

# ARTICLES

## [DIS-]INFORMING THE PEOPLE'S DISCRETION: JUDICIAL DEFERENCE UNDER THE NATIONAL SECURITY EXEMPTION OF THE FREEDOM OF INFORMATION ACT

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I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion . . . .

—Thomas Jefferson<sup>1</sup>

[W]hat I deem the essential principles of our Government, and consequently those which ought to shape its Administration . . . [includes] the diffusion of information and arraignment of all abuses at the bar of the public reason . . .

—Thomas Jefferson<sup>2</sup>

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1. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 160–61 (Paul Leicester Ford ed., 1899).

2. THOMAS JEFFERSON, FIRST INAUGURAL ADDRESS AT WASHINGTON, D.C. (Mar. 4,

I think it's clear that some of the conversations [Snowden] has generated, some of the debate, actually needed to happen . . . . If there's a good side to this, maybe that's it.

—James Clapper<sup>3</sup>

*As noted by President Obama's recent Review Group on Intelligence and Communications Technologies, pervasive state surveillance has never been more feasible. There has been an inexorable rise in the size and reach of the national security bureaucracy since it was created after World War II, as we have gone through the Cold War and the War on Terror. No one doubts that our national security bureaucracies need to gain intelligence and keep some of it secret. But the consensus of decades of experts, both insiders and outsiders, is that there is rampant overclassification by government agencies. From its inception in 1966, the Freedom of Information Act (FOIA) has presumed disclosure. And from its inception, Congress intended the federal courts to act as a brake on unfettered agency discretion regarding classification. But courts have not played a strong role in this regard. This Article examines the interplay of overclassification, excessive judicial deference, and illusory agency expertise in the context of the national security exemption to the FOIA.*

*The national security exemption allows documents to be withheld that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and that "are in fact properly classified pursuant to such Executive Order." The history of national security classification and the passage of the FOIA illuminate the tension between legislative demands for transparency and the growth of the national security state with its agency culture of secrecy. That tension has generally been resolved by the courts in favor of secrecy, despite agreement that there is rampant overclassification and pseudo-classification (labeling documents as sensitive but unclassified). This deference in turn leads agencies routinely to deny FOIA requests that should in fact be granted. Without adequate court oversight, there is no agency incentive to comply with the FOIA's presumption of disclosure.*

*We argue that courts have been systematically ignoring their clear legislative mandate. Although the government is entitled to substantial deference, the role of the judiciary is not to rubber stamp claims of national security, but to undertake de novo and in camera review of government claims that the information requested was both required to be kept secret and properly classified. Congress amended the FOIA in 1974 to make this requirement explicit, overruling a judicial attempt to defer completely to government claims that national security classifications are proper.*

*There are many reasons that courts are reluctant to get involved in determining the*

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1801), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, H.R. DOC. No. 82-540, at 13 (1952).

3. Ken Dilanian, *Clapper: Snowden Case Brings Healthy Debate; More Disclosures to Come*, L.A. TIMES, Sept. 12, 2013, <http://articles.latimes.com/2013/sep/12/world/la-fg-wn-clapper-snowden-disclosures-20130912>.

*validity of exemption claims based on national security. Overestimation of risk may be one reason, as is fear of the consequences of error. We also discuss a “secrecy heuristic” whereby people attribute greater accuracy to “secret” documents. Notwithstanding these rationales, courts have, in other contexts, wrestled successfully with the conflict between national security and paramount rights, such as those found in the First and Fourth Amendments. Courts have the institutional expertise to review claims of national security, if they choose to exercise it.*

*Our conclusion is that the systematic failures of the federal courts in the FOIA context are neither inevitable nor justified. We show that courts do occasionally order the release of some documents. This Article includes the first empirical investigation into the decisionmaking of the D.C. district courts and federal circuit courts in cases involving the national security exemption to determine what, if any, factors favor document release. We find that party characteristics are the biggest predictor of disclosure. We also show that, while politics do not seem to matter at most courts, they do at the D.C. Circuit Court of Appeals, at which Republican-dominated panels have never ordered disclosure.*

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## INTRODUCTION

In February 2012, Richard W. Roberts, a district court judge in the District of Columbia, issued a headline-making order in a Freedom of Information Act (FOIA)<sup>4</sup> case: the court held that the Office of the United

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4. U.S.C. § 552 (2012). See *What Is FOIA?*, U.S. DEP'T OF JUSTICE, <http://www.foia.gov/about.html> (last updated Jan. 2011) (describing that the Freedom of Information Act (FOIA) was enacted on July 4, 1966, and provides that any person may

States Trade Representative (USTR) had failed, after multiple opportunities, to justify withholding a position paper under the first exemption to the FOIA.<sup>5</sup> This exemption, so-called “Exemption One,” allows agencies to withhold documents that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and that “*are in fact properly classified pursuant to such Executive order.*”<sup>6</sup> Judge Roberts did what few judges have done: asking whether the document in question was “in fact properly classified,” concluded that it was not, and ordered disclosure.<sup>7</sup>

The national security exemption of the FOIA embodies what is arguably the most important issue in American governance today: the need to balance transparency with security. As the recent report of President Obama’s Review Group on Intelligence and Communications Technologies discusses, we live in a surveillance state, and the rationale for that state is national security.<sup>8</sup> Yet our legal tradition is one that values transparency, as exemplified by the FOIA. The FOIA requires courts to protect transparency, but judges have been reluctant to grapple directly with a claim by the government that a document is classified and may be withheld from a FOIA requester.<sup>9</sup>

As we demonstrate below, plaintiffs rarely win FOIA cases when the government invokes the national security and foreign affairs exemption. By our account, only 5% of such cases will result in an outright win for a plaintiff, and fewer than one in five cases lead to even partial disclosure. Disclosure has become even rarer after 9/11: only two of sixty-one cases have led to full disclosure since 2001.<sup>10</sup> Why are courts so reluctant to order disclosure in Exemption One cases? This Article examines Exemption One in light of its historical context, the legislative and judicial

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obtain access to federal agency records, unless the record is protected from disclosure by a specific exemption).

5. Ctr. for Int’l Env’tl. Law v. Office of the U.S. Trade Representative (*CIEL III*), 845 F. Supp. 2d 252 (D.D.C. 2012).

6. 5 U.S.C. § 552(b)(1) (emphasis added).

7. See *CIEL III*, 845 F. Supp. 2d at 256–58; Transcript of Oral Argument at 1, Ctr. for Int’l Env’tl. Law v. Office of the U.S. Trade Representative (*CIEL IV*), 718 F.3d 899 (D.C. Cir. 2013) (No. 12-5136) (showing that the government appealed the order and that oral arguments were heard on February 21, 2013); *id.* at 3–4 (showing that Judge Roberts did not review the document in question in camera). But see *CIEL IV*, 718 F.3d at 904 (overturning Judge Roberts’s decision).

8. THE PRESIDENT’S REVIEW GRP. ON INTELLIGENCE & COMM’NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 96 (2013) [hereinafter LIBERTY AND SECURITY IN A CHANGING WORLD], available at [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

9. See analyses *infra* Parts III. and V.

10. See *infra* Part VI.

ballet over the appropriate level of deference to the Executive, and the role of overclassification and pseudo-classification.<sup>11</sup> The latter refers to the phenomenon that agencies have generated their own schemes for categorizing sensitive information, even when not authorized to do so by statute. In the absence of a review agency, these schemes vary wildly across agencies.<sup>12</sup> We evaluate the national security community's estimations of agency expertise and motivation in classifying national security matters, and argue that a pattern of overclassification and pseudo-classification has produced agency denial of FOIA requests that should in fact be granted.

Originally passed in 1966, the FOIA was the culmination of a number of attempts to increase agency openness and prevent secrecy. But since then, the evolution of the law on agency classification of documents has not been favorable to requesters. In 1974, Congress passed an amendment to the FOIA granting judicial authority to conduct *de novo* and *in camera* reviews of government claims that information was authorized under an executive order to be kept secret and that the information was in fact properly classified. The amendment was meant to override the Supreme Court decision in *EPA v. Mink*, which held that an agency's claim of withholding documents based on the national defense and foreign policy exemptions of the FOIA could be sustained solely on the basis of an affidavit from the government that the materials were properly classified.<sup>13</sup> During congressional discussions of the amendment, legislators stated that courts should review agency classification determinations. However, the

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11. See *Dubin v. United States*, 363 F.2d 938, 942 (Ct. Cl. 1966) (explaining, in its discussion of radar laws, that overclassification is somewhat self explanatory: it is excessive classification, but performed pursuant to a classification scheme laid out by statute or executive order); see also Reducing Over-Classification Act, Pub. L. No. 111-258, 124 Stat. 2648 (2010) (codified in scattered sections of 6 and 50 U.S.C.) (requiring the Department of Homeland Security to develop a strategy to prevent the over-classification of homeland security information and to promote homeland security information sharing with state, local, tribal, and private sector entities, but failing to define "over-classification"); RICK BLUM, OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2005 9 (2005) <http://www.openthegovernment.org/otg/SRC2005.pdf> (2005) (explaining that *pseudo-classification* is the practice of labeling documents with such terms as "sensitive but unclassified" (SBU) and that unlike classified documents, there are no consistent rules about what constitutes a pseudo-classified document). Some other examples include Sensitive Security Information (SSI), For Official Use Only (FOUO), and Controlled Unclassified Information (CUI). See *id.* at 9–10.

12. A report issued by a presidential task force in 2009 found there were 117 versions of the CUI designation in use. See PRESIDENTIAL TASK FORCE ON CONTROLLED UNCLASSIFIED INFO., REPORT AND RECOMMENDATIONS 33–34 (2009); see also Exec. Order No. 13,556, 3 C.F.R. 267, 268 (2010) (stating that "appropriate consideration should be given to the report of the interagency Task Force on Controlled Unclassified Information published in August 2009.").

13. See 410 U.S. 73, 81 (1973).

legislators decided that because of agency expertise and experience, the agency could give substantial weight to agency classification determinations. Since 1974, the D.C. Circuit Court of Appeals, the busiest court for FOIA cases, has generally declined to take an active role in oversight of agency assertions of national security classification.<sup>14</sup> But not always.

This Article revisits the concept of “agency expertise” in national security matters. We suggest that there is overwhelming evidence that agencies do in fact overclassify documents, and that the motivation for classification arises from an agency culture of secrecy. Agencies sometimes seek to legitimize the superior value of information by designating it as “secret.” They also use classification to prevent the exposure of embarrassing and politically volatile information that has no national security value.<sup>15</sup> At the same time, the very concept of national security has been expanding since 9/11, with public discourse focusing on a state of war, in which the next attack is imminent. Cognitive psychology suggests that in such circumstances people overestimate risks, further tilting decisionmaking towards secrecy and against civil liberties and transparency.<sup>16</sup>

To illuminate how the courts have balanced national security and civil liberties, this Article includes an empirical investigation into the decisionmaking of the D.C. Circuit and identifies the circumstances in which a FOIA requestor is more likely to get some or all disputed documents that have been withheld pursuant to the national security or foreign policy exemption. Besides providing some insight for FOIA litigators, the analysis has important implications for the perennial efforts to address national security concerns in an open and democratic society. Legislative efforts in this regard must take into account judicial reticence to police national security matters, and can do so by encouraging a structured, step-by-step inquiry into agency action.

The remainder of this Article is organized as follows. Part I frames the issue by discussing a recent headline-making FOIA case involving Exemption One, and recounts the social and political trends that produced the FOIA and examines how the statute evolved regarding judicial review

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14. Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 261–62 (2011) (examining the likelihood of a FOIA case going to trial).

15. See, e.g., Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 1, 2011, available at [http://www.nytimes.com/2011/08/02/us/02\\_secret.html?\\_r=0](http://www.nytimes.com/2011/08/02/us/02_secret.html?_r=0) (discussing how overclassification is rampant).

16. See OREN GROSS, *Security vs. Liberty: On Emotions and Cognition*, in THE LONG DECADE: HOW 9/11 HAS CHANGED THE LAW 45, 48 (2014) noting that people “tend to link their assessment of the probability of an occurrence of a particular event to their ability to imagine similar events taking place.”).

of claims of exemptions based on national security or foreign affairs. Part II discusses judicial reluctance to review agency decisions and its possible causes. Part III then reviews the problems of overclassification and the illusion of agency expertise. Part IV presents an empirical study of the FOIA decisions of the D.C. district court and the circuit courts of appeal. Part V discusses the confluence of the national security narrative and the transparency narrative. The Article concludes by discussing the role that courts can play in addressing overclassification, simply by relying on congressionally approved techniques for oversight: *de novo* and *in camera* review, and using experts to provide a reasoned response to agency assertions.

## I. THE FOIA AND POLITICAL TRENDS IN THE EVOLUTION OF EXEMPTION ONE

### A. CIEL v. USTR: *The Exception that (Almost) Proved the Rule*

The *Center for International Environmental Law v. USTR (CIEL)*<sup>17</sup> case, described at the outset of this Article, provides a useful introduction to the issues involved in classification and FOIA. In that case, the district court took the unusual step of rejecting an agency's conclusory declaration that documents involving international trade negotiations might cause harm to the United States negotiating efforts and asked whether the documents were properly classified.<sup>18</sup> After the USTR tried three times to justify the classification, the court rejected the classification and ordered USTR to turn over the documents. Until the final appellate court review, this case was an unusual victory for FOIA requestors. Even when a court takes the unusual step of demanding substantial justification for agency classification decisions, the ultimate result can still be denial: this is precisely what happened in a case involving a FOIA request for videos of four prisoners in Guantanamo Bay Naval Base.<sup>19</sup> The procedural complexity of the case is itself an indication of the difficulties that FOIA requestors face.

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17. The Center for International Environmental Law (CIEL) is a non-profit public interest organization concerned with the impact of trade policy on the environment. *See Who We Are*, CTR. FOR INT'L ENVTL. LAW, [http://www.ciel.org/About\\_Us/index.html](http://www.ciel.org/About_Us/index.html) (last visited Oct. 28, 2014).

18. *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 159 (D.D.C. 2007) (*CIEL I*); *see also* Exec. Order No. 12,958, § 1.2(a)(4), 3 C.F.R. 333, 335 (1995) (stating that documents are only properly classified if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security and the original classification authority is able to identify or describe the damage.").

19. *Int'l Counsel Bureau v. U.S. Dept. of Def. (ICB v. DOD IV)*, 906 F. Supp. 2d 1, 9 (D.D.C. 2012).

The *CIEL* case began when CIEL filed a FOIA request for documents relating to sessions of the Negotiating Group on Investment (NGI) for the Free Trade Agreement of the Americas (FTAA).<sup>20</sup> During the negotiations, the USTR gave documents containing the attending foreign governments' proposed text and commentary for the investment portion of the FTAA to the negotiators. Although the USTR identified forty-six documents in its office responsive to CIEL's request, the USTR withheld all forty-six documents, citing the deliberative process exemption to the FOIA.<sup>21</sup>

In 2001, CIEL filed suit and moved for production of a Vaughn Index.<sup>22</sup> During the course of the proceedings, the parties agreed that forty-one of the documents were properly covered by the deliberative process exemption. Only four of the documents remained in dispute. At that point in the litigation, for the first time, the USTR claimed that Exemption One protected the four documents, as they concerned national security or foreign affairs.<sup>23</sup> In 2007, Judge Roberts ruled that the agency's declaration was inadequate to establish that Exemption One covered the documents. Then, at the request of the USTR, the countries negotiating the FTAA derestricted three of the documents, which were released to CIEL.<sup>24</sup> The USTR did not ask for the fourth document to be derestricted.<sup>25</sup>

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20. *CIEL I*, 505 F. Supp. 2d at 153.

21. *Id.* at 154 (citing to 5 U.S.C. § 552(b)(5) (2012)).

22. Complaint at 7, *CIEL I*, 505 F. Supp. 2d 150 (D.D.C. 2007) (No. 1:01CV00498). A Vaughn Index is an itemized list of justifications for FOIA withholdings prepared by government agencies in the context of FOIA litigation. A court may require an agency to produce a Vaughn Index on its own motion, or a plaintiff may petition the court to do so. The decision to order production is left to the discretion of the court. Agencies are not required to produce Vaughn Indices when the release of information included in the Index would allow the requester to deduce the general content of the undisclosed material or when the agency is not required under the FOIA to confirm or deny that it possesses particular materials. FOIA requesters may not compel agencies to produce Vaughn Indices during the administrative process, though agencies may voluntarily do so. Vaughn Indices must include three types of information: (1) identification of each document being withheld; (2) the relevant statutory exemption for each document; and (3) an explanation detailing how the disclosure of the document would impair the interests safeguarded by the statutory exemption. *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). As the Vaughn court explained, the requirements set forth by the court serve two main purposes: (1) to ensure "part[ies'] right to information" and (2) to allow "the court system effectively and efficiently to evaluate the factual nature of disputed information." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Procedurally, the Vaughn Index has been a substitute for discovery in FOIA litigation; discovery orders are very rare. *See Kwoka*, *supra* note 14, at 235.

23. *See CIEL I*, 505 F. Supp. 2d at 154. One undisputed document was released to CIEL. *Id.*

24. *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative (CIEL II)*, 777 F. Supp. 2d 77, 80 (D.D.C. 2011).

