[Dis-]Informing the People's Discretion: Judicial Deference Under The National Security Exemption of the Freedom of Information Act

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

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

SUSAN NEVELOW MART AND TOM GINSBURG *

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

[what] 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 public reason. . .

—Thomas Jefferson

I think it’s clear that some of the conversations [Snowden] has generated,

* Respectively, Associate Professor and Director of the Law Library, University of Colorado Law School, Boulder, Colorado and Leo Spitz Professor of International Law, University of Chicago, and Research Professor, American Bar Foundation. The authors thank Jennifer Nou and Nicholas Stephanopoulos for helpful comments, along with colleagues at Colorado Law for their insightful review of this paper at Colorado Law’s Works-in-Progress series, particularly Sarah Krakoff, Helen Norton, Amy Schmitz, and Ahmed White, and colleagues at the Duke/University of North Carolina Workshop for Scholarship on Legal Information and Information Law and Policy, April 4-5, 2013, especially Lolly Gasaway and Guangya Liu. Special thanks go to Dr. Jeffrey T. Luftig, Lockheed Martin Professor of Management & Program Director, University of Colorado Engineering Management Program, for his help in designing the coding for the statistical analysis. The authors thank Emily Heasley and Rochelle Laxamana for excellent research assistance.


some of the debate, actually needed to happen. . . If there’s a good side to this, maybe that’s it.
—James Clapper³

Abstract

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 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 Freedom of Information Act.

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 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

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 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, wrested 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)\footnote{5 U.S.C. § 552. This statute was enacted on July 4, 1966, and provides that any
person may obtain access to federal agency records, unless the record is protected from
disclosure by a specific exemption. See generally http://www.foia.gov/about.html [last accessed
Oct. 3, 2015].} case: the court held that the office of the United
States Trade Representative (USTR) had failed, after multiple
opportunities, to justify withholding a position paper under the first
exemption to the FOIA.\footnote{5. Ctr. for Int’l Envtl. Law v. Office of the United States Trade Representative (CIEL
III), 845 F. Supp. 2d 252 (D.D.C. 2012).} 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.”\footnote{6. 5 U.S.C. § 552(b)(1) (2012).} 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.\footnote{7. CIEL III, 845 F. Supp. 2d at 256. See Transcript of Oral Argument at 1, CIEL III, 845 F. Supp. 2d 252 (2012) (No. 12-5136) (showing that the government appealed the order and that oral arguments were heard on February 21, 2013). See id at 4 (showing that Judge Roberts did not review the document in question in camera). But see Ctr. for Int’l Envtl. Law...}
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.8 Yet our legal tradition is one that values transparency, as exemplified by the FOIA. 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.9

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 2001.10 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 ballet over the appropriate level of deference to the executive, and the role of overclassification and pseudo-classification.11 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

9. See analyses infra Parts III. & V.
10. See infra Part VI.
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 Overclassification Act, Pub. L. No. 111-258 (2010) (requiring the Department of Homeland Security to develop a strategy to prevent the overclassification of homeland security information and to promote homeland security information sharing with state, local, tribal, and private sector entities, but failing to define overclassification); Rick Blum, Secrecy Report Card 2005, 9, OPENTHEGOVERNMENT.ORG, 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 document that is being “pseudo-classified”). Some other examples include Sensitive Security Information (SSI), For Official Use Only (FOUO), and Controlled Unclassified Information (CUI).
across agencies. 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, 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 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 or 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. During Congressional discussions of the amendment, legislators stated that courts should review agency classification determinations. However, the 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 in FOIA cases, has generally declined to take an active role in oversight of agency assertions of national security classification. 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 legitimate 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. At the same time, the very concept of national

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12. A report issued by a presidential Task Force in 2009 found there were 119 versions of the CUI designation in use. See generally Controlled Unclassified Information, Exec. Order No. 13,556, 75 F.R. § 68675 (2010) (stating that “appropriate consideration should be given to the report of the interagency Task Force on Controlled Unclassified Information published in August 2009”).
15. See, e.g., SCOTT SHANE, COMPLAINT SEEKS PUNISHMENT FOR CLASSIFICATION OF DOCUMENTS, N.Y. TIMES, AUG. 1, 2011, AVAILABLE AT
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 decision making towards secrecy and against civil liberties and transparency.\(^\text{16}\)

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 II frames the issue by discussing a recent headline-making FOIA case involving Exemption One, then recounts the social and political trends that produced the FOIA and examines how the statute evolved regarding judicial review of claims of exemptions based on national security or foreign affairs. Part III discusses judicial reluctance to review agency decisions and its possible causes. Part IV then reviews the problems of overclassification and the illusion of agency expertise. Part V presents an empirical study of the FOIA decisions of the D.C. District court and the Circuit courts of appeal. Part VI discusses the confluence of the national security narrative and the transparency narrative. Part VII concludes.

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 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. After the Office of the United States Trade Representative (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. The procedural complexity of the case is itself an indication of the difficulties FOIA requesters face.

The Center for International Environmental Law (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). 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.

In 2001, CIEL filed suit and moved for production of a Vaughn Index.  

