “critical infrastructure.”

A more controversial step would be to require classifiers to weigh the public benefits of disclosure. Balancing was mandated in a 1998 bill that had strong bipartisan support,³⁰⁰ but it drew forceful and ultimately decisive opposition from the Clinton administration, precisely on the ground that it would give teeth to FOIA review and thus

²⁹⁵ See p. xxx, *supra*.

²⁹⁶ H.R.985, S.274, 110th Cong., 1st Sess. (2007); see http://www.sourcewatch.org/index.php?title=Whistleblower_Protection_Enhancement_Act_of_2007.

²⁹⁷ H.R.1507, 111th Cong. (2009); see <http://www.govtrack.us/congress/bill.xpd?bill=h111-1507&tab=committees>.

²⁹⁸ See Whistleblower Protection Enhancement Act: Hearing before H. Comm. on Oversight and Government Reform, 111th Cong., 1st Sess., at 3 (2009) (statement of Michael German), <http://oversight.house.gov/documents/20090513184145.pdf>.

²⁹⁹ *E.g.*, PRESIDENT’S COMM’N, *supra* note xx, at 13-16; SCHLESINGER, *supra* note 6, at 365-66.

³⁰⁰ S.712, Secrecy Reform Act of 1998, § 2(c)(1), 105th Cong., 2d Sess.; S.REP. 105-258 (1998).

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violate the alleged principle of exclusive presidential control.³⁰¹ If balancing is considered too cumbersome for all initial classification decisions, it can more easily be required at the later stages where selected classification actions are challenged.

Cynics may doubt the value of such steps, because strong preferences for secrecy can easily override any verbal formula. But formal criteria do effect initial classifications, and their impact can be considerable in subsequent intra-agency, inter-agency and FOIA review. The current, highly permissive criteria make it difficult even for a skeptical reviewer to conclude that material was not “properly classified.” Narrower standards for initial classification would invigorate the checking function at later stages.

Congress must also strengthen its capacity to override executive secrecy decisions that are unjustified and self-serving. Bruce Ackerman has made one of the few concrete efforts to address this crucial problem. He proposes that during a state of emergency, congressional leaders of both parties should have access to all relevant classified material, and the opposition party, even when a minority in Congress, should have power to decide how much information could be shared more broadly, both within Congress and publicly.³⁰² Congressional leaders already have considerable access to classified information, but they have not managed to translate that access into an effective check, in part because of their inability to mobilize public opinion or even their own congressional caucus by sharing their knowledge. But Ackerman’s solution – in effect conferring declassification authority on opposition leaders – is unrealistic, not just because it is a political nonstarter but more basically because opposition incentives are so strongly skewed in favor of distraction and scandal-mongering (when those motives do not dictate the opposite – tactical obeisance to whatever a popular President proposes).³⁰³

³⁰¹ Letter of Samuel R. Berger to Hon. Lee Hamilton, Sept. 17, 1998, <http://www.fas.org/sgp/clinton/berger998.html> (“balancing test could encourage judicial intrusion on the President’s constitutional authority”).

³⁰² ACKERMAN, *supra* note x, at 85. On issues requiring congressional authorization, “[l]egislators will have the fundamental right to pass on the main points to the public as they debate and explain their votes.” *Id.* at 86. Ackerman does not specify whether this right of disclosure, in effect a prerogative to declassify, should be given to individual legislators or should require wider support.

³⁰³ Ackerman posits that minority-controlled oversight committees will be “watchdogs for society. They will have a real political interest in aggressive and ongoing investigations into the emergency regime.” *Id.* at 85. Unfortunately, recent experience contradicts these sanguine assumptions, except with respect to “aggressive . . . investigations,” which have been common but typically far from constructive. *See* p. xxx *supra*.