25. *See* Transcript of Oral Argument at 12–13, *Ctr. for Int'l Envtl. Law v. Office of the*



Now only one document remained in dispute. The document explains the United States's initial proposed negotiating position on the meaning of "in like circumstances," which "defines the conditions under which national-treatment and most-favored-nation rules . . . apply."<sup>26</sup> Judge Roberts again rejected the USTR's declarations, finding that the USTR's inconsistent positions on the harm that might be caused "should not provide the basis for withholding a document. Such inconsistency is an indication of unreliability, and the agency affidavits will be shown no deference with respect to any justification for withholding that involves maintaining trust of negotiating partners."<sup>27</sup> Submitting further affidavits, the USTR brought a third summary judgment motion but failed to convince Judge Roberts.<sup>28</sup> The USTR was ordered to turn over the document, having failed to show that classification of the document was proper under the criteria set out in the relevant executive order.<sup>29</sup> Judge Roberts had *never seen* the document.<sup>30</sup>

The USTR appealed Judge Roberts's decision, and oral arguments were held before the D.C. Circuit Court of Appeals on February 21, 2013.<sup>31</sup> On June 7, 2013, the D.C. Circuit reversed Judge Roberts, preventing disclosure.<sup>32</sup> "Courts," it noted, "are 'in an extremely poor position to second-guess' the Trade Representative's predictive judgment in these matters . . . but that is just what the district court did in rejecting the agency's justification for withholding the white paper."<sup>33</sup> As in so many other previous cases, the government was able in the end to keep a document secret, on the basis of a generalized judicial invocation of institutional incapacity.

### *B. The Evolution of the Disclosure Regime*

What made Judge Roberts's decision so noteworthy is that it *followed* the

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U.S. Trade Representative (*CIEL IV*), 718 F.3d 899 (D.C. Cir. 2013) (No.12-5136).

26. Initial Brief for the Appellants at 40, *CIEL IV*, 718 F.3d 899 (D.C. Cir. 2013) (No. 12-5136) (internal citations omitted); *see also id.* at 8 (describing the document in question).

27. *CIEL II*, 777 F. Supp. 2d at 85.

28. *See* Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative (*CIEL III*), 845 F. Supp. 2d 252, 253, 259 (D.D.C. 2012) (explaining that Judge Roberts found that the document was a non-binding starting point for negotiation that could be revised or withdrawn at any time, so disclosure could not damage the United States's foreign relations by reducing future flexibility, nor could withholding the non-binding document preserve the United States's negotiating capital).

29. *Id.* at 256–57.

30. *See* Transcript of Oral Argument at 4, *CIEL IV*, 718 F.3d 899 (D.C. Cir. 2013) (No. 12-5136).

31. *Id.* at 1.

32. *CIEL IV*, 718 F.3d at 904.

33. *Id.* at 903 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009)).

congressional mandate to hold the government to the standards of proper classification and disclosure the FOIA was passed to implement. Few courts have done so,<sup>34</sup> despite the original language of the FOIA and the clarification Congress passed when courts failed to follow that mandate.<sup>35</sup> This section traces the history and motive of Exemption One, and argues that understanding the political context of the FOIA's passage helps to illuminate the deep tensions.

One tendency of bureaucracies is to maintain secrecy—about *any* information—not just potentially classifiable information:<sup>36</sup> as Max Weber wrote in 1920, “Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of ‘secret sessions’: in so far as it can, it hides its knowledge and action from criticism . . . .”<sup>37</sup> That tendency was first addressed in the United States by the introduction of the Administrative Procedure Act (APA) in 1946.<sup>38</sup>

The APA reflected a political compromise between proponents of bureaucratic discretion and opponents of the administrative state, who valued judicial review as a means of ensuring accountability.<sup>39</sup> The requirement that agencies disclose information was one of the APA's most important provisions, as the 1966 House Report on the reform of the APA noted:

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34. *See infra* Part IV.

35. The 1974 amendments to the FOIA's national security exemption were expressly directed at the Court's decision in *EPA v. Mink*, 410 U.S. 73, 101 (1973) (Brennan, J., concurring in part and dissenting in part). *See infra* note 61.

36. HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGIN AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 10–28 (1999) (looking at the history of Americans' belief in the right to know).

37. MAX WEBER, *ESSAYS IN SOCIOLOGY* 233 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

38. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012). For a thorough history of attempts to reform administrative law prior to the Administrative Procedure Act (APA), see generally George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

39. *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986) (describing the compromise).

[M]ost important it required “agencies to keep the public currently informed of their organization, procedures, and rules.” The intent of the public information section of the Administrative Procedure Act (sec. 3) was set forth clearly by the Judiciary Committee, in reporting the measure to the Senate. The report declares that the public information provisions—are in many ways among the most important, far-reaching, and useful provisions.<sup>40</sup>

The original exemptions to § 3 of the APA were so broad that agencies used them as an excuse for secrecy, and the abuses pushed the call for reform.<sup>41</sup> The piecemeal attempts at reforming the APA were unsuccessful in overcoming federal agencies’ disinclination to release information.<sup>42</sup> During the time that Congress was tinkering with the APA, there was a separate movement to pass a comprehensive freedom of information law.<sup>43</sup> This was part of a global trend to adopt such laws that began in the 1960s.<sup>44</sup> The history of legislation attempting to deal with, among other things, the failure of agencies to produce documents when requested must be understood in light of the history of legislation creating agencies whose charge required secrecy.

The period in which the APA and a national freedom of information law were being debated coincided with the creation of the post-World War II national security bureaucracy. The institution of permanent agencies whose job it is to collect and keep secrets does not actually go that far back in American history. Before World War II, intelligence units existed only during wars; when the wars were over, so was the need for the intelligence bureaucracy.<sup>45</sup> But when the Japanese attacked Pearl Harbor, everything changed: Pearl Harbor was perceived in part as an intelligence failure driven by excessive concern for secrecy.<sup>46</sup>

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40. H.R. REP. NO. 89-1497, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2420.

41. FOERSTEL, *supra* note 36, at 10–28; *see also* S. REP. NO. 89-813, at 38 (1965) (“After it became apparent that section 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.”).

42. FOERSTEL, *supra* note 36, at 39–40.

43. ALAN B. LEVENSON & HARVEY L. PITT, GOVERNMENT INFORMATION: FREEDOM OF INFORMATION ACT, SUNSHINE ACT, PRIVACY ACT 69–70 (1978). News media groups had worked for ten years to get a Freedom of Information Act passed. *Id.*

44. Jeannine E. Rely, *Freedom of Information Laws and Global Diffusion: Testing Rogers’s Model*, 89 JOURNALISM & MASS. COMM. Q. 431, 433 (2012) (looking at diffusion of countries adopting freedom of information laws in relation to news media).

45. FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947–1989 2 (1990) (“Prior to World War II, intelligence was an issue primarily during wartime. There are few examples of intelligence during peacetime. . . . Up until World War II, the United States created military intelligence units only during major conflicts such as the Civil War and World War I. After hostilities ended, most of these units were downgraded and deemphasized.”).

46. *Id.* The intelligence failure—the failure to share information with other parts of the

After the end of the war, the creation of permanent intelligence agencies was intended to, among other things, allow for the central collection and study of foreign intelligence.<sup>47</sup> This led to the establishment of the Central Intelligence Agency (CIA) for foreign intelligence,<sup>48</sup> while the Federal Bureau of Investigation (FBI) remained responsible for domestic intelligence.<sup>49</sup> However, the new agency remained highly secretive, despite the lessons of Pearl Harbor.<sup>50</sup> Sadly, excessive secrecy within intelligence communities has remained a systemic problem.<sup>51</sup>

It was within this framework of newly institutionalized secrecy that the FOIA was passed in 1966, although President Johnson disapproved of the

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intelligence community in the name of bureaucratic secrecy—was on the same scale and of the same kind, interestingly, as the 9/11 intelligence failure.

Prior to this attack, American intelligence had broken the Japanese diplomatic cipher and had intercepted and deciphered messages that gave clear and definite indications that the Japanese intended to attack Pearl Harbor. Unfortunately, because of the fragmented nature of American intelligence, key Japanese messages were not decrypted in a timely fashion, and the most important intelligence information was disseminated slowly to key policy makers in Washington and never disseminated to the military commanders in Hawaii. Consequently, Pearl Harbor is best described as an “intelligence failure.”

*See id.* The government tried to suppress discussion of the issue by suppressing the publication of a book detailing the nature of the failure for five years. *See* Patricia Sullivan, *Roberta M. Wohlstetter; Military Intelligence Expert*, WASH. POST, Jan. 10, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901741.html>. Failure of intelligence dissemination was a component of the intelligence failure that led to the 9/11 attacks. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 247, 276, 541 n.107 (2004) [hereinafter 9/11 COMMISSION REPORT].

47. SMIST, *supra* note 45, at 2–3. That, of course, is not how the story played out: the American intelligence community resembles a collection of independent fiefdoms. *Id.* at 4.

48. National Security Act of 1947, Pub. L. No. 80-253, § 102, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.).

49. Athan G. Theoharis, *A Brief History of the FBI's Role and Powers*, in THE FBI: A COMPREHENSIVE REFERENCE GUIDE 1, 20 (Athan G. Theoharis et al. eds., 1999). The Federal Bureau of Investigations (FBI) was first an administrative creation; it started in 1908 and was given full statutory authority in 1935. *Id.* at 3–6, 14.

50. SMIST, *supra* note 45, at 2 (explaining that key documents were never sent to military commanders in Hawaii).

51. *See id.* at 3–4; *see also* 9/11 COMMISSION REPORT, *supra* note 46. The 9/11 Commission Report's findings regarding excessive overclassification have been incorporated in the Reducing Over-Classification Act, Pub. L. No. 111-258, § 2, 124 Stat. 2648 (2010) (codified in scattered sections of 6 and 50 U.S.C.), which sets out in its findings that “[t]he National Commission on Terrorist Attacks Upon the United States (commonly known as the ‘9/11 Commission’) concluded that security requirements nurture over-classification. . . . The 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information.”

law.<sup>52</sup> As a statutory framework for protection of access to government information, the FOIA defined the agency records that were subject to disclosure, set up a rebuttable presumption of mandatory disclosure, and granted nine exemptions.<sup>53</sup> The national security exemption is Exemption One.<sup>54</sup> In light of the importance of the national security bureaucracies, it was no surprise that the exemption for national security was the first exemption to the FOIA, occupying a symbolically central place in the legislation. The original national security exemption to the FOIA stated that: “This section applies, according to the provisions thereof, except to the extent that there is involved—(1) a function of the United States requiring secrecy in the public interest . . . .”<sup>55</sup> This section was quickly revised to require that to be exempt from disclosure, the classification of documents had to be done pursuant to an executive order.<sup>56</sup>

The early amendment codified the judicial authority to conduct a *de novo* review: if the records were improperly withheld, “the court shall determine the matter *de novo* and the burden is on the agency to sustain its action.”<sup>57</sup> The Supreme Court has held that the nine “exemptions are explicitly made exclusive . . . and must be narrowly construed.”<sup>58</sup>

Despite the mandate that all of the FOIA exemptions be narrowly construed, courts interpreting Exemption One have not done so. Classified and pseudo-classified documents began to occupy a special niche in the FOIA practice. Even though the FOIA “rejected the traditional rule of

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52. *Freedom of Information at 40*, NAT'L SEC. ARCHIVE (Thomas Blanton ed., July 4, 2006), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm>. “Documents from the [Presidential Lyndon Baines Johnson] Library show that the normally gregarious President, who loved handing out pens at bill signings, refused even to hold a formal ceremony for the FOIA, personally removed strong openness language from the press statement, and only agreed to approve the bill after the Justice Department suggested the tactic that has become President [W.] Bush’s favorite—a signing statement that undercut the thrust of the law.” *Id.*

53. The exemptions are listed in 5 U.S.C. § 552(b) (2012).

54. *Id.* The text of the Exemption reads in full: “(b) This section does not apply to matters that are—“(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]” *Id.*

55. Pub. L. No. 89-554, 80 Stat. 383, 5 U.S.C. § 552(a)(1) (Supp. III. 1964).

56. Exempted were documents “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. . . .” 5 U.S.C. § 552(b)(1) (Supp. III 1964). Agencies do not have to claim an exemption; they have the discretion to release the information where no harm would result from the disclosure. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (explaining that the agency’s need or preference for confidentiality is not a mandatory bar to disclosure).

57. 5 U.S.C. § 552(a)(3) (Supp. III 1964).

58. *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal citations and quotation marks omitted) (addressing law students who sought to compel the Air Force to disclose summaries of honors and ethics hearings under pseudonyms).

deference” to agency expertise in reviewing an agency’s FOIA determination,<sup>59</sup> courts routinely granted deference to an agency determination that a document was properly classified and therefore exempt from the FOIA.<sup>60</sup> The tendency of courts to defer to agencies on national security matters reached its crescendo in *EPA v. Mink*.<sup>61</sup> In *Mink*, members of Congress sued under the FOIA to get information about an underground atomic explosion. *Mink* held that an agency’s claim that documents were not subject to a FOIA request because they qualified for the national security and foreign policy exemptions to the FOIA could be sustained solely on the basis of a government affidavit that the documents were properly classified.<sup>62</sup> The Court was not allowed to review the documents and see if a portion of the documents could be released.<sup>63</sup> The concurrence by Justice Stewart blamed Congress for imposing such a stringent form of deference, noting that hotly contested nuclear tests were just the sort of information that should be disclosed “consistent with legitimate interests of national defense.”<sup>64</sup> In *Mink*, Justices Brennan wrote an eloquent concurrence in part, dissent in part on what they believed was the clear legislative intent of Congress:

We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly “in order that the ultimate decision as to the propriety of the agency’s action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.” . . . And to underscore its meaning, Congress rejected the traditional rule of deference to administrative determinations by “[p]lacing the burden of proof upon the agency” to justify the withholding . . . . The Court’s rejection of the Court of Appeals’ construction is inexplicable in the face of this overwhelming evidence of the congressional design.<sup>65</sup>

*Mink* mandated rubber-stamping agency determinations despite what the dissent felt was clear congressional intent, and Congress reacted by

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59. *EPA v. Mink*, 410 U.S. 73, 101 (1973) (Brennan, J., concurring in part and dissenting in part).

60. This kind of deference is not consistent with “a proper understanding of FOIA or the constitutional ‘right to know.’” Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,”* 72 MD. L. REV. 1, 70 (2012) (discussing the failure to consider the constitutional underpinnings of the FOIA).

61. *Mink*, 410 U.S. at 84 (majority opinion). Justice Stewart’s position requires looking at the documents and segregating the parts that could and that could not be disclosed; that was what the court of appeals had ordered. *Id.* at 78 (majority opinion); *see id.* at 94 (Stewart J., concurring).

62. *Id.* at 84 (majority opinion).

63. *Id.* at 93.

64. *Id.* at 94 (Stewart, J., concurring).

65. *Id.* at 100–01 (Brennan, J., concurring in part and dissenting in part).

legislatively overruling *Mink* in the 1974 amendments to the FOIA.<sup>66</sup> The broader context for the congressional discussion about balancing national security and the access to information necessary for a functioning democracy was a general concern about overclassification in the burgeoning national security bureaucracy.<sup>67</sup> In 1971, the Chair of the Senate Foreign Relations Committee, William Fulbright, was already complaining that “secrecy . . . has become a god in this country.”<sup>68</sup> Even though the FOIA was originally passed in 1966, by 1972, the overclassification problem required a new executive order. When President Nixon signed Executive Order 11,652 on classification in 1972, he had this to say about overclassification:

Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.<sup>69</sup>

However, it was the Nixon Administration's actions that created a tipping point against unfettered executive secrecy. The political upheaval caused by Vietnam and the Watergate break-in eroded congressional trust in the Executive Branch and set the stage for the creation of a special committee for intelligence oversight.<sup>70</sup> Early in 1975, the Senate appointed

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66. Freedom of Information Act, 5 U.S.C. § 552 (1976), amended by Pub. L. No. 93-502, 88 Stat. 1561.

67. VICTOR MARCHETTI & JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 11–12 (1974) (describing the Central Intelligence Agency's (CIA's) original purpose “as a coordinating agency responsible for gathering, evaluating, and preparing foreign intelligence of use to governmental policy-makers” and its subsequent actions away from the original purpose).

68. PHILIP H. MELANSON, *SECRECY WARS: NATIONAL SECURITY, PRIVACY, AND THE PUBLIC'S RIGHT TO KNOW* 7 (2001).

69. Richard Nixon, Classification and Declassification of National Security Information and Material, Exec. Order No. 11,652, 37 C.F.R. 375 (1973); Richard M. Nixon, *Statement on Establishing a New System for Classification and Declassification of Government Documents Relating to National Security*, THE AMERICAN PRESIDENCY PROJECT (Mar. 8, 1972), <http://www.presidency.ucsb.edu/ws/index.php?pid=3762>. Although Nixon openly discussed excessive classification when signing the Executive Order, the Executive Order itself expanded the range of documents exempted under Exemption One of the FOIA: “interests of national defense” was changed to “interests of national security and foreign relations.” See Harold C. Relyea, *Opening Government to Public Scrutiny: A Decade of Efforts*, 35 PUB. ADMIN. REV. 3, 6 (1975) (comparing Executive Order 10,501 to Executive Order 11,652, and discussing the Foreign Operations and Government Information Subcommittee's eleven-point criticism of President Nixon's Executive Order).

70. SMIST, *supra* note 45, at 9–10; *Legislative Proposals to Strengthen Congressional Oversight of the Nation's Intelligence Agencies: Hearings on S. 4019, S. 2738, S. Res. 419, and S. 1547 Before the S. Comm. on Gov't Operations*, 93d Cong. 20–21 (1974) (statement of Sen. Charles McC. Mathias,

Senator Frank Church to investigate and make recommendations about intelligence improprieties<sup>71</sup> and the House appointed Representative Otis Pike to head a similar committee.<sup>72</sup>

The Church Committee's investigations of intelligence agency operations resulted in fourteen reports, issued in 1975 and 1976.<sup>73</sup> In the Church Reports, newspaper accounts of CIA surveillance within the United States were confirmed, documenting that the CIA had opened and photographed hundreds of thousands of pieces of first class mail to and from U.S. citizens, creating a database holding 1.5 million names known as CHAOS.<sup>74</sup> The National Security Agency (NSA) had a private arrangement with three American telegraph companies, which gave millions of private telegraphs to the NSA from 1947 to 1975.<sup>75</sup> The

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Jr.).

