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Chapter 3

Oversight of national security secrecy in the United States

Stephen Schulhofer*

Introduction

In a constitutional system, the legislature is expected to play an active role in formulating policy, and the courts are expected to play an active role in protecting individual rights. But nonetheless, where issues affecting national security are concerned, executive officials in virtually all constitutional democracies typically exercise unchecked power to conceal information that is essential to the effective exercise of those legislative and judicial functions. In its actual practices, the United States (US) largely conforms to this pattern of de facto executive dominance, even though its formal laws grant substantial power to regulate secrecy to Congress and the courts.

Although some secrecy in national security matters is appropriate and inevitable, unilateral executive control over decisions whether to impose secrecy is not. American law provides five separate processes for overriding executive secrecy judgments. Along with semi-independent review within the executive branch and oversight by Congress, three distinct bodies of law grant a checking function to the courts: the Classified Information Procedures Act (CIPA, applicable in criminal cases), the state secrets privilege (SSP, applicable in civil suits), and the Freedom of Information Act (FOIA, a statute that creates a free-standing cause of action to demand disclosure of information held by the government). These five systems differ considerably in the degree to which they involve deference to the executive, or – in contrast – active, independent judgments about the need for secrecy. American law thus provides broad scope to compare competing approaches. In addition, where American adversary procedures for the review of executive-branch secrecy are at their height (in CIPA), they permit full-fledged representation by security-cleared counsel, a more vigorous checking capability than appears possible through the ‘special advocate’ approach

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favored in the UK. This chapter describes these American oversight systems and assesses them by focusing on the expertise and incentives of the participants in each.\footnote{For more detailed discussion of these issues, with more detailed citations, see Stephen J. Schulhofer, Secrecy and Democracy: Who Controls Information in the National Security State?, available at http://ssrn.com/abstract=1661964.}

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 the knowledge and experience necessary to make sound judgments about when to maintain secrecy in national security affairs. Congress has considerable expertise in military, foreign policy and intelligence matters. While judges typically do not, courts have solid institutional capacities to elicit 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 markedly deficient. Courts therefore have an indispensable place in a sound system for making information-access decisions. They offer not only the obvious advantage of independence from self-interested incentives, but also the rarely noticed point that they are in fact superior in some essential forms of expertise.

In one domain of American practice, criminal cases governed by CIPA, US courts routinely provide active oversight of classification decisions, an experience that demonstrates the capacity of the CIPA model to afford a fully adversarial and yet workable judicial check.

This chapter builds on this adversarial judicial model and integrates it with a more robust legislative role, in order to propose a framework for effective oversight of executive branch judgments about access to national security information.

Section 1 describes the existing executive secrecy apparatus. Section 2 examines the present structure of legislative and judicial oversight, and Section 3 assesses the extent to which Congress and the courts currently are able to prevent unjustified secrecy. As Sections 2 and 3 show, these outside institutions have considerable legal powers, but they now operate
under self-imposed informal constraints; their willingness to thwart improper secrecy is episodic and feeble. Section 4 develops an oversight framework more consonant with constitutionalism—a framework that combines robust national security safeguards with maximum feasible transparency and accountability.

1. The Executive Secrecy Apparatus

Despite the Wikileaks phenomenon and the more selective revelations accomplished by journalists and whistleblowers, the executive secrecy system remains powerful and largely effective.

For many, this is exactly as it should be. The fact that individuals outside the executive branch cannot nullify classification decisions simply reflects the supposed fact that outsiders 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. In fact, the executive secrecy apparatus is purposely designed for over-classification. Officials are required to disregard many relevant interests in transparency, and they have largely unchecked freedom to impose secrecy, when doing so serves their political and personal self-interest, even if such secrecy is not called for by national security concerns. This section describes the framework for initial classification decisions and the available systems for review of those decisions by officials within the executive branch.

1.1 Initial Classification

In the American Government, millions of individuals are allowed to impose secrecy on documents in which they insert classified material. An executive order promulgated by the President provides that information controlled by the US Government can be classified whenever its disclosure ‘reasonably could be expected to cause damage to the national

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security’. The order prohibits classification to ‘conceal violations of law, inefficiency or administrative error’. Of course, that restriction can easily be ignored in practice. But even on paper, the regime doesn’t work against over-classification and in fact serves to enable it.