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A variation on Ackerman's idea might be to allow declassification by the opposition, but only when it can muster significant support across the aisle. An authority of this sort could counteract in any instance of executive overreaching sufficiently extreme for members of both parties to support a public rebuke. But such cases would be rare. Declassification by congressional coalition, like the cumbersome power currently lodged in the Senate and House as a whole, would almost always be stymied by the President's party. In any event it could not meet the need for an ongoing check on the thousands of significant classification actions taken every working day.³⁰⁴

A more promising option would be to build on the existing Interagency Security Appeals Panel (ISCAP). ISCAP now offers a check on turf protection and myopia within the classifying agency, but it is not structured to handle a significant volume of appeals, and it cannot provide a fully independent check because all its members are drawn from the executive branch. With minor modification, a successor to ISCAP (call it FDC, a Federal Declassification Commission) could remedy these defects. Additional staff would permit FDC to handle many times the existing ISCAP caseload. The crucial step, to create an independent version of ISCAP, would be to reserve seats on the panel for appointees drawn from intelligence-committee or GAO professional staff, to be designated by congressional leaders of both parties.³⁰⁵

A body already in place, the Public Interest Declassification Board (PIDB), has a similar composition (five members appointed by the President and four by the congressional leadership) but only advisory functions. The proposed FDC would in effect transfer ISCAP's declassification powers to the existing but more independent PIDB. As a mixed executive-legislative panel, FDC would supply national security expertise without complete subservience to the President and would afford political accountability without the unhelpful incentives that are often uppermost for members of Congress.

To be realistic, one could not expect such an agency to defy the President when executive branch preferences are strongly held. The votes controlled by the President and his party would preclude any such outcome. An FDC therefore should not supplant recourse to the judiciary through FOIA. But in thousands of noteworthy but less politically fraught cases, FDC could furnish independent yet expert judgment,

³⁰⁴ See note xx *supra* (23 million documents newly classified each year, i.e. 88,000 per working day).

³⁰⁵ Commission members would be presidential appointees, but the requirement of Senate confirmation would give congressional leaders a decisive say in their selection.

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providing considerable pressure for transparency. As is, ISCAP appellants have had success rates of up to 87%.³⁰⁶ FDC presumably would have at least as much impact.

2. *Strengthening the courts.* Existing barriers to judicial oversight are as much psychological as doctrinal. FOIA courts have a mandate for *de novo* review that most judges simply refuse to exercise. Nonetheless, change in the law remains essential, both for its direct effect on judges' authority and for its indirect effect on their willingness to employ it.

State secrets privilege is the obvious place to start. In its current form it is a glaring anachronism, defined by a fifty-year-old decision that is painfully out of step with modern experience and modern jurisprudence bearing on its central concerns – safe handling of sensitive documents; the national security capacities of the judiciary; and the obligation of courts to enforce the rule of law.³⁰⁷ And regardless of other steps to enhance information oversight, reform of the privilege remains essential because the current privilege too often blocks any remedy for individual victims of executive misconduct.

The needed reforms are mostly straightforward, requiring little more than to import into civil cases the tools already well-established under the Classified Information Procedures Act. CIPA experience should make those steps uncontroversial; indeed it is hard to see how resistance to reform can rest on anything other than an inexcusable desire to insulate executive officials from accountability, even when national security risks can be safely eliminated. Game-changing but simple reforms include *in camera* inspection of allegedly privileged material; adversarial scrutiny of alleged secrecy dangers, with the aid of security-cleared counsel; and reliance on redaction, substitution and protective orders to minimize the impact of justified secrecy on litigation of potentially justified claims.³⁰⁸

The CIPA analogy breaks down, however, when national security material is necessary for fair litigation of a claim and cannot be replaced by an adequate substitute. In these situations under CIPA, the government loses, and the prosecution must be dismissed. But an equivalent approach in civil litigation (resolving against the government any disputed issue to which the privileged evidence relates) could create almost limitless possibilities for opportunistic suits.

³⁰⁶ INFORMATION SECURITY OVERSIGHT OFFICE, 2007 REPORT TO THE PRESIDENT 19 (May 30, 2008).

³⁰⁷ See p. xxx, *supra*.

³⁰⁸ See, e.g., S.2533, 110th Cong., 2d Sess. (2008); H.R.5607, 110th Cong., 2d Sess. (2008); H.R.984, 111th Cong., 1st Sess. (2009).