71. SMIST, *supra* note 45, at 10.

72. The Pike Committee was not successful; its final report was repudiated by the members of the House of Representatives on January 29, 1976. SMIST, *supra* note 45, at 10; 122 CONG. REC. 1641 (1976). The committee report was leaked to the press. SMIST, *supra* note 45, at 10–11.

73. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 94-755 (1976) [hereinafter FINAL REPORT, S. REP. NO. 94755] (contains six books); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTERIM REPORT, S. REP. NO. 94-465 (1975) [hereinafter INTERIM REPORT, S. REP. NO. 94-465]; SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, HEARINGS, S. RES. 21, 94th Cong. (1974) (contains seven volumes), *available at* ASSASSINATION ARCHIVES & RESEARCH CTR., CHURCH COMMITTEE REPORTS (1976) [hereinafter THE CHURCH REPORTS], <http://www.aarclibrary.org/publib/church/reports/contents.htm> (providing links to all fourteen reports of the Church Committee).

74. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, FINAL REPORT, S. REP. NO. 94-755, at 6 (1976).

75. *Id.* This litany may sound familiar to modern readers: it echoes several programs that have been revealed over the past decade. One program was the Bush Administration's terrorist surveillance program or total information awareness program. *See generally* GINA MARIE STEVENS, CONG. RESEARCH SERV., RL31730, PRIVACY: TOTAL INFORMATION AWARENESS PROGRAMS AND RELATED INFORMATION ACCESS, COLLECTION, AND PROTECTION LAWS (2003). Congress defunded the program, but parts of the program continued on. CHALMERS JOHNSON, DISMANTLING THE EMPIRE 105 (2010). The latest revelations about the National Security Agency's (NSA's) current surveillance program were leaked to *the Guardian* by NSA defector Edward Snowden and published in June 2013. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>. Then came further information about a program called PRISM, which collects data from major Internet providers, including data on Americans. *See generally* Timothy B. Lee, *Here's Everything We Know About PRISM to Date*, WASH. POST, June 12, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date>. "On March 24, 2009, the [NSA]'s inspector general issued a 51-page draft report on the President's Surveillance Program, the



Church Reports also validated reports of covert actions of the United States government, such as manipulating elections,<sup>76</sup> and attempting assassinations in Chile, Cuba, and the Congo.<sup>77</sup>

After working for two years to expose the illegalities that had been obscured by government secrecy, members of the Church Committee came down firmly on the side of openness: “In almost every case where liberty was sacrificed to obtain a measure of security, the sacrifice turned out to be unnecessary and ineffective.”<sup>78</sup> Senator Hart said that “[a]s Americans, we should never do anything we would be ashamed for the world to know about.”<sup>79</sup> The general consensus was that “[i]f there was one lesson all of us who served on the Church Committee learned, it was that there are no secrets, everything comes out, and the promises of improved security nearly always fail to justify the sacrifice of liberty.”<sup>80</sup> In the midst of these revelations about secrecy and the cover-up of illegal activities, the 1974 amendments to the FOIA were being introduced, debated, amended,<sup>81</sup> passed, vetoed, and passed again over the President’s veto. These amendments clearly shifted the legislative mandate in favor of transparency.

The amendments were squarely directed at problems of

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warrantless authority under which NSA had collected phone records and email since 2001.” See William Saletan, *The Taming of the Spook*, SLATE, (July 1, 2013, 9:34 AM), [http://www.slate.com/articles/news\\_and\\_politics/frame\\_game/2013/07/nsa\\_history\\_how\\_bureaucrats\\_leaks\\_and\\_courts\\_tamed\\_government\\_surveillance.html](http://www.slate.com/articles/news_and_politics/frame_game/2013/07/nsa_history_how_bureaucrats_leaks_and_courts_tamed_government_surveillance.html). This report, classified as top secret, was also leaked to *the Guardian* by Snowden. *Id.*

76. THE CHURCH REPORTS, *supra* note 73, at 8–10, 62, 66 (covering interference in elections in Chile and interference in the elections in post-war Italy).

77. INTERIM REPORT, S. REP. NO. 94-465, *supra* note 73, at 4–5.

78. GARY HART, *Liberty and Security*, in US NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY: FROM THE CHURCH COMMITTEE TO THE WAR ON TERROR 13, 14–15 (Russell A. Miller ed., 2008) (describing the Church Committee reports on CIA intelligence during the Cold War and its relation to the current War on Terror).

79. *Id.* at 15.

80. *Id.* at 17. The recommendations of the Church Committee inspired the legislation that led to the creation of the Foreign Intelligence Surveillance Act of 1978 (FISA) and the Foreign Intelligence Surveillance Court (FISC). See Christopher P. Banks, *Protecting (or Destroying) Freedom Through Law: The USA PATRIOT Act’s Constitutional Implications*, in AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 29, 34 (David B. Cohen & John W. Wells eds., 2004).

81. When the Senate debated the national security exemption to the FOIA, it expressly removed a requirement that courts sustain the government’s finding that documents were properly withheld unless the withholding was without a reasonable basis, thereby leaving the de novo standard undisturbed. SUBCOMM. ON GOV’T INFO. & INDIV. RIGHTS OF THE H. COMM. ON GOV’T OPERATIONS & SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 306–28 (J. Comm. Print 1975) [hereinafter SOURCE BOOK].

overclassification in the national security and foreign policy contexts.<sup>82</sup> Senator Baker, in describing his tenure on the Senate Select Committee on Presidential Campaign Activities, recalled viewing “literally hundreds of Watergate-related documents that had been classified ‘secret’ or ‘top secret’ . . . 95 percent of [them] should not have been classified in the first place and . . . the Nation’s security and foreign policy would not be damaged in any way by public disclosure of these documents.”<sup>83</sup> To the Attorney General’s concern that the amendments to the FOIA “would shift the burden to the government,” Senator Muskie responded, “[t]he burden is on the agency to sustain its action.”<sup>84</sup> The FOIA imposes the burden because of “the weight of the Federal bureaucracy, which has made it almost impossible for us to come to grips with secrecy control and limit the classification process.”<sup>85</sup> The consensus of the conferees was that the “burden remains on the Government under this law.”<sup>86</sup> The conferees also discussed, but refused to limit, judicial review of classified material to determining if the classification decision had a reasonable basis<sup>87</sup> and, in fact, felt that the weight given to agency expertise was meant to be balanced by the weight *any other expert* could bring to the debate:

Rather, I am saying that I would assume and wish that the judges give such expert testimony considerable weight. However, in addition, I would also want the judges to be free to consult such experts in military affairs . . . or experts on international relations . . . or other experts, and give their testimony equal weight.<sup>88</sup>

The balance the conferees hoped to achieve in the judicial review process has not been implemented, as very few FOIA requestors have been able to overcome the judicial reliance on the mention of “substantial weight” in the legislative history, notwithstanding the existence of other balancing language.<sup>89</sup> Indeed, the general rule in FOIA cases since 1974

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82. It is worth noting that the etymology of bureaucracy is the French word, *bureau*, a “writing-desk with drawers,” and the Greek word for “rule”: the tendency to put things away and shut them up is part of the definition of bureaucracy. See THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 127 (1966).

83. SOURCE BOOK, *supra* note 81, at 460.

84. *Id.* at 316, 321.

85. 120 CONG. REC. 17,029 (1974) (statement of Sen. Edmund Muskie).

86. SOURCE BOOK, *supra* note 81, at 226.

87. S. 2534, 93d Cong. (1974) included the limiting language, but the proposed language was stricken from the bill by a Senate motion carried by a 56–29 vote. 120 CONG. REC. 17,022–32.

88. SOURCE BOOK, *supra* note 81, at 308.

89. *Id.*; S. REP. NO. 93-1200, at 12 (1974) (Conf. Rep.). The text of the statute reads: On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine

has been that the courts, “lacking expertise in the substantive matters at hand, must give substantial weight to agency statements, so long as they are plausible and not called into question by contrary evidence or evidence of agency bad faith.”<sup>90</sup> No court seems to have taken up the congressional call for the use of “other experts,” and have simply stated that they lack expertise.<sup>91</sup> Instead, courts have routinely refused to hear the testimony of other experts. Some examples of experts whose views have been rejected include a United States Senator who had read the requested document in his official capacity as a member of the Committee on Foreign Relations,<sup>92</sup> an admiral,<sup>93</sup> a former CIA agent,<sup>94</sup> and a former ambassador who had personally prepared some of the records at issue,<sup>95</sup> among others.<sup>96</sup> Courts have “demonstrated deference to agency expertise by according little or no weight to opinions of persons other than the agency classification

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

5 U.S.C. § 552(a)(4)(B) (2012).

90. *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980). For a more recent case, see *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (citing *Halperin*, and finding that “the government’s assessment is plausible, and as there is no contrary evidence or evidence of bad faith, we accept its representations.”).

91. See, e.g., *Students Against Genocide*, 257 F.3d at 837 (holding that because courts lack expertise in national security matters, they must give “substantial weight to agency statements” (quoting *Halperin*, 629 F.2d at 149)).

92. See generally *Washington Post v. U.S. Dep’t of Def.*, No. 84-2949, U.S. Dist. LEXIS 16108 (D.D.C. Feb. 25, 1987) (concerning a staff writer sought to compel the Department of Defense (DOD) to disclose a report prepared in order to help the Salvadorian government develop a military strategy), cited in U.S. DEP’T. OF JUSTICE, OFFICE OF INFO. POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT 150 & n.40 (2009 ed.) [hereinafter FOIA GUIDE 2009].

93. See *Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy*, 891 F.2d 414, 421–22 (2d Cir. 1989) (ruling in favor of the Navy’s claim of exemption regarding alleged environmental law violations since the judicial branch cannot analyze alleged violations, but noting that the Navy is subject to congressional environmental laws), cited in FOIA GUIDE 2009, *supra* note 92, at 150 n.41.

94. See *Gardels v. CIA*, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (describing a student sought disclosure of information regarding CIA contacts with a university after the CIA provided affidavits to establish exemption), cited in FOIA GUIDE 2009, *supra* note 92, at 150 n.41.

95. See *Rush v. Dep’t of State*, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990) (holding a former ambassador working on requested documents could be denied information if it was properly classified), cited in FOIA GUIDE 2009, *supra* note 92, at 150 n.41.

96. See *Pfeiffer v. CIA*, 721 F. Supp. 337, 340–41 (D.D.C. 1989) (holding a former CIA employee can similarly be denied information if it was properly classified), cited in FOIA GUIDE 2009, *supra* note 92, at 150 n.41.

authority.”<sup>97</sup> Only once has a court actually appointed a special master to review and categorize classified documents.<sup>98</sup>

Nor did passing the 1974 amendments end the political battle. President Ford vetoed the amendments to the FOIA on the advice of Chief of Staff Donald Rumsfeld and Deputy Chief of Staff Richard Cheney, who warned that, among other concerns, the amendments would go too far in allowing judicial review of classified documents.<sup>99</sup> Antonin Scalia weighed in with arguments that the amendments were unconstitutional.<sup>100</sup> Congress overrode the veto. In the debates regarding the veto, Senator Baker weighed in on the side of disclosure, stating that the risk that a judge might “disclose legitimate national security information” was worth bearing as transparency would help stop “the potential for mischief and criminal activity.”<sup>101</sup> The 1974 FOIA national security amendment was intended to further access to overclassified documents.<sup>102</sup> The hearings and testimony on the amendment refer to the need to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>103</sup> The debate and the amendment were made in a time, much like our own, when revelations about the secret machinations of government made daily headlines, and there was open discussion about the problem of too much secrecy. But the trend towards secrecy has not abated since 9/11.

As has often been noted, we now live in a state of permanent

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97. 1 CORNISH F. HITCHCOCK, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* 158–59 (2014) (analyzing both the Freedom of Information and Privacy Acts).

98. *In re U.S. Dep’t of Def.*, 848 F.2d 232, 235 (D.C. Cir. 1988) (upholding the District Court’s appointment of a special master (a security-cleared intelligence expert) to create a representative sample of the withheld documents and to summarize for the court the arguments each side made or could have made regarding the exemptions). The District Court judge was dissatisfied with alternative means of document review, including giving the judge’s clerks security clearances so they could review the documents, allowing the government to prepare a sample index, citing case authority that questioned the impartiality of government-run sampling, or a purely random sample. *Id.* at 234. See also Patricia M. Wald, “Some Exceptional Condition”—*The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b)*, 62 ST. JOHN’S L. REV. 405, 407–08 (1988) (discussing the judge’s dissatisfaction with the alternative means of document review). The special master was ordered to proceed in *Washington Post v. United States Department of Defense*, Civ.A No. 84-3400-LFO, 1988 WL 73852, at \*1 (D.D.C. June 6, 1988).

99. See *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT’L SEC. ARCHIVE (Dan Lopez et al. eds., Nov. 23, 2004), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142> (describing history of FOIA goals and norms).

100. See *id.* For more detail on the basis of Antonin Scalia’s opposition, see generally Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar./Apr. 1982, at 14.

101. SOURCE BOOK, *supra* note 81, at 461.

102. 120 CONG. REC. 17,029 (1974).

103. *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

emergency.<sup>104</sup> Presidential authority has expanded dramatically in the national security sphere, and the traditional checks are widely viewed as ineffective or inappropriate.<sup>105</sup> While there has been some movement under the Obama Administration toward proactive release of information,<sup>106</sup> which makes FOIA requests redundant, this has not occurred in the national security context. The next part discusses some possible reasons for the courts' unwillingness to participate in enhancing transparency.

## II. JUDICIAL DECISIONMAKING UNDER CONDITIONS OF UNCERTAINTY

Cognitive psychology has identified several ways in which actual decisionmaking runs counter to the model of the rational, self-interested person, which forms the basis of so many discussions about legal problem solving. When making decisions, it turns out, there are a number of distinct biases that individuals bring to the decisionmaking process; the relevant one here concerns "availability," the overweighting of information at hand.<sup>107</sup> This is a variation of the concept of salience in decisionmaking, which was popularized by Amos Tversky and Daniel Kahneman.<sup>108</sup> The availability heuristic tilts decisionmaking toward "prominent" information, so that people "rely too heavily on information that is readily available or

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104. See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 2–6 (Kevin Attell trans., 2005) [hereinafter *STATE OF EXCEPTION*] (arguing that uses of "states of exception" to justify abuses of power are normal government models); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1723–32 (2011) (discussing the expansion of national security—and militarism—into realms previously unassociated with national security, including the environment, health, drugs, and crime).

105. See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (discussing the increase of presidential power post-9/11 and its relation with legal and political constraints); see also ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 20 (2007) (denying that courts or judges, as an institutional matter, can improve on executive decisionmaking during emergencies).

106. See Memorandum on Transparency and Open Government, 3 C.F.R. 338, 338–39 (2009); Memorandum on the Open Government Directive from Peter R. Orszag, Director, Office of Mgmt. & Budget, for the Heads of Executive Departments and Agencies (Dec. 8, 2009), [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf).

107. See Nobert Schwarz et al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCHOL. 195, 195 (1991).

108. See generally AMOS TVERSKY & DANIEL KAHNEMANN, *Introduction to JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 264–66 (2011) (explaining salience bias against transparency and complexity biases and discusses both in relation to federal income taxes and discrete provisions).

prominent, ignoring information that they do not see as often or as readily or that is in the background.”<sup>109</sup> This bias trumps more thoughtful determinations of frequency and probability.<sup>110</sup> Of particular relevance for present purposes, it distorts the ability to assess low probability events that might have “high consequence risks.”<sup>111</sup>

As Stephen Schulhofer has pointed out, “[t]he reasons for judicial resistance to *de novo* review, despite the statutory mandate for it, are not mysterious”: judges feel they lack competence and the stakes are too high.<sup>112</sup> In the realm of decisionmaking about national security, the stakes of the worst-case scenario—that terrorists will, for example, get sufficient information from the release of any given document to harm national security—trumps the probability or likelihood of that actually happening, given the vast number of over-classified documents.<sup>113</sup>

This is not to maintain that mere probability should be the deciding factor in a FOIA case, but it should be an element in an analysis by a court of whether to seriously review a government claim that a document is properly classified or to undertake an *in camera* review in order to make the determination. But the availability heuristic may help explain the relatively low incidence of disclosure orders or true *de novo* review,<sup>114</sup> and judicial experience or training does not exempt judges from the effects of the bias.<sup>115</sup>

109. Schenk, *supra* note 108, at 264. Economists’ studies have shown that when something is salient, it had a more pronounced effect on behavior and responses. *Id.* at 264–65.

110. See Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in TVERSKY & KAHNEMAN, *supra* note 108, at 190, 192 (“Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionately affect judgments.”). An example of the salience bias in action is illustrated by *CIA v. Sims*, 471 U.S. 159, 178–79 (1985), where the CIA was allowed to “withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source.”

111. See generally Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POL’Y ANALYSIS & MGMT. 565 (1989) (showing how people misjudge low probability events).

112. Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* 48 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-53, 2010), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1661964](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661964).

113. See Craig E. Jones, *The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision-Making*, 41 ADVOCATES’ Q. 49, 75 (2013).

114. *Id.* at 51 (explaining that in cognitive psychology, heuristics are “cognitive shortcuts that we use as something like defaults in the decision-making process. These heuristics operate mostly at a sub-conscious level”).