17. Ctr. for Int’l Envtl. Law v. Office of the United States Trade Representative, 505 F. Supp. 2d 150, 159 (D.D.C. 2007) [CIEL I]. See also Classified National Security Information, Exec. Order No. 12958, 60 Fed. Reg. 19,825, 19,826.1.2(a)(4) (April 20, 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”).
21. Id. at 154 (citing to 5 U.S.C. § 552(b)(5)).
22. Complaint, CIEL I (D.D.C. 2001) (No. 1:01-cv-00498-RWR), available at http://www.fas.org/sgp/jud/ciel/111612-appendix.pdf. 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 Indexes 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 FOIA to confirm or deny that it possesses particular materials. FOIA requesters may not compel
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. 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.

The USTR did not ask for the fourth document to be derestricted. Now only one document remained in dispute. The document explains the United States’ initial proposed negotiating position on the meaning of “in like circumstances,” which “defines the conditions under which the national treatment and most-favored-nation rules apply.” 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.” Submitting further affidavits, the USTR brought a third summary judgment motion but failed to convince Judge Roberts.

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, n.1 (9th Cir. 1995). As the Vaughn court explained, the requirements set forth by the court serve two main purposes: (1) to ensure “parties’ 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, The Freedom of Information Act Trial, supra note 13 at 235.


27. CIEL II, 777 F. Supp. 2d at 79.

28. See Ctr. for Int’l Envtl. Law v. Office of the United States Trade Representative
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. Judge Roberts had never seen the document.

The USTR appealed Judge Roberts’ decision, and oral arguments were held before the D.C. Circuit Court of Appeals on February 21, 2013. On June 7, 2013, the D.C. Circuit reversed Judge Roberts, preventing disclosure. “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.” Similar to many cases before it, the Government was able to keep the document secret, on the basis of a generalized judicial invocation of institutional incapacity.

\section*{B. The Evolution of the Disclosure Regime}

What made Judge Roberts’ decision so noteworthy is that it followed the 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, despite the original language of the FOIA and the clarification Congress passed when courts failed to follow that mandate. 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: 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 tends to be an administration of ‘secret sessions’ in so far as it can, it hides its knowledge and actions from criticism...”36 That tendency was first addressed in the United States by the introduction of the Administrative Procedure Act in 1946.37

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.38 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:

[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.39

The original exemptions to section 3 of the APA were so broad that agencies used them as an excuse for secrecy, and the abuses pushed the call for reform.40 The piecemeal attempts at reforming the APA were unsuccessful in overcoming federal agencies’ disinclination to release information.41 During the time that Congress was tinkering with the APA, there was a separate movement to pass a comprehensive Freedom of Information law.42 This was part of a global trend to adopt such laws

40. Foerstel, supra note 32, at 10-28; see also S. REP. NO. 89-813, at 3 (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. 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.
beginning in the 1960s. 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. 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.

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. This led to the establishment of the Central Intelligence Agency for foreign intelligence, while the Federal Bureau of


44. FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1994, at 2 (1994) (“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.”).

45. Id. The intelligence failure—the failure to share information with other parts of the 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 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.” Id. See also Patricia Sullivan, Roberta M. Wohlstetter; Military Intelligence Expert, WASH. POST, Jan. 10, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901741.html; THE NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 217, 276, 541 n. 107 (2004). 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. Failure of intelligence dissemination was a component of the intelligence failure that led to the 9/11 attacks.

46. SMIST, supra note 41, 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.

Investigation remained responsible for domestic intelligence. However, the new agency remained highly secretive, despite the lessons of Pearl Harbor. Sadly, excessive secrecy within intelligence communities has remained a systemic problem.

It was within this framework of newly institutionalized secrecy that the FOIA was passed in 1966, although President Johnson disapproved of the law. As a statutory framework for protection of access to government information, FOIA defined the agency records that were subject to disclosure, set up a rebuttable presumption of mandatory disclosure, and granted nine exemptions. The national security exemption is exemption one. 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 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.” This section was quickly revised to require that to be exempt from disclosure, the classification of documents

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

49. SMIST, supra note 43, at 2. Key documents were never sent to military commanders in Hawai‘i. Id.

50. Id. See also THE 9/11 COMMISSION REPORT, supra note 43. The 9/11 Commission Report’s findings regarding excessive overclassification have been incorporated in the Reducing Overclassification Act (P.L. 111–258, codified at various sections of the United States Code) 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 overclassification . . . . The 9/11 Commission and others have observed that the overclassification 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.”

51. Thomas Blanton, Freedom of Information at 40, THE NATIONAL SECURITY ARCHIVE (2006), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm. “Documents from the LBJ 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 Bush’s favorite—a signing statement that undercut the thrust of the law.” Id.

52. 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.