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One approach to this dilemma would be to retain the current solution – when evidence is truly privileged and no adequate substitute is available, the government gets to maintain secrecy and prevail in the litigation as well.³⁰⁹ Though this approach preserves one of the most troubling features of the existing privilege, its impact would be much diminished, because *in camera* inspection, redaction and substitution greatly narrow the occasions on which an unavoidable conflict can arise. An alternative – more balanced, but inevitably vague – would be for courts to adapt remedies to the equities of the case,³¹⁰ for example dismissing suits that appear flimsy, but resolving disputed issues against the government when – as in many rendition cases – there is compelling evidence of official abuse.

FOIA poses a different challenge, because Congress already tried an obvious and seemingly sufficient remedy, mandating *de novo* review but to little effect. Yet one weakness built in from the start was legislative history emphasizing that *de novo* review should be combined with “substantial deference” to agency claims of national security risk. Over time, “substantial” deference has grown to “utmost” deference, and the *de novo* standard, a textual mandate, usually loses out to a strong deference requirement extrapolated from legislative history. If the judiciary is determined to be a passive overseer, what more can be done?

Yet it need not be futile for Congress to try again, re-emphasizing the importance of oversight and the reasons to take national security claims with *both* deference and skepticism.³¹¹ More concretely, tight standards for initial classification and a “balancing” requirement would give FOIA judges more room to find that information was not properly classified at the outset.³¹²

Such changes, of course, would make FOIA even more time-consuming and expensive than it already is. Critics of transparency litigation cite FOIA’s cost (\$400 million annually) as a big strike against it.³¹³ But that figure, the cost of FOIA demands

³⁰⁹ *E.g.*, S.2533, *supra* note xxx, §4055.

³¹⁰ *E.g.*, H.R.5607, *supra* note xxx, §7(d) (when nonprivileged substitute is unavailable, “the court shall weigh the equities and make appropriate orders in the interest of justice”).

³¹¹ *Cf.* H.R.5607, *supra* note xxx, §6(c) (in resolving state secrets claims, “court shall weigh testimony from Government experts in the same manner as it does . . . any other expert testimony.”).

³¹² If “balancing” is considered unwieldy at the time of initial classification, Congress could require FOIA judges to release information, though “properly classified” at the outset, when the interest in transparency is sufficiently strong.

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across the entire government, is only a fraction of the expenditures for maintaining secrecy just within the publicly reporting national security agencies (\$10 billion annually),³¹⁴ and little more than a rounding error in the budget of the entire enterprise that FOIA monitors (almost \$4 trillion annually).³¹⁵

Ultimately, however, any effort to make FOIA more effective will require a substantial process of education in the federal judiciary. Tunnel vision leads most judges to see only the value of national security expertise and to discount their own strength in other essential skills. Of course, judges are not alone in this myopic outlook; most commentators on the secrecy problem make the same mistake. The problem has deep psychological roots and is not easy to fix. But clearly Congress can make a start.

3. *A specialized national security court?* One way to restrain unjustified FOIA deference would be for Congress to refer Exemption 1 claims to a special court, perhaps one modeled on the court established under the Foreign Intelligence Surveillance Act (FISA). FISA provides a mechanism to issue warrants for wiretapping and electronic surveillance of suspected foreign agents. Instead of directing applications for these warrants to ordinary magistrates and judges, the statute creates a new entity to entertain such applications – a court comprised of Article III judges designated by the Chief Justice to serve rotating seven-year terms.³¹⁶ The rationale for a specialized court was largely logistical, reflecting pre-CIPA concern with the risk of leaks from insecure courthouses.³¹⁷ The FISA court nonetheless represents an ingenious way to reconcile independence with expertise. FISA judges see enough classified material to develop familiarity and self-confidence, but because they retain an ordinary caseload and serve limited terms, they don't completely lose the comprehensive perspective of the generalist. Creating a similar panel to address information-access issues (or using the FISA court itself) could enhance both the ability and willingness of judges to exercise more assertive oversight.

³¹³ Note, *supra* note xxx, at 1564.

³¹⁴ See INFORMATION SECURITY OVERSIGHT OFFICE, 2007 REPORT TO THE PRESIDENT (May 30, 2008), at 28.

³¹⁵ Office of Management and Budget, Budget of the U.S. Government, Fiscal Year 2010, Updated Summary Tables (May 2009), <http://www.gpoaccess.gov/usbudget/fy10/pdf/summary.pdf> (projecting \$3.998 trillion expenditure for fiscal 2009 and \$3.591 for fiscal 2010).