115. *Id.* at 65. Attorneys and judges can be more resistant than the general populace to a few biases (framing effects and the representative heuristic), but not the ones discussed here. *Id.* at 73. Mortality reminders, like those connected with scenarios of terrorism, have

Regarding the legislative requirement for judicial review of agency determinations regarding national security, courts have long refused to entertain requests for de novo review in FOIA cases except in the most exceptional circumstances, and have generally refused to hear evidence from outside experts proffered by plaintiffs, even when those experts have the highest qualifications.<sup>116</sup> Despite clear directives from Congress, including a direct congressional override of the early judicial adoption of deference in Exemption One cases, trial courts have in fact exhibited extreme reluctance to actually make any determinations in these cases that are contrary to government assertions of national security.<sup>117</sup> This seems to be a classic case of uncertainty in decisionmaking leading to refusal to make decisions. As Adrian Vermeule notes, in decision theory, “[t]he term uncertainty is reserved for the class of situations in which the decision maker knows the payoffs associated with various outcomes but not the probability that the possible outcomes will come to pass.”<sup>118</sup>

This perfectly describes the dilemma faced by courts deciding the FOIA cases: the judge knows that if the information is suppressed, the public will not have access to information it is legitimately entitled to know. On the other hand, if the information is truly properly classified, and its release will cause damage to the security of the United States, then the goal of protecting the security of the United States will not be met. Apparently feeling unable to assess the probability that the release of the information will damage the security of the United States, the courts have routinely deferred to the government in situations where hindsight has shown it was foolish to do so.<sup>119</sup> Routine deference immunizes the courts from criticism if the low probability of large harm occurs. But that still leaves courts relying on the supposed expertise of government bureaucrats. Relying on supposed experts can have negative consequences where “the group is influenced by some selection bias, professional norm, or opinion cascade

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been shown to make judges more “defensive and ‘in-group’ oriented, and thus more harshly judgmental of unconventional moral norms.” *Id.* at 63. The in-group (or group to which the subject belongs) in a FOIA case where the national security exemption is being claimed would be the government, and the actual classifiers would be a subset of the government, just as judges are subsets of the government. *See id.* FOIA requesters, on the other hand, are the out-group.

116. *See supra* notes 92–98 and accompanying text.

117. *See infra* Part IV.

118. Adrian Vermeule, *Interpretive Choice*, N.Y.U. L. REV. 74, 114 (2000) (examining problems with judicial statutory interpretation).

119. For example, see *United States v. Reynolds*, 345 U.S. 1, 4–5 (1953), where the government claimed it would have to reveal state secrets about a plane’s spy mechanism for the case to go forward, but when the report was declassified fifty years later, no national security secrets were involved, just evidence that the plane malfunctioned. *See infra* notes 183–185 and accompanying text.

that herds the whole group towards one policy option without independent consideration by (most of) the group's members."<sup>120</sup>

There are, of course, many situations where judges make difficult decisions and are not seemingly paralyzed by fear of consequences, even in the national security context.<sup>121</sup> The Pentagon Papers case is a prime example. Relying on both the First and the Fourth Amendments, the Court in *New York Times Co. v. United States* refused to restrain the publication of the Pentagon Papers.<sup>122</sup> It may have mattered that the Pentagon Papers were already published, and the sky had not fallen, but the Court had no trouble balancing national security and civil liberties in that case. Meredith Fuchs has suggested that the need to confront the First Amendment directly made the difference in that case.<sup>123</sup> But a First Amendment analysis is notably missing from most cases concerning the right to information. The debate about access to government information and the passage of the FOIA were taking place at the same time that the Supreme Court was expanding its First Amendment jurisprudence.

If the FOIA had not been enacted when it was, there might be a more explicit First Amendment protection of access to government information as a subset of the constitutionally protected right to receive information.<sup>124</sup> Before the FOIA was passed, scholars looked to the First Amendment to create a broader right to know about the workings of the government.<sup>125</sup> Despite the Supreme Court's continued affirmation of a constitutionally protected right to *receive* information,<sup>126</sup> the Court has relied on the FOIA,

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120. Vermeule, *supra* note 118, at 119.

121. In contexts other than the FOIA, it has been noted that, in the tradeoff between security and liberty, even if courts feel a lack of expertise in national security, they are experts in liberty, and so must exercise that expertise in the weighing of the risks and benefits. See Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511, 1517 (2012).

122. 403 U.S. 713, 714 (1971).

123. As Meredith Fuchs has stated:

No clear reason explains why the Court would judge itself more competent to assess the need to keep information secret simply because the information had already been leaked to the press. When faced with the government's request to enjoin publication, however, the Court had to directly confront the First Amendment. Had the Pentagon Papers not been leaked, there would have been no First Amendment clash to resolve—secrecy for the purpose of covering up government misrepresentations would have triumphed.

Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 170 (2006).

124. See FOERSTEL, *supra* note 36, at 66–67; Sullivan, *supra* note 60, at 17–18.

125. See, e.g., Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 3 (1957) (discussing constitutional issues relevant to statutory and presidential action required to create an openly informative government).

126. The Supreme Court has recognized a constitutional right to receive information.



not the Constitution, to protect *access* to most government information.<sup>127</sup> Although the right to know about all of the workings of the government may be implied in the right to petition the government, the Supreme Court has limited access to government information in the context of considering the press's constitutional right to information about certain trial proceedings.<sup>128</sup>

Congress did in fact give the courts a potentially powerful tool to use to analyze matters of national security: experts.<sup>129</sup> While individual judges may not have expertise in matters of national security, even without the congressional mandate in the FOIA's legislative history, courts have "solid *institutional* capacities to elicit expertise."<sup>130</sup> As Stephen Schulhofer points out, national security expertise requires balancing two types of institutional values, secrecy and transparency; and while national security officials abhor transparency, judges thoroughly understand the values of transparency.<sup>131</sup>

Although judges may express a lack of expertise, deciding issues of national security arises in many contexts. Judges have automatic access to classified information as an aspect of their status<sup>132</sup> and review national security issues under many laws, including the Classified Information Procedures Act, the Fourth Amendment, and the Foreign Intelligence Surveillance Act, in addition to the FOIA.<sup>133</sup>

The result of the courts' failure to follow the balancing procedures set

*Compare* *Martin v. Struthers*, 319 U.S. 141, 141–42, 147, 149 (1943) (deciding that a local law prohibiting door-to-door distribution was considered a violation of the constitutional freedoms of speech and press), *with* *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (finding that Congress was permitted to pass an act requiring public libraries to have Internet filters in order to receive federal subsidies as being designed to meet educational and informational purposes).

127. One early commenter on the 1974 revisions to the FOIA hoped that the FOIA would provide a procedural framework to adjudicate the right to know; that has not happened. *See* David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 161–62 (1977) (advocating for injecting a constitutional right to know into the discussion where national defense and foreign policy claims for withholding information are made).

128. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 257–302 (2004) (arguing that jurisprudence disfavors the flow of information in the interest of protecting the government, academia, or private organizations).

129. SOURCE BOOK, *supra* note 81, at 308.

130. *See* Stephen J. Schulhofer, *Oversight of National Security Secrecy in the United States*, in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 22, 23 (David Cole et al. eds., 2013).

131. *Id.*

132. *See, e.g.*, Frederic F. Manget, *Another System of Oversight: Intelligence and the Rise of Judicial Intervention*, 39 STUD. INTELLIGENCE 43, 43 (1996), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol39no5/pdf/v39i5a06p.pdf>.

133. *Id.* at 46–48.

out in the FOIA is that the balance has tilted toward excessive secrecy, with all its attendant ills. The 1974 FOIA amendments made it clear that the courts were directed to perform substantive reviews of agency claims that information was properly classified, and that *Mink's* rubber stamp approval of agency determinations was not consistent with the purpose of the FOIA. As David Pozen points out, “[a]bduction, again, exacerbates delegation’s disadvantages as well as its advantages. Legally, delegation threatens FOIA’s principles of segregation and individualized document review; it undermines the Act’s allocations of burdens, if not de novo review itself; and it violates legislative intent.”<sup>134</sup> The incentive provided by the possibility of rigorous oversight at least some of the time has recently been called the “observer effect.”<sup>135</sup> Failure to perform a rigorous oversight function often enough to make unfavorable court review a factor in agency determinations disincentivizes agencies from thinking more deeply about whether or not a document *needs* to be classified or could be provided *despite* classification.<sup>136</sup>

The actual impact of court review on agency action might vary, depending on the agency involved and the frequency of invocation of Exemption One. Some agencies rarely invoke Exemption One, but others do so routinely. For example, the Department of Justice (DOJ), one of the agencies that make Exemption One claims, received 69,456 FOIA requests in 2012, and only 408 of those implicated Exemption One (0.01%).<sup>137</sup> Within the DOJ, the FBI received 12,783 of those FOIA requests, and 333 involved a claim where Exemption One applied (0.03%).<sup>138</sup> But where the primary focus of an agency implicates national security, as one might expect, the percentage of times an agency invokes Exemption One goes up.

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134. David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628, 668 (2005) (internal parentheticals omitted).

135. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 834–38 (2013) (defining the effects of being observed by courts on executive policy). The observer effect is in play outside the executive policy arena. See *id.* at 834 n.19. An example of the observer effect on agencies would be “hard look” judicial review deterring agencies from “implementing policies rashly or without factual basis.” *Id.* at 853 n.127.

136. Agencies do not have to claim an exemption where no harm would result from the disclosure. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (discussing agency discretion to claim exemption or provide documents); see also *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133–34 n.1 (D.C. Cir. 1987) (explaining that an agency’s FOIA disclosure decision can “be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions”).

137. These percentages were created using FOIA.gov’s data generator. *Create a Basic Report*, FOIA.GOV, <http://www.foia.gov/data.html> (last visited Oct. 27, 2014). The data is on file with the author.

138. *Id.*

The CIA received 3,745 FOIA requests, and claimed Exemption One applied to 2,112 of them (56%).<sup>139</sup> The NSA received 1809 FOIA requests, and claimed Exemption One in 1,104 cases (61%).<sup>140</sup> The Defense Intelligence Agency received 1,144 requests, and claimed Exemption One applied in 344 of them (30%).<sup>141</sup> The Office of the Director of National Intelligence received 343 FOIA requests, and claimed that Exemption One applied in 51 of them (15%).<sup>142</sup> These agencies are necessarily involved in national security classification and might be more likely to pay attention to being observed by the courts.

Just because a decision is difficult does not mean that reasoned decisions can be avoided. Judges make difficult decisions in a variety of contexts, including those that involve the First Amendment; in these cases, “judges are well-suited to recognize interference with the flow of information about government affairs.”<sup>143</sup> There is no reason why judges cannot set up procedures that will allow them to evaluate the risks associated with disclosure.<sup>144</sup> Appointing referees, allowing experts to testify on behalf of disclosure, and creating specialized courts have all been suggested as possibilities to add some balance to a system that does not recognize the overwhelming evidence of overclassification or balance the harmful effects of secrecy against the harmful effects of disclosure.<sup>145</sup>

### III. OVERCLASSIFICATION AND THE ILLUSION OF AGENCY EXPERTISE

We have seen that courts defer to agency expertise in national security matters; indeed the legislative history of the 1974 amendments to FOIA made many references to “substantial deference” to agency expertise in national security matters.<sup>146</sup> So if in fact there is systemic overclassification,

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Fuchs, *supra* note 123, at 170.

144. *Id.* at 170–71.

145. SOURCE BOOK, *supra* note 81, at 175, 308.

146. *See id.* at 308; *see, e.g.*, Lawyers Alliance for Nuclear Arms Control—Phila. Chapter v. Dep’t of Energy, 766 F. Supp. 318, 322 (E.D. Pa. 1991) (referring to the legislative history of the FOIA amendments, stated that “[b]ecause executive departments handling defense and foreign policy matters have ‘unique insights’ into the dangers of public exposure, courts are to ‘accord substantial weight to an agency’s affidavits concerning the details of the classified status of a disputed record’” (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (quoting S. Rep. No. 93-1200, at 12 (1974) (conf. rep.))). The Lawyers Alliance court cited *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987), which adopted the standard of the D.C. Circuit as stated in *Abbotts v. Nuclear Regulatory Commission*, 766 F.2d 604, 606 (D.C. Cir.1985). *Lawyers Alliance*, 766 F. Supp. at 322.

then deference as a matter of course is troubling: information is not being released that should be. We suggest that there is overwhelming evidence that agencies in fact routinely overclassify documents, and that the motivation for classification arises from an agency culture of secrecy. Agents sometimes seek to legitimize the superior value of inexpert information by designating it as “secret.” They also use classification to prevent the exposure of embarrassing and politically volatile information that has no national security value.<sup>147</sup> This section examines the reasons for overclassification and the “classification state.”

During the 1973 hearings on Executive Privilege, Secrecy in Government, and Freedom of Information, one of the witnesses was William G. Florence, a retired Air Force Security Analyst with decades of experience in reviewing and classifying documents.<sup>148</sup> He stated that “[t]here is abundant proof that the false philosophy of classifying information in the name of national security is the source of most of the secrecy evils in the executive branch.”<sup>149</sup>

Mr. Florence listed the most common reasons information is classified, and none of his eight reasons are related to any actual harm to the security interests of the United States. The reasons given by Mr. Florence were:

1. Newness of the information;
2. Keep it out of newspapers;
3. Foreigners might be interested;
4. Don’t give it away—and you hear the old cliché, don’t give it to them on a silver platter;
5. Association of separate nonclassified items;
6. Reuse of old information without declassification;
7. Personal prestige; and
8. Habitual practice, including clerical routine.<sup>150</sup>

Mr. Florence is among those experts who have quantified the amount of

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147. SOURCE BOOK, *supra* note 81, at 460–61.

148. Mr. Florence served for twenty-two years in the Army and the Air Force, and served twenty-one more years with the Department of Defense in civilian status. For twenty-six years, his duties included the development and application of policy for classifying and declassifying official information. From 1971 to 1973, he served as a security consultant to government contractors in matters involving national defense considerations, and was associated with the defense in the Ellsberg-Russo Pentagon papers case. *Executive Privilege Secrecy in Government Freedom of Information: Hearing Before the Subcomm. on Intergovernmental Relations of the S. Comm. On Gov’t Operations, Subcomms. On Separation of Powers & Admin. Practice & Procedure of the S. Comm. On the Judiciary* 93d Cong. 285 (1973) [hereinafter *Executive Privilege Hearings*] (statement of William G. Florence).

149. *Id.*

150. *Id.* at 287.

properly classified information, and in his opinion, somewhere between one-half of one percent and five percent of all classified information is in fact properly classified.<sup>151</sup> Once documents are classified, it can be extremely difficult to convince an agency to change that classification, even when the documents have been made public. Mr. Florence gave an example from the Daniel Ellsberg trial in 1969 regarding twenty documents that were made a part of the public record during the trial and where “[t]he judge specifically ruled that all material introduced as evidence is public, and that the still-classified documents are available to anyone. Both departments [Defense and State] have repeatedly refused to cancel the classification markings assigned to their respective documents to this day.”<sup>152</sup>

A more current example dates from the George W. Bush Administration, when the Justice Department requested that the Judiciary Committee remove several letters regarding a government investigation into claims that important translations were not being done properly prior to the 9/11 terrorist attacks.<sup>153</sup> The Judiciary Committee removed two of the letters from its website.<sup>154</sup> It took a lawsuit to get the Justice Department to admit that retroactive classification was impossible, since the letters had been already published on the Internet.<sup>155</sup>

William J. Leonard, retired head of the Information Security Oversight Office, has noted that, although no document may be classified to “conceal violations of law, prevent embarrassment to a person or agency, restrain competition, or delay the release of declassifiable information,”<sup>156</sup> no one

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151. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Subsection (b)(1) of the Freedom of Information of Act (Part 7): Hearings Before the Subcomm. of the H. Comm. on Gov’t Operations*, 92d Cong. 2296 (1972) [hereinafter *Hearings on Security Classification Problems*] (statement of William G. Florence).

152. *Executive Privilege Hearings*, *supra* note 148, at 287.

153. *Classified Letters Regarding FBI Whistleblower Sibel Edmonds*, MEMORY HOLE, [https://web.archive.org/web/20090317040641/http://www.thememoryhole.org/spy/edmonds\\_letters.htm](https://web.archive.org/web/20090317040641/http://www.thememoryhole.org/spy/edmonds_letters.htm) (last visited Oct. 27, 2014); Chris Strohm, *Lawsuits Challenge Justice Effort to Classify Previously Public Information*, GOV’T EXECUTIVE (June 28, 2004), <http://www.govexec.com/dailyfed/0604/062804c1.htm>.

154. Strohm, *supra* note 153.

155. Stipulation of Dismissal, *Project on Gov’t Oversight v. Gonzales*, C.A. No. 1:04cv1032 (D.D.C. Mar. 9, 2005), available at <http://www.citizen.org/documents/stipdismissal.pdf>; see also Letter from Vesper Mei, U.S. Dep’t. of Justice, to Michael T. Kirkpatrick, Pub. Citizen Litig. Grp. (Feb. 18, 2005), available at <http://www.citizen.org/documents/2-18-05letter.pdf> (acknowledging that the letters are “releasable in full, pursuant to the Freedom of Information Act”).