53. 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.

had to be done pursuant to an Executive Order. 55

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 shall be on the agency to sustain its action.” 56 The Supreme Court has held that the nine “exemptions are specifically made exclusive . . . and must be narrowly construed.” 57

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 deference” to agency expertise in reviewing an agency’s FOIA determination, 58 courts routinely granted deference to an agency determination that a document was properly classified and therefore exempt from FOIA. 59 The tendency of courts to defer to agencies on national security matters reached its crescendo in EPA v. Mink. 60 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 or foreign policy exemptions to the FOIA could be sustained solely on the basis of a government affidavit that the documents were properly classified. 61 The court was not allowed to review the documents and see if a portion of the documents could be released. 62 The concurrence by Justice Stewart blamed Congress for imposing such a stringent form of deference, noting that disclosure about hotly contested

55. 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. IV 1969). 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 agency’s need or preference for confidentiality is not a mandatory bar to disclosure).


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


59. 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 MARYLAND L. REV. 1, 70 (2012) (discussing the failure to consider the Constitutional underpinnings of the FOIA).

60. Mink, 410 U.S. at 84. 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.

61. Id.

62. Id. at 93.
nuclear tests were just the sort of information that should be disclosed “consistent with legitimate interests of national defense.” In Mink, Justices Brennan and Marshall wrote an eloquent dissent 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 (citations omitted) (italics added).

Mink mandated rubber-stamping agency determinations despite what the dissent felt was clear congressional intent, and Congress reacted by legislatively overruling Mink in the 1974 amendments to the FOIA. 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. In 1971, the chair of the Senate Foreign Relations Committee, William Fulbright, was already complaining that “secrecy has become a kind of god in this country.

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 11652 on classification, in 1972, he had this to say about overclassification:

63. Id. at 94.
64. Id. at 100–101.
66. Victor Marchetti & John D. Marks, The CIA and the Cult of Intelligence 11 (1974) (discussing the CIA’s original purpose “as a coordinating agency responsible for gathering, evaluating, and preparing foreign intelligence of use to policymakers” and its subsequent actions away from the original purpose).
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 (emphasis added). 68

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. 69 Early in 1975, the Senate appointed Frank Church to investigate and make recommendations about intelligence improprieties 70 and the House appointed Representative Otis Pike to head a similar committee. 71

The Church Committee’s investigations of intelligence agency operations resulted in fourteen reports, issued in 1975 and 1976. 72 In the Church Reports, newspaper accounts of CIA surveillance within 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 (emphasis added). 68

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69. SMIST, supra note 41, at 9–10.

70. Id. at 10; Senate Committee on Government Operations, Legislative Proposals to Strengthen Congressional Oversight of the Nation’s Intelligence Agencies: Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong. 20–21 (1974).

71. 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 41, at 10; 122 CONG. REC. 1641 (1976). The committee report was leaked to the press. SMIST, supra note 41, at 10–11.

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.\textsuperscript{73} The National Security Agency had a private arrangement with three American telegraph companies, which gave millions of private telegraphs to the Agency from 1947 to 1975.\textsuperscript{74} The Church Reports also validated reports of covert actions of the United States government, manipulating elections,\textsuperscript{75} and attempting assassinations in Chile, Cuba, and the Congo.\textsuperscript{76}

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.”\textsuperscript{77} Senator Hart said that “[a]s Americans, we

\begin{itemize}
\item \textsuperscript{73} Select Comm. to Study Governmental Operations, Intelligence Activities and the Rights of Americans, Final Report, S. Rep. No. 94-753, at 6 (1976).
\item \textsuperscript{74} 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, e.g., Gina M. Stevens, Cong. Research Serv., RL31730, Privacy: Total Information Awareness Programs and Related Information Access, Collection, and Protection Laws (2003). The program was defunded by Congress, but parts of it 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, Jun. 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, e.g., Timothy B. Lee, Here’s Everything We Know About PRISM to Date, Wash. Post, Jun. 12, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/here’s-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 warrantless authority under which NSA had collected phone records and email since 2001. This report, classified as top secret, was also leaked to the Guardian by Snowden. See William Saletan, The Taming of the Spook: A Secret History of the NSA Surveillance Program Shows It’s Gotten Better, Not Worse, Slate, Jul. 1, 2013, available at http://www.slate.com/articles/news_and_politics/frame_game/2013/07/nsa_history/how_bureaucrats_leaks_and_computer_tamed_nsa_surveillance.html.
\item \textsuperscript{75} Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Hearings, S. Res. 21, 94th Cong., at 8–10, 62, 66 (1974) (covering interference in elections in Chile and interference in the elections in post-war Italy).
\item \textsuperscript{77} Russell A. Miller, ed., U.S. National Security, Intelligence and Democracy: From the Church Committee to the War on Terror 14 (2008) (describing the Church Committee reports on CIA intelligence during the Cold War and its
should never do anything we would be ashamed for the world to know about.”

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.” In the midst of these revelations about secrecy and the cover-up of illegal activities, the 1974 amendments to FOIA were being introduced, debated, amended, 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 overclassification in the national security and foreign policy context. 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 that the Nation’s security and foreign policy would not be damaged in any way by public disclosure of these documents.”

To the Attorney General’s concern that the amendments to FOIA “would shift the burden to the government,” Senator Muskie responded, “[t]he burden is on the agency to sustain its action.” The FOIA imposes the burden because “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.”