³¹⁶ 50 U.S.C. §1801 *et seq.*

³¹⁷ When FISA was enacted in 1978, the judiciary had little familiarity with handling classified material. See p. xxx, *supra*.

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A specialized court would, however, pose practical difficulties and one large problem of principle. On the practical level, Exemption 1 claims often overlap with other exemption arguments.³¹⁸ Although the Exemption 1 issue could be severed and referred to the special court, that approach would add further complexities to an area of litigation that is already far from simple. Yet the alternative – transferring the entire FOIA case to the special court – would encourage strategic behavior by litigants and leave non-classification issues to be resolved by specialized national security judges.

The more fundamental concern is that a specialized court for national security matters would represent an abrupt break with American jurisprudential traditions and our commitment to a judiciary of fully independent generalists. To date, courts of limited jurisdiction have largely dealt with technical matters such as patents, trademarks and bankruptcy.³¹⁹ We have not given them power to resolve disputes implicating bedrock imperatives of democracy – privacy and public order versus free speech, liberty and fair procedure versus effective law enforcement, or – in the present context – national security versus transparency, accountability and the rule of law.

What about the FISA court itself? Proposals to create a national security court in other contexts (e.g., preventive detention) sometimes cite FISA as precedent,³²⁰ but the example is misleading. The sole authority entrusted to the FISA court is to issue search and surveillance warrants, a proceeding that has always – for more than 200 years – been secret and *ex parte*, even in ordinary law enforcement. If by a court we mean a tribunal using adversary processes to resolve disputes between two or more opposing parties, then the FISA “court” is not a court at all. The possible benefits of a FISA-type panel in terms of more self-confident oversight are worth exploring, but the issue must be approached with caution.

A less radical solution would be to continue assigning Exemption 1 cases to ordinary Article III courts, but draw prominent attention to the easily forgotten point that national security expertise is only one of the ingredients of sound decision-making. Judges usually need to be reminded that equally necessary attributes are impartiality, an appreciation for transparency, and an ability to provide a fine-grained accommodation of conflicting claims. The message must be communicated to judges – and to the public at large – that although courts lack national security expertise (and other sorts of expertise

³¹⁸ See note xxx, *supra*.

³¹⁹ See CHARLES ALAN WRIGHT & MARY KAY KANE, *THE LAW OF FEDERAL COURTS* (2002).

³²⁰ E.g., Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007.

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relevant to cases they decide), they represent our preeminent repository of the indispensable expertise in providing objective, narrowly tailored reconciliation of the competing values – security and transparency – on which the survival of a healthy democracy depends.

VI. Conclusion

Meaningful participation in public affairs requires access to information. Yet in the domain of national security, we give executive officials largely unchecked power to control whatever information they choose to consider sensitive. In an area of vital importance, we have thus disconnected part of the essential machinery of democracy.

Although our law and the broader culture have long accepted the executive information monopoly, new developments permit its reach to expand exponentially. The lethal combination of smaller, cheaper weapons of mass destruction, less complex delivery systems, and less deterrable adversaries creates an environment of heightened, never-ending danger. Meanwhile, perceived national security priorities multiply, from the population centers of the Cold War to bridges, courthouses, and many of the infrastructures of everyday life, including computer networks and data storage centers. Supposedly vital national assets can now be attacked from any cyber café in the world. Secrecy is nothing new, but its potential for eroding the structures of democracy is growing, even under a President ostensibly committed to greater transparency.

Prompted by these developments, discomfort with the executive monopoly is increasingly evident in judicial decisions and legislative initiatives. But these acts of resistance remain halting and uneven, hobbled by the mystique of executive expertise and the myth of outsider incompetence. In fact, many capabilities necessary for sound secrecy decisions are notably absent in the executive branch; they can be found only in Congress or the courts. Properly harnessed, congressional and judicial expertise can subject large areas of executive action to accountability and the rule of law, without exposing the nation to greater danger. To the contrary, robust checks and balances – the machinery of a genuine information democracy – are essential for safeguarding our national security effectively over the long-term.