156. See Bill Weaver, *State Secrets and the Temptations for Misuse*, NAT’L SEC. ADVISORS: NAT’L SEC. L. BLOG (May 22, 2007, 1:32 PM), [http://natseclaw.typepad.com/matseclaw/2007/05/paving\\_the\\_road.html](http://natseclaw.typepad.com/matseclaw/2007/05/paving_the_road.html); see also Exec. Order No. 13,526 § 1.7(a)(1)–(2), (4), 3 C.F.R. 298, 302 (2009). Bill Weaver asked William Leonard, then the

has ever been disciplined for violating these provisions. Leonard's agency had responsibility for enforcing classification policy throughout the government and under the National Industrial Security Program.<sup>157</sup>

There is evidence that, despite the clear directives in executive orders on classification, agencies routinely use classification for every one of the prohibited reasons. The Church Reports were not the last major congressional report on excessive secrecy and improper classification. Daniel Patrick Moynihan, the Chairman of the 1997 Commission on Protecting and Reducing Government Secrecy, stated that using the "sources and methods"<sup>158</sup> approach of classifying information has meant that how the information is obtained, not the content of the information, is a major determinant of classification; almost everything that an intelligence agency collects, including information from open sources, is automatically classified:<sup>159</sup> this meant that "in 1995 there were 21,871 'original' Top Secret designations and 374,244 'derivative' designations."<sup>160</sup> Senator Moynihan asked: "can there really have been some 400,000 secrets created in 1995, the disclosure of any one of which would cause 'exceptionally grave damage to the national security?'"<sup>161</sup>

To bring these numbers more up to date, in 2011, there were 127,072 original classifications,<sup>162</sup> and over 50 million derivative classifications made in 2010, the last year for which there are figures.<sup>163</sup> To update Senator Moynihan's question, can there really have been over 50 million secrets created in 2010, the disclosure of any one of which would have caused exceptionally grave damage to the national security?

In 1993, then-Senator John F. Kerry of Massachusetts made a comment regarding classified documents reviewed by the Select Committee on

head of the Information Security Oversight Office, the office responsible to the President for policy and oversight of the government-wide security classification system and the National Industrial Security Program, whether anyone had ever been disciplined for violating the Executive Order. Weaver, *supra* note 156. No one could remember a single instance of discipline, despite the fact that there "are three million derivative classifiers." *Id.*

157. Weaver, *supra* note 156.

158. National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(3), 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.).

159. S. DOC. NO. 105-2, at XXVII (1997).

160. *Id.* at XXXIX ("Many of these 'derivative' designations involve 'sources and methods,' one of the subjects concerning intelligence mentioned in the National Security Act of 1947. A report about troop movements might reveal that we have satellite photography in the region; such like matters.")

161. *Id.*

162. OPENTHEGOVERNMENT.ORG, 2012 SECRECY REPORT: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 20 (2012), [http://www.openthegovernment.org/sites/default/files/Secrecy2012\\_web.pdf](http://www.openthegovernment.org/sites/default/files/Secrecy2012_web.pdf). The government did not release the number of derivatively classified documents in 2011. *Id.* at 21.

163. *Id.* at 23.

POW/MIA Affairs. He stated: "I do not think more than a hundred, or a couple of hundred, pages of the thousands of documents we looked at had any current classification importance, and more often than not they were documents that remained classified or were classified to hide negative political information, not secrets."<sup>164</sup>

Daniel Moynihan relied on Max Weber's theories about bureaucracy when he framed secrecy as a pernicious form of regulation:

Max Weber, who first set forth, over eight decades ago, that secrecy was a normal mode by which bureaucracies conduct their business. . . . Rulemaking was the distinctive mode of bureaucracy. We came to call it regulation. If the present report is to serve any large purpose, it is to introduce the public to the thought that *secrecy is a mode of regulation*.<sup>165</sup>

The default mode of security bureaucracies is secrecy; when a decision needs to be made about whether or not to classify something as secret, there are implicit rules *and* norms in place that favor overclassification. Institutionalized rules and norms can be followed unthinkingly until some feedback from above lets people know the rules and norms are not working properly, and for agencies, judicial constraints on decisionmaking are a way to signal that specific types of decisions will not pass statutory muster.<sup>166</sup> There are sound reasons for curtailing excessive overclassification.

There are many dangers from excessive secrecy. Regarding the dangers of hiding things from the public, Senator Moynihan noted that in the 1960s and 1970s, scientists were clear that overclassification of scientific evidence was actually a danger to America's national security, as it "deprive[s] the country of the lead time that results from the free exchange of ideas and information" and that the amount of technical information that was overclassified or improperly classified was as much as 90%.<sup>167</sup>

The range of estimates for the amount of overclassification varies, but the fact that massive overclassification exists does not. Many of the estimates of overclassification have been made by people with years of experience in the government. The fact that there is a consensus that a large percentage of what is classified need not be classified should change the risk analysis for judicial review. When determining the likelihood of an event happening, courts should not be insensitive to the prior probability of the outcome. If there is a likelihood that, to be conservative, 50% of

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164. S. Doc. No. 105-2, at XXXI-XXXII.

165. *Id.* at XXXVI.

166. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 493-94 (2002). The other methods include a crisis calling the rule into question, a new leadership with new ways, or congressional or presidentially imposed constraints. *Id.* Some combination of these methods have all been relied upon to intervene in the bureaucracy of secrecy, to little apparent effect to date. See *id.*

167. S. DOC. NO. 105-2, at app. A-61.

documents are not properly classified, that probability needs to be taken into account when determining the likelihood that a claim of exemption should be reviewed by the court or should be treated with skepticism, or that releasing a particular document will cause a major national security harm. Failure to do so causes judges to overestimate the probability that the document is properly classified—and those properly classified documents are the only documents Exemption One protects from disclosure.<sup>168</sup> The Moynihan Report points out the resulting harm of this practice: “One legacy of a century of real and imagined conspiracy, most of it cloaked in secrecy, is that the American public has acquired a distrust of government almost in proportion to the effort of government to attempt to be worthy of trust.”<sup>169</sup>

Of course, not everyone associated with the government is dissatisfied with the way in which the federal courts have interpreted the congressional mandate for muscular review of claims that national security exempts documents in FOIA disclosure; there are those who believe that the Executive’s mandate to control national security should not be interfered with by the Judiciary.<sup>170</sup> The argument that documents cannot be released because of national security concerns is not, of course, limited to the FOIA. Many fascinating examples of claims of national security that have turned out to be false come from cases outside the FOIA, such as the state secret claim in *Edmonds v. Department of Justice*,<sup>171</sup> where the government retroactively classified documents that had been available on the U.S. Senate website.<sup>172</sup>

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168. Cf. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (observing failure of decisionmaking because of heuristics and biases).

169. S. Doc. No. 105-2, at app. A-75. The recent Snowden disclosures have raised a storm of distrust, even though the government has claimed legal legitimacy for some of its actions; the secrecy itself is part of the problem. See *infra* note 206.

170. See, e.g., Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 907–08 (2006). See generally Laura A. White, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT’L L. 1071 (2003).

171. *Edmonds v. Dep’t of Justice*, 161 F. App’x. 6 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005). Sibel Edmonds was a CIA translator who claimed she was fired for whistleblowing; her case was dismissed, despite evidence that her allegations were true and that she had been fired for whistleblowing. See generally U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, OFFICE OF OVERSIGHT AND REVIEW, A REVIEW OF THE FBI’S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS: UNCLASSIFIED SUMMARY (2005), available at <http://www.justice.gov/oig/special/0501/final.pdf>.

172. Anne E. Kornblut, *Translator in Eye of Storm on Retroactive Classification*, BOS. GLOBE, July 5, 2004, [http://www.boston.com/news/nation/articles/2004/07/05/translator\\_in\\_eye\\_of\\_storm\\_on\\_retroactive\\_classification/?page=full](http://www.boston.com/news/nation/articles/2004/07/05/translator_in_eye_of_storm_on_retroactive_classification/?page=full).



An earlier example of a claim that turned out to be valid was at issue in the case of *New York Times v. United States*,<sup>173</sup> in which then-Solicitor General Erwin N. Griswold argued that disclosure would pose the threat of serious injury to the national security.<sup>174</sup> Mr. Griswold later recanted:

I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat. Sen. Gravel's edition is now almost completely forgotten, and I doubt if there is more than a handful of persons who have ever undertaken to examine the Pentagon Papers in any detail—either with respect to national security or with respect to the policies of the country relating to Vietnam.<sup>175</sup>

It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. “This is the lesson of the Pentagon Papers experience, and it may be relevant now.”<sup>176</sup>

The government can use national security as a trump card in litigation, and has been doing so for quite some time. Bill Weaver worked for the NSA for nine years, and reviewed and created classified information as a daily part of his job.<sup>177</sup> Speaking in the context of the state secrets privilege, he called for oversight, as he had “no doubt [the privilege] is often abused.”<sup>178</sup> He “observed and personally engaged in abuse of overclassification and saw unclassified items classified in order to prevent their disclosure. These problems are rampant and seemingly incurable.”<sup>179</sup>

There are no apparent penalties for classifying things for the improper reasons set out in executive orders. According to Weaver, the “classification of unclassified material and overclassification are actions that are viewed favorably by managers. If one does or claims otherwise one will

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173. See discussion *supra* note 45.

174. Brief for the United States at 18, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873), 1971 WL 167581.

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

176. *Id.*

177. Weaver, *supra* note 156.

178. *Id.*

179. *Id.*

not have a job very long.”<sup>180</sup> In the face of his personal knowledge of improper and overclassification, Weaver states that “there is *no reason* that judges should treat claims of classification and dangers that will occur from disclosure as sober judgments made in the best interests of the country.”<sup>181</sup> Too often, Weaver notes, it is politics, personal concerns, and fear of embarrassment that lead to classification decisions.<sup>182</sup> Retired Admiral Gene La Rocque testified in 1972 hearings before the Foreign Operations and Government Information Subcommittee about the reasons why the military overclassified information:

Other reasons for classifying material are: to keep it from other military services. . . from civilians in the Defense Department, from the State Department, and of course, from the Congress. Sometimes, information is classified to withhold it for later release to maximize the effect on the public or the Congress. Frequently, information is classified so that only portions of it can be released selectively to the press to influence the public or the Congress.<sup>183</sup>

Just recently, the nominee for Director of National Intelligence, Admiral Dennis C. Blair, admitted:

[t]here is a great deal of over-classification. . . . Some of it, I think, is done for the wrong reasons, to try and hide things from the light of day. Some of it is because in our system, there is no incentive not to do that, and there are penalties to do the reverse, in case you get something wrong and don't classify it.<sup>184</sup>

As Steven Aftergood, who directs the Federation of American Scientists Project on Government Secrecy, has noted, it is not that government officials cannot follow the procedural rules for classifying information; it is that their “subjective ‘determination’ that classification is necessary” is an “error in judgment.”<sup>185</sup>

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180. *Id.*

181. *Id.* (emphasis added).

182. *Id.*

183. *Hearings on Security Classification Problems*, *supra* note 151, at 2909–10.

184. Steven Aftergood, *Blair: Intel Classification Policy Needs “Fundamental Work,”* SECREC NEWS (Jan. 26, 2009), <http://www.fas.org/blog/secrecy/2009/01/blair/>. During questioning, Blair pledged to use classification policy “only to protect national security and not to manipulate public opinion or frame or mis-frame political debates[.]” *Id.*

185. Steven Aftergood, *Inspector General Classification Reviews Due in September*, SECREC NEWS (July 8, 2013), <http://fas.org/blogs/secrecy/2013/07/ig-reviews-due/>. “Thus, for example, when an agency’s classification judgment is overruled by the Interagency Security Classification Appeals Panel . . . —which happens with some frequency—it is not because of an error in procedure but because of an error in judgment.” *Id.* The vagaries of judgment are illustrated by one author’s experience with the FOIA: “In many of the documents I obtained through the Freedom of Information Act, the redactions by government censors made little sense. Exactly the same information would be supplied in one document, yet

This culture of excessive secrecy is the reason that Congress asked the Judiciary to balance claims of secrecy with common sense, expert testimony, and careful review. The courts have not complied. One small part of the problem is that judges do not understand what agencies do when they classify information, according to Alex Rossmiller.<sup>186</sup> Mr. Rossmiller worked at the Defense Intelligence Agency and knows that documents' classification is often done so that others will take the information more seriously.<sup>187</sup> For judges reviewing documents that the government claims are properly classified, it is important to understand the conditional language of classification. This refers to the use of

phrases such as *we judge*, *we assess*, and *we estimate*—and probabilistic terms such as *probably* and *likely*—[are used] to convey analytical assessments and judgments. Such statements are not facts, proof, or knowledge. These assessments and judgments generally are based on collected information, which often is incomplete or fragmentary. Some assessments are built on previous judgments. In all cases, assessments and judgments are not intended to imply that we have “proof” that shows something to be a factor that definitively links two items or issues.<sup>188</sup>

In other words, judges should take the information they review with a grain of salt. Mr. Rossmiller advises that when assessing protected information, courts should: review the information in question; apply appropriate skepticism; and examine source material.<sup>189</sup> But while Mr. Rossmiller tells us that the language of much classified information is inherently “conditional,” and that healthy skepticism is needed when reviewing it, there is another surprising countervailing force.

An even healthier dose of judicial skepticism may be necessary to overcome this force: the secrecy heuristic. A recent study at the University

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blacked out in another.” ERIC SCHLOSSER, *COMMAND AND CONTROL: NUCLEAR WEAPONS, THE DAMASCUS INCIDENT, AND THE ILLUSION OF SAFETY* 466 (2013) [hereinafter *COMMAND AND CONTROL*].

186. See, Alex Rossmiller, *Adjudicating Classified Information*, 85 ST. JOHN'S L. REV. 1275, 1277 (2011).

187. *Id.* at 1295–96.

188. *Id.* at 1314 & n.153 (quoting OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 5 (2007), available at [http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/20071203\\_release.pdf](http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/20071203_release.pdf)).

189. See *id.* at 1316–23. There have been instances where courts, outside the FOIA context, have done this. In *Parhat v. Gates*, the court found the documents purporting to be actual evidence that Parhat was an enemy combatant were suffused with so many caveats, that there was no actual evidence. 532 F.3d 834, 846–47 (D.C. Cir. 2008). Also, in *Boumediene v. Bush*, the district court found that despite voluminous evidence preferred by the government, the status of the defendants as enemy combatants was based on one unsupported claim from an unnamed source. 579 F. Supp. 2d 191, 197 (D.D.C. 2008).

of Colorado at Boulder offered an additional twist to the overclassification issue: in matters relating to foreign policy, when people are told that a document is secret, they are statistically more likely to believe its contents are true.<sup>190</sup> The study is based on three different experiments that looked at secrecy from a citizen, rather than an institutional, point of view.<sup>191</sup> The study found that secret information is weighed more heavily than public information; secret information is believed to be of higher quality than public information; and decisions made on the basis of secret information are judged more favorably than decisions made on the basis of public information.<sup>192</sup> The *heuristic* fills in for an ability to actually assess the *target* attribute of information: people use secrecy to fill in for quality when there is, in fact, no difference between the supposedly secret and the supposedly open information.<sup>193</sup> If judges are, like the rest of us, subject to the secrecy heuristic, they are just as likely to treat claims of secrecy as a signal of the quality of information.<sup>194</sup> If the information is believed more likely to be true, judges may find it easier to believe the information was properly classified. Furthermore, since the same agency that produced the presumptively true information is resisting disclosure, a judge may be more likely to ascribe veracity to the claim that disclosure would cause harm. Without training for judges to ignore the heuristic, the secrecy heuristic would improperly favor an agency's claim that information is properly classified, further reducing judicial incentives to actually evaluate whether or not the information was properly classified.

It has certainly been anecdotally true that judges have failed to use Mr. Rossmiller's suggested "grain of salt." The Sibel Edmonds case provides an interesting example.<sup>195</sup> A federal judge refused to let Sibel Edmonds, the government translator involved in a whistleblower suit, answer questions that could not plausibly have had a serious national security implication: "When and where were you born?"; "Where did you go to school?"; "What did you focus your studies on in school?"<sup>196</sup> The most famous case is, of

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190. Mark Travers et al., *The Secrecy Heuristic: Inferring Quality from Secrecy in Foreign Policy Contexts*, 35 POL. PSYCHOL. 97, 106, 108 (2014).

191. *Id.* at 98.

192. *Id.* at 98–99. The article speculates that in institutions with cultures of secrecy, such as the CIA, the heuristic may be even *more* prevalent. *Id.* at 108.

193. *Id.* at 99.

194. *See id.*

195. *See generally* Edmonds v. United States, 436 F. Supp. 2d 28 (D.D.C. 2006). Although *Edmonds* is a state secrets case, the judicial analysis for disclosure or nondisclosure in state secrets cases applies to FOIA cases. *See* Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) (providing an analogous interpretation of the national security exemption to the FOIA and the state secrets privilege); *see also* Pozen, *supra* note 134, at 639 (noting that state secrets cases and FOIA Exemption One cases are "analogous") (quoting *Halkin*, 598 F.2d at 9).

196. Anthony Rapa, Comment, *When Secrecy Threatens Security: Edmonds v. Department*

course, the case that gave judicial allowance to a state secrets privilege. In *United States v. Reynolds*, the government successfully terminated the tort claim by the widow of a spy plane pilot killed in a plane crash, claiming that it would have to reveal state secrets about the plane's spy mechanism for the case to go forward.<sup>197</sup> In 2000, the report the government withheld was declassified.<sup>198</sup> When the report was declassified, Mrs. Reynolds's daughter sued for fraud, alleging that there were no national security secrets involved—just evidence that the plane malfunctioned.<sup>199</sup> Every historian has a list of ludicrous secrets, according to Ted Gup,<sup>200</sup> and the “James Madison Project’s list is as good as any: on it is a Pentagon report classified ‘top secret’ that criticizes the excessive use of classification in the military” and a formula for invisible ink for World War I.<sup>201</sup>

The dangers of openness and disclosure are frequently exaggerated.<sup>202</sup> There were no repercussions from the leak of the Pentagon Papers,<sup>203</sup> and the repercussions from the biggest leak of all, Wikileaks, have generally been more evident in the press's imagination than in reality.<sup>204</sup> The leaks

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of Justice *and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 268 n.279 (2006) (criticizing the use of the state secrets privilege and the increase of national security within context of the *Edmonds* case).