The consensus of the conferees was that the “burden remains on the government under this law.” The conferees also

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78. Id. at 15.
79. Id. at 17. The recommendations of the Church Committee inspired the legislation that led to the creation of the Foreign Intelligence Surveillance Act (FISA) and the Foreign Intelligence Surveillance Court (FISC). See DAVID B. COHEN & JOHN W. WELLS, AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 34 (2004).
80. 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. S. COMM. ON ADMIN. PRACTICE AND PROCEDURE & S. COMM. ON GOV’T INFO. AND INDIVIDUAL RIGHTS, 94TH CONG., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (PUB. L. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY 306-28 [hereinafter SOURCE BOOK].
81. It is worth noting that the etymology of bureaucracy is the French word, bureau, a “desk with drawers for papers”, 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).
82. SOURCE BOOK, supra note 807, at 460.
83. Id.
85. SOURCE BOOK, supra note 807, at 114.
discussed, but refused to limit, judicial review of classified material to "determining if the classification decision had a 'reasonable basis'" 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.

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. Indeed, the general rule in FOIA cases since 1974 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." No court seems to have taken up the congressional call for the use of "other experts," and have simply stated that they lack expertise. 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.

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86. 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. 17,022-92 (1974).
87. SOURCE BOOK, supra note 80, at 308.
88. 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 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).
89. 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 . . ..”).
90. See e.g., Students Against Genocide v. Dep’t of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (holding that because courts lack expertise in national security matters they must give “substantial weight to agency statements”).
an admiral, a former CIA agent, and a former ambassador who had personally prepared some of the records at issue, among others. Courts have “demonstrated deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority.” Only once has a court actually appointed a special master to review and categorize classified documents.

Nor did passing the 1974 amendments end the political battle. President Ford vetoed the amendments to 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. Antonin Scalia weighed in with arguments that the amendments were unconstitutional. Congress

FOIA GUIDE 2009.

92. See Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy, 891 F.2d 414, 421–22 (2d Cir. 1989) (ruling in favor of Navy’s claim of exemption regarding alleged environmental law violations since the judicial branch cannot analyze alleged violations, but noting that Navy is subject to Congressional environmental laws), cited in FOIA GUIDE 2009, supra note 88, at 150 n. 41.

93. Gardels v. CIA, 689 F.2d 1100, 1102–03 n5 (D.C. Cir. 1982) (describing that student sought disclosure of information of CIA contacts with a university after CIA provided affidavits to establish exemption), as cited in FOIA GUIDE 2009, supra note 88, at 130 n. 41.

94. 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 88, at 150 n. 41.

95. See Pfeiffer v. CIA, 721 F. Supp. 337, 340–341 (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 88, at 150 n. 41.


97. In re United States 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, 407–408 (1988) (discussing the judge’s dissatisfaction with the alternative means of document review). The special master was ordered to proceed in Washington Post v. U.S. Dep’t of Def., Civ.A. 84–3400-LFO, 1988 WL 73852, at *1 (D.D.C. Jun. 6, 1988).


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.” The 1974 FOIA national security amendment was intended to further access to overclassified documents. 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.” 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 emergency. Presidential authority has expanded dramatically in the national security sphere, and the traditional checks are widely viewed as ineffective or inappropriate. While there has been some movement under the Obama administration towards proactive release of information, which makes FOIA requests redundant, this has not occurred in the national security context. The next section 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. 106 This is a variation of the concept of salience in decisionmaking, which was popularized by Amos Tversky and Daniel Kahneman. 107 The availability heuristic tilts decisionmaking towards “prominent” information, so that people “rely too heavily on information that is readily available or prominent, ignoring information that they do not see as often or as readily or that is in the background.” 108 This bias trumps more thoughtful determinations of frequency and probability. 109 Of particular relevance for present purposes, it distorts the ability to assess low-probability events that might have large consequences. 110

As Stephen Schulhofer has pointed out, the “reasons for judicial resistance to [de novo] review, despite the statutory mandate for it, are not mysteries: Judges feel they lack competence and the stakes are too high.” 111 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. 112


108. Schenk, supra note 104. Economists’ studies have shown that when something is salient, it had a more pronounced effect on behavior and responses. Id. at 265.


This is not to maintain that mere probability should be the deciding factor in an 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, and judicial experience or training does not exempt judges from the effects of this bias.

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. Despite clear directives from Congress, including a direct Congressional override of the early judicial adoption of deference in FOIA Exemption 1 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. 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.”

This perfectly describes the dilemma faced by FOIA courts: 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

113. Id. at 51. (explaining that in cognitive psychology, heuristics are “cognitive shortcuts that we use as something like defaults in the decisionmaking process. These heuristics operate mostly at a subconscious level.”).
114. 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 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 sub-set of the government, just as judges are subsets of the government. FOIA requesters, on the other hand, are the out-group.
115. See Part IV, infra at XXX.
116. Id. at 31. (explaining that in cognitive psychology, heuristics are “cognitive shortcuts that we use as something like defaults in the decisionmaking process. These heuristics operate mostly at a subconscious level.”).
117. See page 20, supra, and associated footnotes.
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. Routine deference immunizes the courts from criticism if the low probability 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 that herds the whole group towards one policy option without independent consideration by (most of) the group’s members . . . .”