One reason for this is that classifiers are charged with reducing possible national security damage to the lowest achievable minimum, suggesting zero tolerance for risk. The costs of secrecy (not only for society at large but for the classifying agency itself) are expressly excluded from the calculus. The executive order provides only one avenue for taking into account ‘the public interest in disclosure’. For the ‘exceptional’ cases in which transparency might be called for, public-interest balancing is permitted, but 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. Thus, public-interest balancing cannot occur at the time of initial classification, and in cases that are not ‘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’. Thus, the American 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.

1.2 Oversight Within the Executive Branch

In an effort to counterbalance the over-classification dynamic, the executive branch has instituted several mechanisms to push back. All of them, however, are structurally weak, and they have had little impact. For example, the procedure for automatic declassification,

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4 Id. at §1.7(a)(1).
5 Id. at § 3.1(b).
7 Id. at 13–14.
normally after 10 or 25 years, is subject to numerous exceptions. Any individual can request mandatory declassification review (MDR) within the classifying agency. MDR amounts to a non-judicial version of the Freedom of Information Act and has become an attractive alternative to FOIA, because it is generally faster. Yet MDR declassification remains trivial in relation to the volume of classified material. The pages declassified in 2008 represent less than 1 per cent of the pages classified that year.

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. 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 slender.

By almost every measure, oversight within the executive branch affords only a slight counterweight to the built-in preference for over-classification. The operational reality is simply that ‘agencies face very little internal pressure to minimize secrecy’. Reinforcing that difficulty, the prerequisite to well-founded government action – an effort to balance benefits against costs – 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. Absent pressure 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 section examines the outside sources of countervailing pressure.

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8 Exec. Order 13526, supra note 3, at §3.3(a), (b).
9 INFORMATION SECURITY OVERSIGHT OFFICE, 2008 ANNUAL REPORT TO THE PRESIDENT (Jan. 12, 2009) [hereinafter ISOO 2008 REPORT], at 9–11.
10 Exec. Order 13526, supra note 3, at §3.5.
11 PIDB REPORT at 14.
12 Id. at 8–12.
2. Checks on the Executive Branch

The executive branch does not have unchallenged control over national security secrets. American 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 disable essential oversight.

The press plays a large but typically overstated 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 officials 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, but 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. Far more often than not, therefore, legal powers to force disclosure become the essential tools that allow the press to do its job. Two institutions have formal authority to pierce the executive information monopoly – Congress and the courts.

2.1 Congress

Congress has formidable tools for obtaining access to classified information. But it often lacks the will to deploy its tools effectively. Though critics of ‘rights-based’ litigation typically consider the political process a preferable source of accountability,14 they often

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14 E.g., Samuel Issacharoff and Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQUIRIES IN LAW 5, 14, 42–44
idealize its potential,\textsuperscript{15} overlooking limitations that can make congressional oversight pallid in national security matters.

Congress controls the intelligence community budget and has substantial influence over amounts spent for particular activities. Under present conditions, however, Congress lacks the practical tools necessary to 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 unitary government (when a single party controls both legislative and executive branches), and even under divided government (when control of the two branches is split between the parties), 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.\textsuperscript{16}

Expenditure levels and the substance of agency activity are understandably the salient areas of national security policy. A third domain – the judgment \textit{whether} to impose secrecy – is at least equally important, because decisions about what the public can know govern its ability to hold the executive branch accountable on budgetary and substantive matters. Yet in this third area of national security policy, congressional oversight is virtually non-existent. Although Congress may press an agency to declassify documents, the decision whether to disclose – the \textit{sine qua non} of public accountability – traditionally has not been subjected to formal oversight at all.

The dangers of this executive monopoly are tempered to a degree by the fact that Senators and Representatives with a ‘need to know’ have considerable (though not unlimited) access to classified secrets. Thus congressional oversight of expenditures and activities does not always occur in an information vacuum. But the information sometimes provided to congressional leaders at best gives 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.’

Executive management of public disclosure therefore places most incentives for legislative oversight under presidential control. Technically, the executive does not oversee itself, but it can regulate what its ostensibly independent overseer (Congress) cares about. As a result, Congress currently does not and cannot supply sufficient countervailing pressure.