197. 345 U.S. 1, 1 (1953). Although *Reynolds* is usually credited as the origin of the states secret doctrine, Laura Donohue has traced it much further back. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 82–85 (2010).

198. *Herring v. United States*, 424 F.3d 384, 387 (3d Cir. 2005); see Jess Bravin, *High Court to Consider State Secrets Doctrine*, WALL ST. J., Jan. 18, 2011, <http://online.wsj.com/news/articles/SB10001424052748704029704576088253308626870> (stating that the crash report, later declassified, said negligence caused the crash and did not contain electronics secrets).

199. *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at \*6–7 (E.D. Pa. Sept. 10, 2004).

200. Ted Gup, *Nation of Secrets: The Threat to Democracy and the American Way of Life* 111 (2007) (EXPLORING HOW AND WHY ACADEMIC, GOVERNMENT, AND BUSINESS INSTITUTIONS KEEP SECRETS FROM THE PEOPLE).

201. *Id.*; see *Litigation Files*, JAMES MADISON PROJECT, <http://www.jamesmadisonproject.org/litigation.php> (last visited Oct. 28, 2014).

202. Even in an arena where there is strong appeal to the proposition that secrecy is *required*, such as the operational details of our nuclear weapon, news reports about classified safety problems with the United States's missile program forced the government to implement crucial safety measures. *COMMAND AND CONTROL*, *supra* note 185, at 466–68.

203. Griswold, *supra* note 175 (“I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat.”).

204. At the time of the leaks by Bradley Manning, then Secretary of State Hillary Clinton accused his leak of 250,000 diplomatic cables of being “an attack on the international community” that “puts people’s lives in danger, threatens our national security and undermines our efforts to work with other countries to solve shared problems.” *Clinton Condemns Leaks as ‘Attack on the International Community,’* CNN, Nov. 30, 2010, <http://www.cnn.com/2010/US/11/29/wikileaks/>. But Clinton also “expressed confidence that U.S.

have certainty caused spectacular embarrassment, but embarrassment is specifically excluded as a reason for classification.<sup>205</sup> The recent Snowden leaks have likewise been an embarrassment, and have led to extensive and difficult conversations at the national and international levels.<sup>206</sup> The leaks have also led to a rash of affirmative releases of previously classified information by the government and have opened a public debate that even the current Director of National Intelligence believes is a step in the right direction.<sup>207</sup> In the wake of the leaks, the Director of the National

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diplomatic efforts will survive the leak of the documents, whose authenticity she would not confirm but which lay out in detail the diplomatic sausage-making that is usually hidden from public view.” *Id.* Sausage-making is embarrassing, not a danger to the national security. Amid many claims that the Wikileaks documents caused the death of innocent people, two claims persisted the longest. One claim regarded the death of Majid Fashi. See Sam Ser, *Did a Wikileaks Document Doom Iranian ‘Massad Agent’?*, TIMES ISR., May 16, 2012, <http://www.timesofisrael.com/wikileaks-report-may-have-doomed-iranian-mossad-agent/>. But the story about Majid Fashi was not true. Andy Greenberg, *Wikileaks: No, Media ‘Morons,’ We Didn’t Help Iran Execute an Israeli Spy*, FORBES, May 16, 2012, <http://www.forbes.com/sites/andygreenberg/2012/05/16/wikileaks-no-media-morons-we-didnt-help-iran-execute-an-israeli-spy/>. The “Afghan Diaries” allegedly put the security of military contacts in Afghanistan at risk. *WikiLeaks Accused of Murder*, CBS EVENING NEWS (July 29, 2010, 7:03 PM) <http://www.cbsnews.com/videos/wikileaks-accused-of-murder/> (“Pentagon officials are accusing the WikiLeaks website and the source of the ‘Afghan Diaries’ of murder for jeopardizing the security of military contacts in Afghanistan.”). But there has been no proof, the government has conceded. See, e.g., Nancy A. Youssef, *Officials May be Overstating the Danger from WikiLeaks*, MCCLATCHY DC, Nov. 28, 2010, <http://www.mcclatchydc.com/2010/11/28/104404/officials-may-be-overstating-the.html> (remarking that despite similar warnings ahead of the previous two massive releases of classified U.S. intelligence reports by the website, U.S. officials concede that they have no evidence to date that the documents led to anyone’s death). See generally Chase Madar, *Accusing Wikileaks of Murder*, THE NATION, Jan. 19, 2012, <http://www.thenation.com/article/165758/accusing-wikileaks-murder#> (documenting that no deaths can be traced to the Wikileaks revelations); Mark Hosenball, *US Officials Privately Say Wikileaks Damage Limited*, REUTERS, Jan. 18, 2011, <http://www.reuters.com/article/2011/01/18/wikileaks-damage-idUSN1816319120110118>.

205. See Griswold, *supra* note 175; see also Exec. Order No. 13,526 § 1.7(a)(2), 3 C.F.R. 298, 302 (2009).

206. See Dilanian, *supra* note 3; *Foreign Intelligence Surveillance Act: 2013 Leaks and Declassifications*, LAWFARE (Oct. 1, 2013, 4:13 PM), <http://www.lawfareblog.com/wiki/nsa-papers/> (providing a timeline of leaks and declassifications). The response to the Snowden leaks calls to mind the findings of the comments of the joint Committee on Government Operations and the Committee on the Judiciary. SOURCE BOOK, *supra* note 81, at 13 (“[I]n fact, years of study by this committee show each new administration develops its own special secrecy techniques which, as time passes, become more and more sophisticated. The factor of credibility, together with the inclination of government to invade the privacy of our citizens, poses an ominous threat to our democratic system which must be opposed at every turn despite the agony it might create. We believe it is better to have too much freedom than too little.”).

207. Dilanian, *supra* note 3. James Clapper, the current Director of National

Counterterrorism Center from 2007 to 2011 called for intelligence agencies to be “‘aggressive’ about reducing classification,” noting that excessive classification has eroded public trust in the whole secrecy regime.<sup>208</sup> When President Obama appointed a committee, the President’s Review Group on Intelligence and Communications Technology, the Committee stated that “[a] central goal of [their] recommendations is to increase transparency and to decrease unnecessary secrecy.”<sup>209</sup> The courts have a role to play in making sure that if the government is indulging in excessive classification, which is in fact excessive secrecy, that the government does not get away with it.

#### IV. EMPIRICAL ANALYSIS

To illuminate how courts have balanced national security and civil liberties, this Article includes an empirical investigation into the decisionmaking of the federal courts. What circumstances or combination of circumstances are likely to result in a FOIA requester getting all or some disputed documents that have been withheld pursuant to the national security or foreign policy exemption? Are there any lessons in these cases to help judges overcome their bias? Are there any prescriptive measures for assuring that overclassification does not preclude rational decisionmaking and hamper the open debate necessary to democratic governance?<sup>210</sup>

We initially chose to look at all of the FOIA cases decided by the trial and appellate courts in the D.C. Circuit from 1974 to 2012. To increase the number of appellate cases in the statistical analysis, we expanded the pool of cases to include all appellate cases in the country. Focusing special attention on the trial court cases in the District of Columbia makes some sense in this context. Thirty-eight percent of all FOIA cases filed from 1979 to 2008 were filed in the District Court for District of Columbia,

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Intelligence, speaking about the Snowden leaks of information about a FISA court order, said: “I think it’s clear that some of the conversations this has generated, some of the debate, actually needed to happen. If there’s a good side to this, maybe that’s it.” *Id.*

208. Steven Aftergood, *Declassification as a Confidence-Building Measure*, *SECRECY NEWS* (Dec. 16, 2013), <http://www.fas.org/sgp/news/secrecy/2013/12/121613.html>.

209. See *LIBERTY AND SECURITY IN A CHANGING WORLD*, *supra* note 8, at 80.

210. To our knowledge, only one other study has taken an empirical look at FOIA cases. In 2002, Paul R. Verkuil looked at all FOIA cases decided in the 1990s to test whether the de novo standard of review was being followed by the courts in FOIA cases; de novo review is the most stringent standard of review, and the author expected reversal rates of close to 50%. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 *WM. & MARY L. REV.* 679, 713 (2002). The actual reversal rate for Exemption One cases where Exemption One was the only exemption claimed was 10.8%, and it was 11.3% where Exemption One was one of several exemptions claimed. *Id.* at 735. Interestingly, the reversal rate was just over 10% regardless of which exemption was claimed. *Id.* at 713. This is much more like “committed to agency discretion.” *Id.* at 715.

according to a recent statistical analysis of the Federal Judicial Center database.<sup>211</sup> The D.C. Circuit has more FOIA litigation than any other circuit court, deciding 38% of all appellate FOIA cases nationally.<sup>212</sup>

### A. Data and Analysis

To evaluate the determinants of successful invocation of the national security exemption, we created a dataset of all reported federal cases in the D.C. federal courts at the district and appellate level that considered the exemption, along with all appellate cases.<sup>213</sup> This produced a dataset of 270 cases, of which 163 were at the district level and 107 at the appellate level. For each of these cases, we analyze characteristics of the plaintiff, the claim itself, the treatment of the claim by the court, the characteristics of the judge or panel, and the ultimate outcome of disclosure or withholding disclosure. We describe these variables here.

*Plaintiff type:* For plaintiff type, we examine whether or not the named plaintiff is a non-governmental organization (NGO) or an individual. We recognize, of course, that the named plaintiff imperfectly correlates with the actual party in interest. We also examine whether the plaintiff has been involved in more than one suit in our database.

*Nature of the claim:* In terms of the claim itself, we examine whether Exemption One was invoked on the basis of national security, foreign affairs, or both. Because the FOIA allows the government to claim multiple exemptions in refusing to disclose certain documents, we also identify any other exemptions that were invoked in the case. Eighty-five percent of cases involved another exemption besides Exemption One. The most commonly invoked was Exemption Three (documents specifically

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211. Kwoka, *supra* note 14, at 261. To put the volume of FOIA cases the D.C. District Court disposes of in perspective, the D.C. Circuit disposes of only 1.3% of all district court litigation.

212. Data on file with authors; *see also* Kwoka, *supra* note 14, at 261; Patricia M. Wald, “. . . Doctor, Lawyer, Merchant, Chief,” 60 GEO. WASH. L. REV. 1127, 1147 (1992) (analyzing the evolution of panel courts’ change and effect on jurisprudence via presidential appointment).

213. To identify cases, we conducted searches in the Westlaw and Lexis databases for Freedom of Information Act cases that mentioned “Exemption one” or “Exemption 1” or the “national security exemption,” then manually screened out cases that did not rely on the relevant exemption. We considered doing a PACER docket search for more unreported cases, but are not convinced that such a search would be systematic enough to obtain a reliable sample, or that the time involved in the manual review required would be repaid. We acknowledge that not all cases are reported in the Westlaw and Lexis databases, and that not all cases reach the level of a written decision. But the Westlaw and Lexis databases can be searched using complex Boolean searches, and both cover the entire period of our analysis. Because the number of appellate cases in the D.C. Circuit dataset was relatively small, we expanded the appellate analysis to include all circuit courts of appeals.



exempted by other statutes) followed by Exemption Seven (law enforcement) and Exemption Five (privileged internal or inter-agency documents). There were no cases invoking Exemptions Eight or Nine, which are narrow exceptions for, respectively, securities and oil and gas.

*Other case variables:* We also ask whether or not the case included a Vaughn Index prepared by the agency; whether the court ordered in camera review; and whether the court discussed the sufficiency of the affidavit.

*Judge and panel characteristics:* Finally, in terms of judge and panel characteristics, we ask whether the judge was appointed by a Democrat or Republican. In the case of appellate panels, we identify the composition of the panel by political party of the appointing president.

*Outcome:* We coded cases as leading to full disclosure, which is counted as a victory for the plaintiff; partial disclosure, in which some requested documents are disclosed; and non-disclosure, which is coded as a victory for the government. We note whether there was a remand in the decision.

Table 1 provides summary statistics, with appellate panel composition in Table 3 in the next section. Note the rarity of an outright win by the plaintiff. Only 5–6% of all FOIA cases lead to full disclosure. Trial courts are less likely than appellate courts to grant some form of disclosure.

### **Table 1: Summary statistics**

		<b>ALL CASES (n=270)</b>	<b>DISTRICT CASES ONLY (n=163)</b>	<b>APPELLATE CASES ONLY (n=107)</b>
<b>Plaintiff Characteristics</b>	Individual Plaintiff	.73	.68	.79
	NGO or Other Plaintiff	.27	.32	.21
<b>Exception</b>	Foreign Affairs Exception	.40	.20	.68
	National Defense Exception	.86	.91	.78
	Other Exemptions (all categories)	.85	.88	.80
	Exemption 2	.20	.27	.11
	Exemption 3	.58	.64	.50
	Exemption 4	.05	.08	.01
	Exemption 5	.31	.46	.12
	Exemption 6	.27	.35	.16
	Exemption 7	.41	.46	.34
<b>Treatment by Court</b>	In Camera	.38	.37	.39
	Vaughn Index	.51	.59	.39
	Sufficiency of Affidavit Discussed	.72	.77	.64
	Leg. Hist. Discussed	.11	.03	.21
	Leg. Hist. Discussed as Basis for Disclosure	.05	.01	.11
<b>Judge/Panel Characteristics</b>	Trial Judge Party = democrat	.41	.58	
	Appellate Panel Majority or All Democrat Appointee	.55	N/A	.55
<b>Outcome</b>	Outcome = Gov't Wins	.79	.74	.88
	Outcome = Partial	.14	.06	.35
	Outcome = Plaintiff	.05	.04	.11
	Outcome = 2 or 3 (Disclosure or Partial)	.15	.09	.23
	Outcome Includes Remand	.17	.01	.66

### B. District Court Results

To understand the impact of these factors on case outcomes, we estimate a series of logistic regression models, reported in Table 2.<sup>214</sup> The dependent variable in each model is the case outcome, coded “1” if the plaintiff secured a full or partial win, and “0” otherwise. We aggregate full and partial victory because the number of cases in which a plaintiff won the case outright was very small (6 out of 163 district cases for which an outcome was identifiable).<sup>215</sup> Thus, coefficients with a positive sign indicate a greater probability of disclosure. Note that several cases fall out of the analysis because of missing data.

Our first model included only case characteristics. We examine whether the exemption invoked foreign affairs, and whether there were any other exemptions claimed in addition to Exemption One. We also examine whether or not the government prepared a Vaughn Index, whether or not the court examined the affidavit in camera, and whether or not the case discusses the sufficiency of the affidavit. The second model adds characteristics of the party. We examine whether the plaintiff was an NGO as opposed to an individual (n=58), and whether the plaintiff is found in more than one of the cases in the dataset (repeat plaintiff) (n=109). Our hypothesis is that NGOs and repeat plaintiffs will have greater resources to bring to bear, and will also have better information to select winning cases.<sup>216</sup>

The majority of cases in the data are brought against four government agencies: the CIA (55); the FBI (20); the Department of State (29); and the DOJ (36). We expect that these repeat defendants will be in a good position to settle cases they are likely to lose, and hence will have a better “win-rate.” Hence, we include a dummy variable for cases in which the government defendant is an agency other than those four (n=60). We predict this variable will be associated with greater likelihood of plaintiff victory. Of course, many of the DOJ cases will in fact involve a defendant that is another government agency.

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214. Logit regression models are appropriate when the dependent variable—here, the case outcome—is binary.

215. These cases were: *Center for International Environmental Law v. Office of the United States Trade Representative (CIEL III)*, 845 F. Supp. 2d 252 (D.D.C. 2012); *National Security Archive v. Office of Independent Counsel*, No. 89-2308, 1992 U.S. Dist. LEXIS 13146 (D.D.C. Aug. 28, 1992); *Pratt v. Webster*, 508 F. Supp. 751 (D.D.C. 1981); and *Jaffe v. CIA*, 573 F. Supp. 377 (D.D.C. 1983). “Win” means that the final document or documents still contested after negotiations concluded and all motions had been heard were ordered to be disclosed by the trial court.

216. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y. REV. 95, 98–101 (1974) (showing that repeat players have structural advantages in the legal system).

Our third model includes, in addition to the other variables discussed so far, a dummy variable indicating whether or not the trial judge was appointed by a Democrat. A large volume of literature in political science and law demonstrates that ideology—typically as measured by the party of the appointing president—has significant explanatory power as a determinant of judicial behavior.<sup>217</sup> We thus investigate the effect of the appointing party.

**Table 2: Logit Regression Models Predicting Disclosure  
Order by District Court**

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217. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 233–34 (1993). *But see* LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 27–28 (2013) (providing a more nuanced analysis showing that party influence is not consistent across types of cases and level of court).