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. The Pentagon Papers case is a prime example. Relying on both the First and the Fourth Amendments, the court in *New York Times v. United States* refused to restrain the publication of the Pentagon Papers. 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. 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

118. See *United States v. Reynolds*, 345 U.S. 1 (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 50 years later, no national security secrets were involved, just evidence that the plane malfunctioned. See discussion *infra* at page 35.

119. Id. at 119.

120. 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. 1151 (2012).

121. 403 U.S. 713, 714 (1971).

122. 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).
explicit First Amendment protection of access to government information as a subset of the constitutionally protected right to receive information.\(^{123}\)

Before the FOIA was passed, scholars looked to the First Amendment to create a broader right to know about the workings of the government.\(^{124}\) Despite the Supreme Court’s continued affirmation of a constitutionally protected right to receive information,\(^{125}\) the Court has relied on the FOIA, not the Constitution, to protect access to most government information.\(^{126}\)

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’ constitutional right to information about certain trial proceedings.\(^{127}\)

Congress did in fact give the courts a potentially powerful tool to use to analyze matters of national security: experts.\(^{128}\) While individual judges may not have expertise in matters of national security, even without the Congressional mandate in FOIA’s legislative history, courts have “solid institutional capacities to elicit expertise.”\(^{129}\)

As Stephen Schulhofer points out, national security expertise requires balancing two types of institutional values, secrecy and transparency; and while national security officials

\(^{123}\) See generally Foerstel, supra note 32, at 66–67; FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,” supra note 57, at 17–18.

\(^{124}\) See, e.g., Wallace Parks, The Open Government Principle: Applying the Right to Know Under the Constitution, 26 GEO. WASHINGTON L. REV. 1, 3 (1957) (discussing constitutional issues relevant to statutory and presidential action required to create an openly informative government).

\(^{125}\) See Martin v. Struthers, 319 U.S. 141, 147(1943) (deciding that local law prohibiting door-to-door distribution considered a violation of constitutional freedoms of speech and press), to U.S. v. American Library Ass’n, Inc., 539 U.S. 194 (2003) (finding that Congress was permitted to pass internet act requiring public libraries to have internet filters in order to receive federal subsidies as being designed to meet educational and informational purposes), the Supreme Court has recognized a constitutional right to receive information.

\(^{126}\) 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 CON. 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).


\(^{128}\) Source Book, supra note 80, at 308.

abhors transparency, judges thoroughly understand the values of transparency.\textsuperscript{130}

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,\textsuperscript{131} 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.\textsuperscript{132}

The result of the courts’ failure to follow the balancing procedures set out in the FOIA is that the balance has tilted towards 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]bdication, 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.”\textsuperscript{133} The incentive provided by the possibility of rigorous oversight at least some of the time has recently been called the “observer effect.”\textsuperscript{134} 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.\textsuperscript{135}

\textsuperscript{130}. \textit{Id.}


\textsuperscript{132}. \textit{Id.} at 4-8.


\textsuperscript{134}. Ashley Deeks, \textit{The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Defiance}, 82 \textit{FORDHAM L. REV.} 827, 834-838 (2013) (defining the effects of being observed by courts on executive policy). The observer effect is in play outside the executive policy arena. \textit{Id.} at 834, fn. 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.” \textit{Id.} at 853, fn. 127.

\textsuperscript{135}. Agencies do not have to claim an exemption where no harm would result from the disclosure. Chrysler Corp. v. Brown, \textit{supra} note 53 at 293, discussing agency discretion to claim exemption or provide documents. \textit{See also} CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1333-34 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.”).
The actual impact of court review on agency action might be variable, depending on the agency involved and the frequency of invocation of the Exemption. Some agencies rarely invoke the Exemption, but others do so routinely. For example, the Department of Justice, 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%).\(^\text{136}\) Within the Department of Justice, the Federal Bureau of Investigation received 12,783 of those FOIA requests, and 333 involved a claim that Exemption One applied (0.03%).\(^\text{137}\) 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. The Central Intelligence Agency received 3745 FOIA requests, and claimed Exemption One applied to 2112 of them (56%).\(^\text{138}\) The National Security Agency received 1809 FOIA requests, and claimed Exemption One in 1104 cases (61%).\(^\text{139}\) The Defense Intelligence Agency received 1144 requests, and claimed Exemption One in 344 of them (30%).\(^\text{140}\) The Office of the Director of National Intelligence received 343 FOIA requests, and claimed that Exemption One applied in 51 of them (15%).\(^\text{141}\) 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.”\(^\text{142}\) There is no reason why judges cannot set up procedures that will allow them to evaluate the risks associated with disclosure.\(^\text{143}\) 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.\(^\text{144}\)

\(^\text{136}\) These percentages were created using FOIA.gov’s data generator, at http:www.foia.gov.data.html. The data is on file with the author.
\(^\text{137}\) Id.
\(^\text{138}\) Id.
\(^\text{139}\) Id.
\(^\text{140}\) Id.
\(^\text{141}\) Id.
\(^\text{142}\) Judging Secrets, supra note 118, at 170.
\(^\text{143}\) Id. at 170–71.
\(^\text{144}\) SOURCE BOOK, supra note 80, at 175, 308.
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.\(^\text{145}\) So if in fact there is systemic overclassification, 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 expert 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.\(^\text{146}\)

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.\(^\text{147}\) 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.”\(^\text{148}\)

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:


\(^\text{146}\) Source Book, supra note 80, at 460–61.