2.2 The Courts

Like Congress, the courts have many tools to challenge executive control. But the courts also resemble Congress in another respect, for they are typically unwilling to deploy their checking powers effectively. This section examines the judicial checking function in the three contexts where it arises most often: criminal litigation, civil damage suits, and the Freedom of Information Act.

<\c>2.2.1. Criminal cases

The Classified Information Procedures Act 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) and the security of courthouse quarters where proceedings involving classified material occur.

Under CIPA, when a defendant seeks classified information for pre-trial preparation or for use at trial, the judge reviews the information in a closed pre-trial hearing, to determine if it is relevant. If it is, CIPA permits the government to avoid compulsory disclosure by replacing sensitive information with an unclassified ‘substitution’ – for example, a redacted

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18 Habeas corpus review of Guantánamo detentions has proceeded as a rough version of criminal litigation; judges and counsel for the detainees by and large appear to have had substantial access to the relevant facts. Where the process has fallen short is primarily in two domains. First, the rules of law imposed by the US Court of Appeals have been unjustifiably favorable to the government. Second, even if defense counsel’s access to information has been adequate, public access has been woefully inadequate.
version. But substitution is permissible only when it ‘provide[s] the defendant with substantially the same ability to make his defense’; 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. If the government is unwilling to accept disclosure under a protective order, and if no other remedy will adequately protect defense interests, the judge must dismiss the prosecution.

In a terrorism prosecution, these procedures confront the CIPA judge with a daunting task. A discovery request may require judicial review of thousands of pages of classified material, with difficult judgments to be made on every page about relevancy, substitution and other options for meeting the defense needs. Courts working with CIPA quickly realized that they needed help. The solution most readily available was to insist that members of the defense team obtain security clearance (under the CIPA procedures already in place for clearance of courthouse personnel) and then to provide the classified material to cleared defense counsel under protective order. This approach was successfully used pre-9/11 for vast amounts of material in the “embassy bombings” trial, in order to narrow the issues in dispute and enable the judge to make a well-informed ruling after an adversarial presentation; it is now the common practice.

Cleared counsel is not a ‘special advocate’ in the UK conception – that is, a lawyer appointed by and responsible to the court. Cleared counsel is the defendant’s lawyer and is ethically obliged to provide zealous representation. He is fully engaged in trial strategy, pretrial preparation and the trial itself, all on the defendant’s behalf.

The principal limitation of cleared counsel – by comparison to the American defense attorney’s role in conventional pretrial discovery – is that cleared counsel normally cannot share classified information with his client and therefore may not be able adequately to assess its import. There is a presumption that counsel-only review is sufficient, but the presumption

21 CIPA, supra note 19, at §6(c).
can be overcome and client consultation permitted if defense counsel shows that the defendant’s personal input is necessary to evaluate the information.23

Since its enactment, CIPA has affected hundreds of espionage and terrorism prosecutions. There were 62 espionage prosecutions during the 1980s alone,24 and there have been over 100 international terrorism prosecutions since September 11, 2001, most of them with the potential to expose considerable amounts of classified information.25

These developments call into question many conventional assumptions about judges’ supposed lack of national security expertise. CIPA practice has drawn judges deeply into the details of classified files. Judges have evaluated reams of material, assessing relevancy 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. In criminal litigation, federal judges seem especially cognizant of their 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.26 Yet there are no known instances in which a significant security breach attributable to CIPA has ever occurred.27

In theory, CIPA leaves disclosure decisions entirely within executive hands. But unless the government is willing to forego prosecution entirely, CIPA procedures force the disclosure of classified files to the judge and sometimes to defense counsel. That process provides a degree of accountability and a deterrent to self-serving classification decisions. Moreover, the threat of CIPA dismissal obliges the executive to internalize part of the social cost of secrecy. Inevitably that dynamic leads 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 would normally resist. When a matter is sufficiently sensitive, however, the executive branch can opt to preserve secrecy, and pay the price by declining to prosecute. CIPA thus affords only

23 Id. at 28.
24 Id. at 22.
26 See id. at 84–85.
27 Id. at 88.
modest accountability to the general public when disclosures are subject to a protective order. Moreover, because dismissal is always an available option for the government, CIPA cannot invariably force disclosure, and it therefore does not offer any accountability at all when the executive is determined to avoid it. Those, of course, are the times when accountability may be most needed.