<b>Independent Variables</b>	<b>(1) Case characteristics</b>	<b>(2) Case + Party characteristics</b>	<b>(3) Case, Party and Judge characteristics</b>
<b>Foreign Affairs Prong</b>	-0.01* (.69)	.19 (0.73)	0.31 (0.73)
<b>Other exemption claimed</b>	-1.63 (0.94)	-.20 (0.88)	-0.13 (0.89)
<b>In Camera Review</b>	0.63 (0.87)	0.63 (0.59)	0.65 (0.59)
<b>Vaughn Index</b>	0.55 (0.92)	0.54 (0.63)	0.56 (0.64)
<b>Sufficiency of Affidavit Discussed</b>	0.59 (0.63)	0.13 (0.70)	0.20 (0.71)
<b>NGO Plaintiff</b>		0.22 (0.65)	0.28 (0.64)
<b>Repeat Plaintiff</b>		0.74 (0.67)	-0.74 (0.66)
<b>Defendant = Other</b>		1.17* (0.62)	1.28** (0.64)
<b>Trial Judge = Democratic Appointee</b>			0.55 (0.64)
<b>Constant</b>	-2.73*** (0.94)	-3.85*** (1.26)	-4.43*** (1.47)
<b>Observations</b>	159	158	158
<b>Pseudo R-squared</b>	.07	.08	.09

Standard errors in parentheses

\*\*\* p&lt;0.01, \*\* p&lt;0.05, \* p&lt;0.1

The results indicate that most of the cases do not produce significant results. The most consistent predictor of whether or not the court will

order disclosure is the identity of the defendant. When the defendant is an agency other than the most common targets, disclosure is more likely. Political party affiliation of the judge does not make a difference.

### *C. Appellate Results*

We continue the analysis by running the same model described above on the appellate cases for all circuits. We include all variables described above as well as additional variables to capture whether the panel has a majority of judges appointed by Democratic presidents (DEMAPP) and a dummy variable for cases in the D.C. Circuit Court of Appeals. Our findings are somewhat similar to the district court results, in that plaintiff characteristics are strong predictors of success. We observe that repeat plaintiffs have an advantage, and “other” defendants (who can be presumed to have less experience) have a disadvantage at the appellate level. In addition, cases involving in camera review are associated with higher levels of disclosure. Interestingly, the foreign affairs prong of Exemption One is associated with more disclosure in one model, though the result is not consistent.

### **Table 3: Logit Regression Models Predicting Disclosure Order by Appellate Court**

<b>Independent Variables</b>	<b>(1)</b>	<b>(2)</b>	<b>(3)</b>
<b>Foreign Affairs Prong</b>	0.96 (0.63)	1.757** (0.80)	-13.65 (1,322)
<b>Other Exemption Claimed</b>	-0.10 (0.66)	-0.32 (0.740)	-0.53 (0.79)
<b>In Camera Review</b>	0.48 (0.52)	1.21* (0.62)	1.17* (0.67)
<b>Vaughn Index</b>	0.60 (0.51)	0.69 (0.56)	1.04* (0.62)
<b>Sufficiency of Affidavit Discussed</b>	0.18 (0.56)	-0.19 (0.620)	-0.15 (0.669)
<b>NGO Plaintiff</b>		-0.75 (0.84)	-0.95 (0.99)
<b>Repeat Plaintiff</b>		1.94** (0.78)	2.54*** (0.96)
<b>Defendant = Other</b>		1.24** (0.55)	1.13* (0.59)
<b>Majority of Panel Democratic Appointees</b>			0.41 (0.56)
<b>D.C. Circuit</b>			-16.22 (1,322)
<b>Constant</b>	-2.459*** (0.79)	-4.22*** (1.09)	11.26 (1,322)
<b>Observations</b>	105	105	105
<b>Pseudo R-squared</b>	.06	.16	.22

While the pooled results for all circuits show no special propensity for the D.C. Circuit to support the government, our data presents some intriguing findings when we examine party differences. Perhaps the most interesting outcome is associated with panel composition, presented in the two panels

of Table 3. As noted, we distinguish between panels in which all judges are appointed by Democrats, Republicans, or if the panel is mixed. Party composition has played an important role in recent understandings of judicial behavior, and our evidence is partly consistent with this literature.<sup>218</sup> Of the four cases in which the D.C. Circuit granted disclosure, three were decided by panels that included two Democratic appointees, and three Democratic appointees decided one of the cases.<sup>219</sup> In other words, *panels of the D.C. Circuit composed of a majority of Republican appointees have never granted disclosure when Exemption One is invoked.*<sup>220</sup> While this is perhaps not surprising, it is an interesting and important result, and contrasts with the results reported above for district cases in which party affiliation made no difference.

At the same time, the broader sample of appellate cases does not exhibit the same pattern. Looking at Table 3b, we see that the D.C. Circuit pattern is not replicated in the other circuits. Indeed, in other circuits, all-Republican panels appear to be *more* likely to side with the plaintiff. And in general, the D.C. Circuit appears particularly deferential toward government. To be sure, the multivariate results suggest that this is largely explained by case characteristics and party type. Still, the suggestion that party status may matter in one court is consistent with recent scholarship that finds that the influence of ideology increases at higher levels of the federal bench.<sup>221</sup> We have also identified an important difference among

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218. See generally Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (looking at panel composition in administrative law). See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1493–94 (2008) (discussing effects of panel composition in Voting Rights Act cases); Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 739 (2008) (reviewing research on judicial voting in panels); FRANK B. CROSS, *DECISION MAKING IN THE US COURTS OF APPEALS* 176–77 (2007) (analyzing influence of appointing president on circuit court decisions); Jonathan P. Kassel, *Panel Composition and Judicial Compliance on the U.S. Courts of Appeals*, 23 J.L. ECON. & ORG. 421, 422 & n.2 (2007) (integrating studies on judicial compliance, panel decisionmaking, and case selection).

219. *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (two Democrat panel finding that agencies bear the burden of proof, under reasonableness standards); *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974) (two Democrat panel giving burden of proof to government agency, as well as giving plaintiff the right to limited discovery); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (three Democrat panel allowing for partial disclosure and prohibiting conclusory affidavits as sufficient proof of meeting a FOIA exemption); *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 949–50 (D.C. Cir. 1979) (two Democrat panel defining a more limited understanding of the FOIA exemptions by analyzing legislative intent and requiring more than substantial compliance on the government's behalf).

220. A t-test for difference in means indicates the difference ( $t=-1.53$ ) is just shy of significant at the 10% confidence level ( $\Pr(T < t) = 0.06$ ).

221. See EPSTEIN ET AL., *supra* note 217, at 27.



appellate circuits, in which the D.C. Circuit behaves differently from others. This finding is consistent with notions of specialization, but also may reflect excessive deference by a court that plays a central role in the modern administrative state.

**Table 3a: Panel Composition Summary: D.C. Circuit Only**

<b>Appointing President</b>	<b># Cases (%)</b>	<b># P wins* (%)</b>
<b>All Republican</b>	5 (.14)	0 (.00)
<b>2 Republican 1 Democratic</b>	10 (.28)	0 (.00)
<b>2 Democratic 1 Republican</b>	15 (.39)	3 (.20)
<b>All Democratic</b>	7 (.19)	1 (.14)
<b>TOTAL</b>	37	4

**Table 3b: Panel Composition Summary: All Circuits Besides D.C.**<sup>222</sup>

<b>Appointing President</b>	<b># Cases (%)</b>	<b># P wins*(%)</b>
<b>All Republican</b>	10 (.14)	4 (.40)
<b>2 Republican 1 Democratic</b>	23 (.33)	7 (.30)
<b>2 Democratic 1 Republican</b>	24 (.34)	4 (.17)
<b>All Democratic</b>	13 (.19)	5 (.38)
<b>TOTAL</b>	70	20

#### *D. Summary and Discussion*

To summarize our findings, full or partial disclosure in FOIA cases in which the government invokes Exemption One is relatively rare, and it occurs in only around a small percentage of cases that go to trial. Case characteristics and trial judge characteristics are not important determinants of outcomes at the trial level, but the former do seem to

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222. These case were distributed as follows: First Circuit—six cases; Second Circuit—fourteen cases; Third Circuit—seven cases; Fourth Circuit—three cases; Fifth Circuit—five cases; Sixth Circuit—two cases; Seventh Circuit—four cases; Eighth Circuit—two cases; Ninth Circuit—twenty cases; Tenth Circuit—one case; Eleventh Circuit—five cases; Federal Circuit—one case.

matter somewhat at the appellate level, where experience seems to predict success. In addition, we have suggested that while politics does not seem to make a difference at the appellate level, the D.C. Circuit may be an exception in this regard, in that Democratic-dominated panels are more likely to order or affirm disclosure than are those with a majority of Republican-appointees. This is generally consistent with the observation that panel effects are strong at the appellate courts.<sup>223</sup>

Our single most consistent finding is that repeat players seem to have an advantage in FOIA litigation. This is consistent with a long line of literature that emphasizes the informational advantage of repeat players in various litigation contexts.<sup>224</sup> Repeat players can choose which cases to bring, and can also exploit their superior knowledge to select cases to settle.<sup>225</sup> Presumably, in the context of FOIA Exemption One, experienced defendants know what arguments are likely to convince judges that genuine national security interests are at stake, know how to construct a Vaughn Index, and know how to manage the disclosure process. Experienced plaintiffs, on the other hand, know what cases to push and what to settle, and so may be able to prevail on disclosure claims that go all the way to trial.

## V. THE CONFLUENCE OF TWO NARRATIVES

The growth of the national security state from the post-World War II era to the post-9/11 era has been well-documented.<sup>226</sup> The very concept of a war on terror means that the United States can continually exist in what Giorgio Agamben calls the “state of exception,” where legitimate governments expand their powers and suspend the rule of law in response to emergencies.<sup>227</sup> Those powers are meant to end when the emergency is over, or the appropriate government actors have ratified steps taken to respond to an emergency.<sup>228</sup> Agamben identified the actions taken by

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223. See EPSTEIN, ET AL., *supra* note 217, at 153–54.

224. Galanter, *supra* note 216, at 97–114 (identifying advantages repeat players in litigation).

225. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (proposing a settlement model); Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 337 n.105 (1999) (describing repeat players in tax litigation).

226. See, e.g., David Jablonsky, *The State of the National Security State*, PARAMETERS Winter 2002–2003, at 4, 11, available at <http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/02winter/jablonsk.pdf> (last visited Nov. 1, 2014).

227. STATE OF EXCEPTION, *supra* note 104, at 2–6.

228. See, e.g., *id.* at 12–16, 20–21 (providing an example of a state of exception in the United States that lasted for ten weeks, during which President Lincoln functioned as an “absolute dictator” by decreeing that an army should be raised and convening a special session of Congress—acts which were later ratified by Congress).

President Bush after September 11th—what we have come to call the “War on Terror”—as an example of a continuing state of exception.<sup>229</sup> When attack is imminent, as it must be in a “war,” cognitive psychology tells us that humans favor overestimation of risks, further tilting decisionmaking towards national security secrecy and against civil liberties and access.<sup>230</sup>

A balancing act between secrecy and disclosure has been a hallmark of American history, but it has not always been tilted so strongly toward secrecy. The trend has been long and gradual. The Constitutional Convention was held in secret, but even in the first days of the new republic, the populace relied on patriots and the press for disclosure.<sup>231</sup> One measure of the trend comes from the Department of State’s publication *Foreign Relations of the United States (FRUS)*, which has published diplomatic dispatches since 1861.<sup>232</sup> The first volumes actually contained contemporaneous dispatches; until the end of the century, *FRUS* published dispatches that were only a few months old.<sup>233</sup> Originally, the State Department did not really keep secrets, but as the national security state has expanded, so has the amount of time that dispatches remained secret.<sup>234</sup> In 2013, the first volume of dispatches from the Carter Administration (1977–1981) was published, over thirty years after Carter left office.<sup>235</sup>

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229. *Id.* at 3–4 (illustrating the state of exception by the military order President Bush issued on November 13, 2001, authorizing the indefinite detention of noncitizens suspected of involvement in terrorist activities, without providing those detainees the status of persons charged with a crime under U.S. law, or the status of prisoners of war as defined by the Geneva Convention).

230. GROSS, *supra* note 16, at 47.

231. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 332–34 (1973) (discussing the popular sentiment against government secrecy during the early years of U.S. independence, as well as the relatively unchecked power of the press to disclose government secrets at that time).

232. *See generally About the Foreign Relations of the United States Series*, U.S. DEPT OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/about-frus> (last visited Nov. 2, 2014) (describing the *Foreign Relations of the United States (FRUS)* series as the official documentary historical record of major U.S. foreign policy decisions that have been declassified and edited for publication, beginning with the Lincoln Administration).

233. SCHLESINGER, *supra* note 231, at 336.

234. *Id.* (“[T]he State Department before the First World War had no secrets whatever, except for personnel reports.” (quoting John Bassett Moore, former Assistant Secretary of State)).

235. There is a new history of the *FRUS* by the Department of State, documenting the clash between secrecy and disclosure; the conclusion the Department of State comes to is that secrecy is more of a problem than disclosure. *See* William B. McAllister & Joshua Botts, *Conclusion* to WILLIAM B. MCALLISTER, ET AL., *TOWARD “THOROUGH, ACCURATE, AND RELIABLE”: A HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES SERIES*, 316, 318 (preview ed. 2013), available at <http://history.state.gov/historicaldocuments/frus-history.pdf> (“The historical evidence this book presents indicates that the most significant negative

The nature of classification orders has changed over the decades. There was not a formal executive policy on classification until an order establishing a military classification system was signed by Franklin D. Roosevelt in 1940.<sup>236</sup> Then, in 1950, President Truman issued a new executive order for military secrets<sup>237</sup> and another in 1951 that, for the first time, allowed *any* department or agency to classify information when it seemed “necessary in the interest of national security.”<sup>238</sup> In 1955, President Eisenhower replaced it with Executive Order 10,501.<sup>239</sup> This changed the classification standard from “national security” to “national defense” and cut back on the number of agencies that could be classified.<sup>240</sup> These executive orders created entrenched security bureaucracies, and the Executive Branch has never looked back.<sup>241</sup> Congress started studying overclassification,<sup>242</sup> but has not been able to eliminate or even reduce the problem, which is deeply rooted in the culture and incentive structure of the bureaucracy.

There have been arguments made whenever there is a national emergency of some kind—whether we are fighting communism or fascism or waging war on terrorism—that the nature of the risks involved requires the country to set aside the checks and balances of the Constitution.<sup>243</sup> The argument is that whatever is happening now is so extraordinary that the Founders could not possibly have imagined emergencies of such magnitude.<sup>244</sup> But this argument “over-looks the profound historical fact that the Founders fashioned the Constitution with its unique checks and balances at a time when the incipient American republic was in the greatest

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repercussions attributable to the *FRUS* series have not involved damaging releases of potentially-sensitive national security or intelligence information. Rather, the reputation of the U.S. Government has suffered primarily from failures of the series to document significant historical events or acknowledge past actions. *FRUS* realizes its promise when it fulfills global expectations for openness that promote democracy and encourage [human] freedom.”).

236. Exec. Order No. 8381, 3 C.F.R. 634, 634–35 (1938–1943).

237. Exec. Order No. 10,104, 3 C.F.R. 298, 298–99 (1949–1953).

238. Exec. Order No. 10,290, 3 C.F.R. 789, 790–91 (1949–1953).

239. Exec. Order No. 10,501, 3 C.F.R. 979, 981, 984 (1949–1953).

240. *Id.*

241. SCHLESINGER, *supra* note 231, at 340.

242. William G. Phillips, *The Government's Classification System*, in *NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA* 61, 66 (Norman Dorsen & Stephen Gillers eds., 1974) (noting that the Defense Department's Coolidge Committee and the Commission of Government Security (Wright Commission) were two of the earliest groups established to study classification procedures).

243. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203, 2203–08 (2007) (discussing judicial decisions limiting civil liberties that were later acknowledged to have been unjustly decided in the interest of national security).

244. HART, *supra* note 78, at 13.

danger of any in its long future existence.”<sup>245</sup>

The exigency argument has been made successfully and courts have approved violations of civil liberty that, in hindsight, were clearly unnecessary; those decisions are a blot on American history.<sup>246</sup> Cases brought under the Espionage Act of 1917<sup>247</sup> and the Sedition Act of 1918<sup>248</sup> were upheld, but after the war, every convicted person received amnesty.<sup>249</sup> *Korematsu v. United States*<sup>250</sup> is the paradigmatic example of a bad law upheld for the wrong reasons.<sup>251</sup> Since the Vietnam era, the Supreme Court has been more willing to challenge executive claims; the courts have replaced “the ‘logical’ presumption” of deference “with the ‘pragmatic’ presumption of close judicial scrutiny.”<sup>252</sup>

The increased Supreme Court scrutiny started in the 1970s with the Pentagon Papers,<sup>253</sup> but has not trickled down to the lower courts, the gatekeepers for FOIA requests.<sup>254</sup> The range of matters covered by “national security” keeps expanding. In the four epochs of national security that Laura Donohue has identified,<sup>255</sup> our era is characterized by a move

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245. *Id.*

246. Stone, *supra* note 243.

247. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (prohibiting interference with military recruitment, support of national enemies during wartime, or insubordination in the military).

248. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (extending the Espionage Act to limit certain civil liberties—especially speech).

249. Stone, *supra* note 243, at 2205; *see also* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 230–32 (2004) (detailing the efforts made over many years to secure the release of those convicted under the Espionage and Sedition Acts).

250. 323 U.S. 214, 215–16, 223–24 (1944) (justifying violation of civil liberties in the context of Japanese internment camps).

251. Stone, *supra* note 243, at 2208 (explaining that while a presumption of deference to executive and military officials during wartime may be logical in theory because judges have little national security experience, this deference will fail in practice because it precludes those making judgments from properly taking the relevant factors into account in a fair and reasonable way).

252. *Id.* at 2212.

253. *Id.* at 2210–11; *see also* Adrian Vermeule, *The Judiciary is a They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 562 (2005) (stating that lower courts can choose to defy the Supreme Court’s instructions and that there is no real penalty for lower courts’ non-compliance).