\(^\text{147}\) Mr. Florence served 22 years in the Army and the Air Force, and served 21 more years with the Department of Defense in civilian status. For 26 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, 93d Cong. 285 (1973) (statement of William G. Florence, Air Force security analyst).

\(^\text{148}\) Id.
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. 149

Mr. Florence is among those experts who have quantified the amount of 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. 150 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.” 151

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 Sept. 11 terrorist attacks. 152 The Judiciary Committee removed two of the letters

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149. Id. at 287.


152. Classified Letters Regarding FBI Whistleblower Sibel Edmonds, THE MEMORY
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. 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,” no one 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.

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 Report was 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" method 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: this meant that “in 1995 there were 21,871 ‘original’ Top Secret designations and 374,244 ‘derivative’ designations.”


Id. at XXXIX ("Many of these ‘derivative’ designations involve ‘sources and
Moynihan asks: “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’?”

To bring these numbers more up to date, in 2011 there were 127,072 original classifications, and over 50 million derivative classifications made in 2010, the last year for which there are figures. To update Daniel 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 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.”

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.” 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 decision making are a way to signal that specific types of decisions will not pass statutory muster. There are 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.”

160. Id.


163. Moynihan Report, supra note 158, at XXXI-XXXII.

164. Id. at XXXVI.

165. See, e.g., Mark Seidenfeld, Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking, 87 CORNELL L. REV. 486, 493–494 (2001-2002). The other methods include a crisis calling the rule into question, a new leadership with new ways, or
sound reasons for curtailing excessive overclassification.

There are many dangers from excessive secrecy. Regarding the dangers of hiding things from the public, Moynihan notes that in the 60s and 70s, 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 per cent.166

The range of estimates for the amount of overclassification varies, but the fact of massive overclassification 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 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 over-estimate the probability that the document is properly classified—and those properly classified documents are the only documents the first exemption to the FOIA protects from disclosure.167 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.”168

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

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.

168. Moynihan Report, supra note 158, at Appendix 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.
with by the judiciary. The argument that documents can’t 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 FOIA, such as the state secret claim in *Edmonds v. Department of Justice*, where the government retroactively classified documents that had been available on the United States Senate website.

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*, in which then-Solicitor General Erwin N. Griswold argued that disclosure would pose the threat of serious injury to the national security. 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.

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

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172. Discussed *supra* note 45.

may be relevant now. 174

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. 175 Speaking in the context of the state secrets privilege, he called for oversight, as he has “no doubt [the privilege] is often abused.” 176 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.” 177

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 not have a job very long.” 178 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[].” 179 Too often, Weaver notes, it is politics, personal concerns, and fear of embarrassment that lead to classification decisions. 180 Retired Admiral Gene LaRocque testified in 1972 hearings before the Foreign Operations and Government Information Subcommittee about the reasons that the military overclassified information:

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176. Id.
177. Id.
178. Id.
179. Id. (emphasis added).
180. Id.
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 Congress. Sometimes, information is classified to withhold it for later release to maximize the effect on the public or on 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.\(^{181}\)

Just recently, the nominee for Director of National Intelligence, Admiral Dennis C. Blair, admitted “There is a great deal of overclassification, . . . . 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 for the reverse, in case you get something wrong and don’t classify it.”\(^{182}\) As Steven Aftergood, who directs the Federation of American Scientists Project on Government Secrecy, has noted, it isn’t that government officials can’t follow the procedural rules for classifying information; it is that their “subjective ‘determination’ that classification is necessary” is an “error in judgment.”\(^{183}\)

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.\(^{184}\) The Author worked at the Defense Intelligence Agency and knows that documents’


183. Steven Aftergood, Secrecy News: FAS Project on Government Secrecy, Volume 2013, Issue No. 62 July 8, 2013, http://blogs.fas.org/secrecy/. “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 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].

classification is often done so that others will take the information more seriously.\textsuperscript{185} 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.”\textsuperscript{186}

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. \textsuperscript{187} 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 and 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 of Colorado at Boulder offers an additional twist to the overclassification issue: in matters relating to foreign policy, when people are told a document is secret, they are statistically more likely to believe its contents are true.\textsuperscript{188} The study is based on three different experiments that looked at secrecy from a citizen, rather than an institutional, point of view.\textsuperscript{189} 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.\textsuperscript{190} The heuristic fills in for an ability to actually assess the

\textsuperscript{185}Id. at 1294.
\textsuperscript{186}Id. at 1314.
\textsuperscript{187}See id. at 1316–22. There have been instances where courts, outside the FOIA context, have done this. In \textit{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 \textit{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).
\textsuperscript{188}Mark Travers, Leaf Van Boven & Charles Judd, \textit{The Secrecy Heuristic: Inferring Quality from Secrecy in Foreign Policy Contexts}, 35 Political Psychology 1, 97 (2014).
\textsuperscript{189}Id. at 98.
\textsuperscript{190}Id. The article speculates that in institutions with cultures of secrecy, such as 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.\textsuperscript{191} 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.\textsuperscript{192} 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.\textsuperscript{193} 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?,” “Have you met Senate staff members in any unclassified conferences?”\textsuperscript{194} The most famous case is, of course, the case that gave judicial sanction to a state secrets privilege. In \textit{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.\textsuperscript{195} In 2000, the report the government withheld CIA, the heuristic may be even more prevalent. \textit{Id.} at 108.