2.2.2 Civil litigation

Civil suits against the government provide the natural mechanism to fill that gap. Yet state secrets privilege gives the government a wide-ranging license to veto unwanted disclosures in any civil case having national security implications.28 The privilege, as currently interpreted, prevents civil litigation from providing any meaningful check on overbroad or unjustified secrecy decisions.29

2.2.3 The Freedom of Information Act (FOIA)

FOIA establishes the principle that all government records must be publicly available, unless specifically exempted.30 Exemption 1 protects all information that ‘in the interest of national defense or foreign policy [is] properly classified’.31 But unlike the state secrets privilege, exemption 1 procedures permit active judicial oversight. FOIA requires agencies to identify classified material page-by-page and section-by-section.32 And 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’.33 Moreover, FOIA discourages automatic judicial deference to executive preferences, because it requires the court to ‘determine the matter de novo, . . . and the burden is on the agency to sustain its action’.34

29 For detailed discussion, see Schulhofer, supra note 1.
31 5 U.S.C. §552(b)(1) (2009). Other exemptions are available as well, but because these largely duplicate Exemption 1 in national security cases, they will not be discussed separately.
In practice, however, a widely perceived imperative to defer to the executive often migrates into FOIA cases, despite Congress’s expressly stated preference to the contrary. Thus, a former Chief Judge of the US Court of Appeals for the D.C. Circuit acknowledged that, despite Congress’s mandate for de novo review, oversight in Exemption 1 cases ‘often seems to be done in a perfunctory way’. Indeed the ‘reasonable basis’ standard expressly rejected by Congress (in favor of the de novo alternative) has become ‘ironically, a good summation of post-1974 practice’. Federal judges have posited that agency decisions are motivated solely by concern for national security harm, even when circumstances strongly suggest the contrary. And when agencies invoke the ‘mosaic’ argument, courts have even allowed ‘seemingly innocuous’ information – in other words, any information – to be shielded, with essentially no judicial review at all. Mosaic theory 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 mosaic theory can’t be falsified, deference becomes abdication, an abdication many courts make no effort to disguise.

Although the FOIA review typically afforded is therefore far from robust, a minority of judges insist on taking a hard look, a valuable check regardless of its outcome. And because FOIA requests trigger intra-agency review and settlement pressure, FOIA indirectly generates voluminous national security disclosures that almost certainly would not occur

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37 Samaha, supra note 35, at 940.
38 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’).
39 The ‘mosaic’ argument posits that enemy intelligence experts can piece together small details, insignificant in themselves, in order to construct a revealing picture of sensitive U.S. secrets.
41 E.g., Halperin, 629 F.2d 144, 148 (D.C. Cir. 1980) (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’).
otherwise.\textsuperscript{43} In the past six years, tens of thousands of pages of previously classified material have been released in response to FOIA litigation.\textsuperscript{44}

That said, FOIA’s value, though not trivial, is fragile. 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.

3. Assessing the Oversight System

Ideally, 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, the American system falls far short of meeting it. The oversight mechanisms leave wide spaces where executive control of information is unrestrained in practice.

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 public deserves to see. 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. And even when Congress obtains sensitive information for itself, it has virtually no authority to require that classified documents and testimony be made public. 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 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.

\textsuperscript{43} Id. at 1014.

\textsuperscript{44} 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. See www.aclu.org/national-security/aclu-v-department-defense-torture-foia.
That leaves the courts. In criminal cases, courts have been assertive, and CIPA gives them authority to subject secrecy claims to fine-grained inspection. But prosecutors’ charging discretion gives the executive branch substantial control over the scope of the material that faces CIPA scrutiny. FOIA is more promising, as it permits any person to initiate a request for disclosure of any document. Nonetheless, FOIA has one major limitation. FOIA judges can override improper classification decisions, but the substantive standard 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. As a result, a national security exemption from FOIA is typically easy to justify, regardless of its real motivation. And beyond that formal obstacle, FOIA’s potential is easily neutralized by the willingness of judges to be seduced by calls for deference to supposed agency expertise. Overall, FOIA, as currently applied, offers only a modest, unreliable means to challenge executive information control.

In sum, each of the checking institutions – the press, Congress and the courts – has either feeble tools for forcing disclosure or little willingness to insist upon it. And because these 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.