254. Kwoka, *supra* note 14, at 221 (“Because bringing a FOIA case in federal court is the primary legal tool to challenge the government’s right to keep secret its operations, the robustness of our democracy rests, at least in part, on the robustness of the FOIA litigation process itself.”).

255. *See generally* Donohue, *supra* note 104 (listing the four epochs as: (1) “Protecting the union: 1776–1898”; (2) “Formative international engagement and domestic power: 1898–1930”; (3) “The ascendance of national security: 1930–1989”; and (4) “Balancing risk: 1989–2012”).

toward using national security claims to balance competing risks.<sup>256</sup> As a result, in the realm of FOIA requests, judicial compliance with the congressionally mandated standard of review is even more important.

There are not many tools utilized by the courts deciding FOIA cases to perform their functions of review—referees, experts, and masters have not been utilized and discovery is not normally available<sup>257</sup>—but the courts deciding FOIA cases do have one tool they have crafted to help make decisions: the Vaughn Index.<sup>258</sup> Prior to the D.C. Circuit’s decision in *Vaughn v. Rosen*, the FOIA provided no mechanism for government agencies to justify and substantiate their documentary withholdings. Thus, plaintiffs seeking disclosure of government documents often received little to no information regarding the reason why documents were not released. Moreover, courts were hindered in their ability to assess the merits of FOIA withholdings. In *Vaughn*, the court declined to accept the United States Civil Service Commission’s affidavit affirming that certain documents requested by the plaintiff were subject to exemption because it found that the agency’s assertions were conclusory and generalized. Instead, the court required the agency to provide an itemized list of withheld documents, complete with cross-referenced explanations of statutory exemptions for each withholding. This item is known as a “Vaughn Index.” As the *Vaughn* court explained, the requirements set forth by the court serve two main purposes: (1) to ensure “part[ies] right to information” and (2) to allow “the

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256. *Id.* at 1589 (listing risks such as “climate change, pandemic disease, drugs, and organized crime,” and stating that “[n]ational security persists in its position of dominance, constantly expanding to envelop other issues”). Part of the problem with the current security state is the sheer size of the security bureaucracy. *See* Bridget Rose Nolan, *Information Sharing and Collaboration in the United States Intelligence Community: An Ethnographic Study of the National Counterterrorism Center* 158 (2013) (unpublished Ph.D. dissertation, University of Pennsylvania), <http://cryptome.org/2013/09/nolan-ntcc.pdf> (“Perhaps the most drastic recommendation I heard was that in some ways it would make sense to reduce the size of [the National Counterterrorism Center] or even of the entire [Intelligence Community]. For the analysts, this would address the hindrances that come along with a bloated bureaucracy; it would also help with what they perceived to be excessive redundancy (as opposed to a lower level of redundancy which was deemed necessary for safety and accuracy reasons).”); *see also* Steve Aftergood: *To Fix US Intelligence, Shrink It*, PUB. INTELLIGENCE BLOG (Sept. 30, 2013), <http://www.phibetaiota.net/2013/09/steve-aftergood-to-fix-us-intelligence-shrink-it/> (stating that Nolan’s dissertation “gives voice to intelligence analysts who are overwhelmed by information, flustered by competitive pressures from their home agencies, and weighed down by dubious security policies”). *But see* CHARLES NEMFAKOS ET AL., *WORKFORCE PLANNING IN THE INTELLIGENCE COMMUNITY: A RETROSPECTIVE* ch. 2 (2013), *available at* [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR100/RR114/RAND\\_RR114.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR114/RAND_RR114.pdf) (discussing a contrary view).

257. Kwoka, *supra* note 14, at 235 (noting that discovery is very rare in FOIA litigation); *see also* *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973).

258. *See supra* note 22.

court system effectively and efficiently to evaluate the factual nature of disputed information.”<sup>259</sup>

There are many justifications for openness and transparency in government. The justifications emphasize the role of openness in curbing fraud, corruption, and despotism,<sup>260</sup> the role of openness in curing social and industrial diseases,<sup>261</sup> and the role of openness in informed and enlightened government decisionmaking.<sup>262</sup> Another benefit of openness is preventing new attacks. As the 9/11 Commission found, more publicity could have prevented 9/11.<sup>263</sup> There is the more modern justification that citizens are entitled to timely and useful information from their government to enable citizen decisionmaking in our complex, modern world.<sup>264</sup> But there is a surprising benefit of allowing only proper and limited classification of national security information: trust in the government. In the now classic book *Secrecy*, Daniel Moynihan compellingly argues that the climate of secrecy engendered by Cold War politics created such an

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259. *Vaughn*, 484 F.2d at 826.

260. WORLD BANK, THE ROLE OF PARLIAMENT IN CURBING CORRUPTION 252–54 (Rick Stapenhurst et al. eds., 2006) [hereinafter CURBING CORRUPTION] (examining the role of parliament’s “culture of compliance, openness, and accountability” in preventing government abuses of power).

261. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . .”).

262. See e.g., Daniel Patrick Moynihan, *Secrecy: How America Blew It*, NEWSWEEK, Dec. 10, 1990, at 14 (discussing the long-kept secret of the Cold War that American analysts consistently inflated the Soviet economy’s ability and rate of growth, leading to decades of American over spending in an effort to catch up to this imaginary Soviet economy). All of these miscalculations were secret and were based on secret evidence. *Id.* Moynihan himself had, in the 1970s, pointed out the visible flaws in the American analysis of the Soviet economy. *Id.*

263. 9/11 COMMISSION REPORT, *supra* note 46, at 46, 115 (2004). The only instance cited by the 9/11 Commission that might have prevented the attacks was a statement by the terrorists’ paymaster that had they known that Zacarias Moussaoui had been arrested at a flight school in Minnesota, bin Laden would have called off the attacks. *Id.* at 247. The 9/11 Commission concluded that only “publicity” could have “derailed the plot.” *Id.* at 276. Other beneficial examples of open access include the capture of the Unabomber only after the *New York Times* reluctantly agreed to publish the Manifesto. JENNIFER DARYL SLACK & JOHN MACGREGOR WISE, CULTURE & TECHNOLOGY: A PRIMER 83 (2005); *This Day in History: Sep. 19, 1995: Unabomber Manifesto Published*, <http://www.history.com/this-day-in-history/unabomber-manifesto-published> (last visited Nov. 2, 2014). The Washington sniper was apprehended only after a license plate number, kept secret by law enforcement, was leaked to the press. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing before the Subcomm. on Nat’l Security, Emerging Threats, & Int’l Relations of H.R. Comm. on Gov’t Reform, 109th Cong. at 124–25* (2005) (statement of Thomas S. Blanton, National Security Archive).

264. ARCHON FUNG ET AL., FULL DISCLOSURE: THE POLITICS, PERILS AND PROMISE OF TARGETED TRANSPARENCY 5–7 (2007) (examining incomplete disclosure that is irrelevant to consumers).

atmosphere of political distrust that people did not believe the government even when the government was telling the truth.<sup>265</sup>

Proponents of transparency emphasize the role of openness in curbing fraud, corruption, and despotism,<sup>266</sup> the role of openness as the cure for social and industrial diseases,<sup>267</sup> and the role of openness in informed and enlightened government decisionmaking.<sup>268</sup> There are, of course, arguments against openness. The belief that transparency is a complete good, or that it always leads to the best decisionmaking, has its critics.<sup>269</sup> And there is the undeniable fact that some modicum of information must be kept secret. But in the context of a FOIA request, the benefits of transparency are meant to be weighed against the costs of publicity. Courts have been assigned this task of balancing secrecy and national security, but they have generally declined to perform it.

There are two powerful narratives at play in the context of the national security exemption to the FOIA. On the one hand, there is the rise of the national security state from the end of World War II to the present. The theme underlying this state has always been: there are enemies we must combat, and we need the tools to do so.<sup>270</sup> And it is in fact true that there are enemies of the United States. But as the enemies have become more

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265. DANIEL PATRICK MOYNIHAN, *SECRECY* 52–58 (1998) (recounting history of secrecy as a tool for the American government). There are, of course, arguments against transparency in high-level government decisionmaking.

266. CURBING CORRUPTION, *supra* note 260, at 252–53.

267. See BRANDEIS, *supra* note 261, at 92.

268. Moynihan, *supra* note 262.

269. See, e.g., Justin Fox & Richard Van Weelden, *Costly Transparency*, 96 J. PUB. ECON. 142, 142 (2012) (arguing that when individuals delegate authority to experts, transparency does not always improve the expert's actions; "observing the consequences of the expert's actions can be socially harmful in many economically relevant environments"). Fox and Van Weelden's article describes the situation a legislator faces who must choose whether or not to approve an executive's proposal, for example, to authorize the Bush Administration to go to war against Iraq; if a Senator had weak information that there were no weapons of mass destruction, she would be more likely to oppose the war if there was no chance of finding out if in fact there were any weapons of mass destruction. *Id.* at 143. If the cost of an unjustified war was really high, voting against the war would have been in a voter's interest. *Id.* Fear of the results actually becoming known militates against voting against the war. *Id.*

270. A recent study suggests that, in the event of an actual attack, large or small, the American people would be willing to lose constitutionally protected liberties and the national security community would also support constitutional infringement without changing existing laws, but that courts would "encourage new laws and acts." See Robin L. Schwartz, *Predicting the Loss of Constitutional Rights and Civil Liberties in the Name of National Security* 37 (Aug. 22, 2010) (unpublished Capstone Study, American Military University), <http://ssrn.com/abstract=1677496>. The report's ultimate conclusion is that laws eroding currently constitutionally protected rights would be approved by courts in the event of a large-scale domestic attack. *Id.* at 3, 7.



diffuse, the tools the government uses have become both more sophisticated and more invasive. The level of spying on American citizens that has been uncovered by the Snowden releases of classified information has caused a lot of controversy and generated a heated discussion about the balance of power between citizens and the government.<sup>271</sup> On the other hand, there is seemingly unanimous agreement that too much information is classified; the differences in opinion are about the percentage of documents that are overclassified, not the fact of overclassification.

The courts should act as a corrective. The courts should follow the directives they were given in the revisions to the FOIA in 1974 often enough that those who routinely classify documents that could in fact be part of the public conversation think before they classify: is this going to pass muster? Since there are so few courts that challenge the government's assertions that releasing a particular document will damage national security, there is no reason to withhold the classification stamp. In the wake of the Wikileaks and Snowden leaks, we have James Clapper telling us that the leaks started an important public debate.<sup>272</sup> His comment referred specifically to the leak of a classified Foreign Intelligence Surveillance Act (FISA) court order; that classification prevented a necessary public debate, and the order should not have been classified. In fact, the Court recently issued an order stating that *all* FISA court orders would be reviewed and released as appropriate.<sup>273</sup> These acknowledgements and concessions are not possible without concluding that the orders were originally overclassified.<sup>274</sup>

When reviewing the denial of a FOIA request, all Article III judges are competent to balance national security and the public interest; nothing in such a review requires or is likely to lead to rubber-stamping the release of documents. We started our analysis with a foreign affairs Exemption One case where, at least so far, the document requested has been ordered released, even though the district court never saw the document. There

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271. *The NSA Files*, GUARDIAN, <http://www.theguardian.com/world/the-nsa-files> (last accessed Nov. 3, 2014) (collecting all of the Guardians' stories on Snowden's leaks regarding NSA surveillance).

272. Dilanian, *supra* note 3 ("I think it's clear that some of the conversations this has generated, some of the debate, actually needed to happen. If there's a good side to this, maybe that's it."). This is not to say that the Snowden leaks have not changed the landscape for U.S. foreign relations or national security, and made many conversations with both allies and enemies more difficult. This is not the same, however, as damage to the national security. *Id.*

273. *In re* Orders of This Court Interpreting Section 215 of the PATRIOT Act, No. Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sep. 13, 2013).

274. Not "improperly" classified, but classified when not classifying the information would not have harmed national security. See comments on *Dubin v. United States*, 363 F.2d 938 (Ct. Cl. 1966), *supra* note 11.

was a Vaughn Index ordered in *CIEL I*.<sup>275</sup>

We end with another case that has generated lots of headlines, *International Counsel Bureau v. U.S. Department of Defense*.<sup>276</sup> In *International Counsel Bureau v. U.S. Department of Defense I*, the district court held the government's declarations to a standard of specificity and adequacy.<sup>277</sup> The plaintiffs sought records about four individuals detained at the Guantanamo Bay Naval Air Base. The first FOIA request was for medical records for two detainees; the second FOIA request sought video, photographs, and other recorded documents about the four named detainees. The DOJ submitted a Vaughn Index and two declarations, and moved for summary judgment as to the adequacy of its search and its inability to segregate non-exempt material from exempt material, as well as the propriety of its four claimed exemptions, as to the fifty-nine photographs, forty-five videos, and one audiotape it had identified. Regarding the government's Vaughn Index, Judge John D. Bates said "[t]his court cannot fairly assess the propriety of the exemption claims because there is a dearth of 'reasonably specific detail' about how the exemptions apply to the documents as a whole."<sup>278</sup> The Department of Defense was ordered to "conduct a new search of the records of the Defense Department and its components for documents responsive to plaintiffs' FOIA request."<sup>279</sup> After the Department's response, the parties again cross-filed for summary judgment.<sup>280</sup>

This time around, the government's search was found adequate, but all of the claims of exemption were not.<sup>281</sup> Although the government's declarations established that at least some portions of the video recordings were properly withheld under Exemption One, the same was not true for the remaining audio recording. To justify withholding this recording, the government offers only the conclusory statements that "releasing it would risk disclosing intelligence sources and methods, causing harm to national security" and that "it contains information concerning that [sic] might identify intelligence sources and methods, and information that, if released, can cause damage to national security."<sup>282</sup> The court found this insufficient

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275. *Ctr. For Int'l Envtl. Law v. Office of the U.S. Trade Representative (CIEL I)*, 505 F. Supp. 2d 150, 154 (D.D.C. 2007).

276. *Int'l Counsel Bureau v. U.S. Dep't of Def. (ICB v. DOD I)*, 657 F. Supp. 2d 33 (D.D.C. 2009).

277. *Id.* at 38–41.

278. *Id.* at 42.

279. *Id.* at 43.

280. *Int'l Counsel Bureau v. U.S. Dep't of Def. (ICB v. DOD II)*, 723 F. Supp. 2d 54, 55–56 (D.D.C. 2010).

281. *Id.* at 60–64.

282. *Id.* at 64.

and sent the government back to try one last time.

Back for the third time, the government tried again.<sup>283</sup> The court found the government's attempts to subdivide the recordings into severable parts "cross-referenced to the relevant portion of the claimed exemption' false, inconsistent, and confusing."<sup>284</sup> The government's "Vaughn indices and declarations also provide no illumination as to the actual lengths of the video, when certain segments begin and end, or how long such subdivided segments run."<sup>285</sup> The court ordered the government to produce three representative videotapes for the court's in camera review.<sup>286</sup> The government complied, and, despite the court's previous statement that it would not give the government another chance,<sup>287</sup> the court accepted new declarations,<sup>288</sup> finding them plausible: "In any event, these additional declarations, providing plausible explanations of the harm to national security from the release of even solo images of a detainee, and explanations for why the videos were appropriately classified in their entirety, 'merit substantial weight.'"<sup>289</sup>

The plaintiffs did not get the documents they requested. It is open to debate whether the government should get so many attempts to justify withholding documents before they hit on one that resonates,<sup>290</sup> but Judge Bates did make the government do what it is supposed to do: link specific harm to a specific disclosure, and that is a good sign. However painful the process, the government needed to justify its rationale for withholding the requested documents in a meaningful way, and holding the government to that standard is what the FOIA was intended to require.

## CONCLUSION

In light of the overwhelming evidence that agencies routinely overclassify documents, courts can play an important role in breaking into that routine.

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283. *Int'l Counsel Bureau v. U.S. Dep't of Def. (ICB v. DOD III)*, 864 F. Supp. 2d 101 (D.D.C. 2012).

284. *Id.* at 105.

285. *Id.* at 106.

286. *Id.* at 110. Compare this to the one case where the court appointed a referee, in a FOIA lawsuit, *In re United States Department of Defense*, 848 F.2d 232, 242 (D.C. Cir. 1988), in which the district court did not trust the government to be impartial in its choices. See Wald, *supra* note 98, at 408.

287. *ICB v. DOD II*, 723 F. Supp. at 54, 65 (D.D.C. 2010) ("The Court repeats that the Department is now being given a third opportunity to justify withholding these recordings; the Court will not offer it a fourth.").

288. *ICB v. DOD IV*, 906 F. Supp. 2d 1, 9 (D.D.C. 2012).

289. *Id.* at 6.

290. This was also a problem in the *CIEL* case. See *supra* note 5–7 and accompanying text. It is particularly troubling when the government does not raise the national security exemption until all other efforts have failed.

They can do so by taking seriously their obligation to perform de novo and in camera review of documents when agencies invoke the first exemption to the FOIA, and by asking for the assistance of experts in analyzing these claims. As the *ICB v. DOD* cases demonstrate, holding the government to the standards required by the FOIA does not result in rubber-stamping the production of documents. Some method of streamlining the review process would certainly reduce the costs of getting information to the public, both for the government and for the currently very limited class of plaintiffs who can afford to take contested requests through the existing process. The result would be a better balance between transparency and national security than currently exists. Since overclassification is in its own way an effort to “curb open public discussion of vital public issues,”<sup>291</sup> courts that hold the government to the exacting standard required by the FOIA are protecting that open debate. This is not a role the courts should knowingly shirk.

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291. See, e.g., David C. Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, 2 J. NAT'L SEC. L. & POL'Y 165, 193 (2006); see also Dilanian, *supra* note 3 (discussing Clapper's view of classification).