\textsuperscript{191} \textit{Id.} at 99.
\textsuperscript{192} \textit{Id.} at 99.
\textsuperscript{195} 345 U.S. 1 (1953). Although \textit{Reynolds} is usually credited as the origin of the states secret doctrine, Laura Donohue has traced it much further back. See Laura K. Donohue, \textit{The Shadow of State Secrets}, 159 U. Pa. L. Rev. 77, 82-85 (2010).
was declassified.\textsuperscript{196} When the report was declassified, Mrs. Reynold’s daughter sued for fraud, alleging that there were no national security secrets involved—just evidence that the plane malfunctioned.\textsuperscript{197} Every historian has a list of ludicrous secrets, according to Ted Gup,\textsuperscript{198} 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.”\textsuperscript{199}

The dangers of openness and disclosure are frequently exaggerated.\textsuperscript{200} There were no repercussions from the leak of the Pentagon Papers\textsuperscript{201} and the repercussions from the biggest leak of all, Wikileaks, have generally been more evident in the press’ imagination than in reality.\textsuperscript{202} The leaks


\textsuperscript{197} Herring v. United States, 2004 WL 20040272 (E.D. Penn. 2004).

\textsuperscript{198} Ted Gup, \textit{Nation of Secrets: The Threat to Democracy and the American Way of Life} 111 (2007) (Explores how and why academic, government, and business institutions keep secrets from the people).


\textsuperscript{200} Even in an arena where there is strong appeal to the proposition that secrecy is \textit{required}, such as the operational details of our nuclear weapon, news reports about classified safety problems with the United States’ missile program forced the government to implement crucial safety measures. \textit{Command and Control}, supra note 179, at 466–468.

\textsuperscript{201} “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.” Griswold, supra note 170.

have certainty caused spectacular embarrassment, but embarrassment is specifically excluded as a reason for classification. The recent Snowden leaks have likewise been an embarrassment, and have led to extensive and difficult conversations at the national and international levels. 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. In the wake of the leaks, the director of the 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. When President Obama appointed a committee, the President’s Review Group on Intelligence and Communications Technology, the committee stated that “a central goal of our recommendations is to increase transparency and to decrease unnecessary secrecy.” The courts have a role to play in making


204. See Dilanian, supra note 3 Foreign Intelligence Surveillance Act: 2013 Leaks and Declassifications, Lawfare, Oct. 1, 2013, http://www.lawfareblog.com/wiki/usa-papers/ (providing a timeline of leaks and declassifications). The response to the Snowden leaks call to mind the findings of the comments of the joint Committee on Government Operations and the Committee on the Judiciary. Source Book, supra note 80 at 13 (“In 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 the 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.”).

205. See Dilanian, supra note 3. James Clapper, the current Director of National 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.”


207. The President’s Review Group on Intelligence and Communications
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?208

We initially chose to look at all of the FOIA cases decided by the trial and appellate courts in the District of Columbia (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, according to a recent statistical analysis of the Federal Judicial Center database.209 The D.C. Circuit has more FOIA litigation than any other circuit court, deciding 38% of all appellate FOIA cases nationally.210

208. 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 1 cases where Exemption 1 was the only exemption claimed was 10.8%, and it was 11.3% where Exemption 1 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.

209. Kwoka, supra note Error! Bookmark not defined., 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. Id.

210. Data on file with authors. See also Kwoka, supra note 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).
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 or appellate level that considered the exemption, along with all appellate cases. 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, and characteristics of the judge or panel, and, as well as 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 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 exempted by other statutes) followed by 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 asked whether or not the case included a Vaughn Index prepared by the agency; whether the judge ordered in camera review; and whether the judge 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 to 6 percent 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**

<table>
<thead>
<tr>
<th>Plaintiff Characteristics</th>
<th>ALL CASES (n=270)</th>
<th>DISTRICT CASES ONLY (n=163)</th>
<th>APPELLATE CASES ONLY (n=107)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual plaintiff</td>
<td>.73</td>
<td>.68</td>
<td>.79</td>
</tr>
<tr>
<td>NGO or other plaintiff</td>
<td>.27</td>
<td>.32</td>
<td>.21</td>
</tr>
<tr>
<td>Exception</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign Affairs exception</td>
<td>.40</td>
<td>.20</td>
<td>.68</td>
</tr>
<tr>
<td>National Defense exception</td>
<td>.86</td>
<td>.91</td>
<td>.78</td>
</tr>
<tr>
<td>Other Exemptions (all categories)</td>
<td>.85</td>
<td>.88</td>
<td>.80</td>
</tr>
<tr>
<td>Exemption 2</td>
<td>.20</td>
<td>.27</td>
<td>.11</td>
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<td>Exemption 3</td>
<td>.58</td>
<td>.64</td>
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<td>.16</td>
</tr>
<tr>
<td>Exemption 7</td>
<td>.41</td>
<td>.46</td>
<td>.34</td>
</tr>
<tr>
<td>Treatment by In camera</td>
<td>.38</td>
<td>.37</td>
<td>.39</td>
</tr>
</tbody>
</table>