4. Reform

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. This section examines the expertise and other strengths of the executive, legislative and judicial branches and then proposes mechanisms to move toward a more meaningful system of checks and balances.

4.1 Institutional Assets and Liabilities

4.1.1 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 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 danger of leaks, however, has little substance. Each chamber has detailed procedures to securely store and handle classified material. Congressional staff who need access to classified information must obtain clearances; there is no reason to consider them less trustworthy than security-cleared employees of the executive branch. Members of Congress are not required to hold security clearances, but there is no indication that security breaches emanating from Congress have ever been a significant problem.45 And because any given secret is known to far more executive officials than to individuals in the congressional offices on Capitol Hill, leaks from Congress are more easily identified and deterred.

The charge of incapacity in national security matters is more justified but highly exaggerated. Intelligence committee staff develop specialized knowledge and 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. Intelligence committee staff often are recruited from the executive agencies and vice versa. George Tenet had spent almost his entire career in congressional staff positions before President Clinton named him to lead the CIA. Porter Goss, his immediate successor, had high-level national security experience only during his seven-year stint as chair of the House Intelligence Committee. Yet both were widely seen to have impressive intelligence expertise. They were not transformed from novices into national security authorities the moment they left Capitol Hill 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 their tenure on the intelligence committees is limited. Congress could easily extend or abolish those term limits, and larger staffs can help 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 must therefore rest less on concerns about its skills, which are easily improved, and more on its incentives, which are highly flawed and hard to fix. The difficulties center on two problems – incentives to act badly 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. The opposition party should (in theory) be motivated to restrain the administration. But the opposition party is also – and more strongly – motivated to win elections, a goal that imposes different priorities. The opposition may use information access to expose embarrassing but inconsequential executive actions – as happened under divided government during the late 1990s. Conversely, the goal of electoral success may push the opposition to ignore its national security prerogatives. It may prefer to avoid confronting the President on issues of national security, almost always his safest terrain – as happened in the years immediately following the 9/11 attacks. Either way, Congress often will have no appetite for the kind of scrutiny that national security oversight requires.

The challenge for Congress is to serve its (and the nation’s) interest in sustaining checks and balances, in the face of distorting incentives and deficits in expertise. But this predicament is not unique to the national security domain; it pervades the modern legislative agenda. Lack of time or knowledge and unwelcome political pressures exist throughout. And Congress has ways to overcome these obstacles – delegating authority to independent agencies and transferring oversight responsibilities from its committees to its specialized cadre of auditors, the Government Accountability Office. The appropriate response to oversight obstacles therefore cannot be for Congress simply to withdraw from the field. As I develop below, Congress can craft mechanisms that address its deficiencies and permit accountability to be restored.

4.1.2 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 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 mandate to uphold the rule of law, by affording some remedy when officials exceed statutory or constitutional bounds. In addition, courts often do have a political mandate, in the form of duties conferred by Congress. FOIA and CIPA are obvious examples. And Congress can at any time instruct the courts to do more. The decisive questions for reform, then, are ones 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 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. 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 who happen to wear robes. 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.

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46 E.g., Posner and Vermeule, supra note 39, at 240–44 (analyzing ‘institutional features of the judiciary’ solely in terms of selection process and motivations for individuals who hold judicial office).
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.47

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,48 the 1953 decision establishing a broad state secrets privilege, and E.P.A. v. Mink,49 the 1973 decision barring judicial review of classified material under FOIA. Many lower courts continue to make the same assumptions; 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 in criminal cases have often found themselves deeply immersed in classified material. Aided by security-cleared counsel, they have evaluated enormous quantities of classified material. Likewise, FOIA judges have made available mountains of improperly classified material, with no known national security damage or unintended leaks attributable to these processes. 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 enough knowledge 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, or diagnose mental illness. But their outstanding proficiency is their ability to listen. 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 flimsy contentions. Secrecy decisions are no different; they require much more than just an understanding of national security effects. Ultimately they require an ability to appraise rival claims, an appreciation for the value of robust public debate, and an instinct for fine-grained solutions that leave maximum feasible scope for all competing interests.

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 irrelevant. In several of the crucial abilities – the generalist’s perspective, the ability to listen, 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 because they can involve very high stakes. Even so, concern about imprudent disclosure cannot justify the complete suspension of accountability. Judges know that unwarranted disclosures may have grave consequences; they can 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.

4.1.3 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. Transparency is not an interest that national security officials can be expected to value, even when they make secrecy decisions in good faith.

And often 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, 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 strengths could offset some of these executive-branch 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 advantages, however, are Congress’s distorted incentives, which impair oversight during divided and unitary government alike.
Courts offer different assets and liabilities. Judges can claim no national security expertise and typically cannot see the big picture. They arguably lack political legitimacy 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. 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’ 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.

4.2 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 about executive expertise and outsider incompetence. Despite repeated attempts, however, that path has produced few improvements. Further efforts in that direction are worth considering, but the core of the problem is the absence of strong, fully independent checks.

4.2.1 Strengthening Congress

Two issues need to be considered – the flow of information to Congress itself and the flow of information to the public.

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50 See President’s Comm’n, supra note 2; PIDB Report, supra note 6.
Facilitating congressional access is relatively simple, because it can be achieved without jeopardizing the classified status of sensitive information. Congress can, for example, strengthen its oversight structures by expanding intelligence committee staffs and permitting longer terms of service for committee members. Another straightforward step would be to reinforce safeguards for whistleblowers who turn to Congress when classification is used to cover up inefficiency and abuse. The failure to provide effective protection for intelligence community employees who alert Congress to matters warranting oversight is inexcusable and profoundly undemocratic.

The other area of concern is over-classification. Congress’s own access to classified information seldom translates into an effective check, in part because – so long as information remains classified – members cannot mobilize public opinion by sharing their knowledge. One way to address this problem would be to tighten the classification criteria – for example by narrowing such manipulable categories as ‘critical infrastructure’ and by stipulating that public-interest balancing must be a factor in the classification decision, so that classification cannot be considered proper when slender national security risks are outweighed by substantial public benefits of disclosure.

Congress also needs to strengthen declassification procedures. One approach might be to allow declassification by the opposition party, at least when it can muster significant support across the aisle. But declassification by congressional coalition would almost always be stymied by the President’s party. And in any event it could not meet the need for an ongoing check on the thousands of classification actions taken every working day. A more promising option, therefore, would be to create a permanent agency, with its own staff and joint executive-legislative membership, in order to consider declassification appeals on an ongoing basis. Such an agency, of course, could not defy the President when executive branch preferences are strongly held, and it therefore should not supplant recourse to the judiciary through FOIA. But in thousands of noteworthy but less politically fraught cases, such a panel could furnish independent yet expert judgment, providing considerable pressure for transparency.

4.2.2 Strengthening the courts
Existing barriers to judicial oversight are primarily psychological rather than doctrinal. In criminal cases, judges seem instinctively comfortable with their checking function, but in FOIA cases, most judges simply refuse to exercise the *de novo* review authority they already possess. Ultimately, therefore, any effort to make judicial review more effective will depend on educating the judiciary. Tunnel vision now leads most judges to see only the value of national security expertise (which they lack). FOIA judges must be reminded that along with that expertise, 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 courts represent our preeminent repository of the indispensable capacity to provide objective, narrowly tailored reconciliation of the competing values – security and transparency – on which the survival of a healthy democracy depends.

**Conclusion**

In the domain of national security, American executive officials ordinarily are left free to control and conceal whatever information they choose to consider sensitive. The press represents a significant but easily exaggerated source of countervailing power, because American reporters have no legal leverage and (despite Wikileaks) only episodic practical success in obtaining classified information. Formal information-access powers are therefore indispensable, in their own right and as enabling mechanisms that permit the press to function.51

In practice, therefore, formal legislative and judicial checks remain essential, even where public opinion and informal political pressure ultimately will be decisive. In fact, however, most of the legal powers required have already been conferred on Congress and the courts; the deployment of these powers is almost invariably hobbled not by formal obstacles but by a lack of will, fueled in turn by the mystique of executive expertise and the myth of outsider incompetence. What nearly all discussion of the over-classification problem overlooks, however, is that much of the expertise necessary for sound secrecy decisions is

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notably absent in the executive branch; it can be found only in legislative bodies or the courts. Mechanisms identified in this chapter are readily available to harness that expertise, promote wider public recognition of it, and thus insure accountability. Such steps are imperative if we are to close the information loophole that permits so much national security activity to escape the rule of law.