B. District Court Results

To understand the impact of these factors on case outcomes, we estimated a series of logistic regression models, reported in Table 2. 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 aggregated 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). Thus, coefficients with a positive sign

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212. Logit regression models are appropriate when the dependent variable—here, the case outcome—is binary.
213. (These cases were Center for International Environmental Law v. USTR, 845 F. Supp. 2d 252 (D.D.C. 2012); National Security Archive v. Office of Independent Counsel, 1992 U.S. Dist. LEXIS 13146; Pratt v. Webster 508 F. Supp. 751 (D.D.C. 1981); 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.
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.214

The majority of cases in the data are brought against four government agencies: the CIA (55), the Federal Bureau of Investigation (FBI) (20), the Department of State (29) and the Department of Justice (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 Department of Justice cases will in fact involve a defendant that is another government agency.

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.215 We thus investigate the effect of the appointing party.

214. Marc Galanter, Why the Haves Come out Ahead, 9 L. Soc. Rev. 95, 98–101 (1974) (showing that repeat players have structural advantages in the legal system).

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

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>(1) Case characteristics</th>
<th>(2) Case + Party characteristics</th>
<th>(3) Case, Party and Judge characteristics</th>
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</thead>
<tbody>
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<td>Foreign affairs prong</td>
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<td>.19</td>
<td>.31</td>
</tr>
<tr>
<td></td>
<td>(.69)</td>
<td>(0.73)</td>
<td>(0.73)</td>
</tr>
<tr>
<td>Other exemption claimed</td>
<td>-1.63</td>
<td>-.20</td>
<td>-0.13</td>
</tr>
<tr>
<td></td>
<td>(0.94)</td>
<td>(0.88)</td>
<td>(0.89)</td>
</tr>
<tr>
<td>In camera review</td>
<td>0.63</td>
<td>0.63</td>
<td>0.65</td>
</tr>
<tr>
<td></td>
<td>(0.87)</td>
<td>(0.59)</td>
<td>(0.59)</td>
</tr>
<tr>
<td>Vaughn Index</td>
<td>0.55</td>
<td>0.54</td>
<td>0.56</td>
</tr>
<tr>
<td></td>
<td>(0.92)</td>
<td>(0.63)</td>
<td>(0.64)</td>
</tr>
<tr>
<td>Sufficiency of affidavit discussed</td>
<td>0.59</td>
<td>0.13</td>
<td>0.20</td>
</tr>
<tr>
<td></td>
<td>(0.63)</td>
<td>(0.70)</td>
<td>(0.71)</td>
</tr>
<tr>
<td>NGO plaintiff</td>
<td>0.22</td>
<td>0.22</td>
<td>0.28</td>
</tr>
<tr>
<td></td>
<td>(0.65)</td>
<td>(0.65)</td>
<td>(0.64)</td>
</tr>
<tr>
<td>Repeat plaintiff</td>
<td>0.74</td>
<td>-0.74</td>
<td>-0.74</td>
</tr>
<tr>
<td></td>
<td>(0.67)</td>
<td>(0.66)</td>
<td>(0.66)</td>
</tr>
<tr>
<td>Defendant=Other</td>
<td>1.17*</td>
<td>1.28**</td>
<td>1.28**</td>
</tr>
<tr>
<td></td>
<td>(0.62)</td>
<td>(0.64)</td>
<td>(0.64)</td>
</tr>
<tr>
<td>Trial Judge=Democratic Appointee</td>
<td></td>
<td></td>
<td>0.55</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(0.64)</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.73***</td>
<td>-3.85***</td>
<td>-4.43***</td>
</tr>
<tr>
<td></td>
<td>(0.94)</td>
<td>(1.26)</td>
<td>(1.47)</td>
</tr>
<tr>
<td>Observations</td>
<td>159</td>
<td>158</td>
<td>158</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The results indicate that most of the case 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 (DC). 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 by 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

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign affairs prong</td>
<td>0.96</td>
<td>1.757**</td>
<td>-13.65</td>
</tr>
<tr>
<td></td>
<td>(0.63)</td>
<td>(0.80)</td>
<td>(1,322)</td>
</tr>
<tr>
<td>Other exemption claimed</td>
<td>-0.10</td>
<td>-0.32</td>
<td>-0.53</td>
</tr>
<tr>
<td></td>
<td>(0.66)</td>
<td>(0.740)</td>
<td>(0.79)</td>
</tr>
<tr>
<td>In camera review</td>
<td>0.48</td>
<td>1.21*</td>
<td>1.17*</td>
</tr>
<tr>
<td></td>
<td>(0.52)</td>
<td>(0.62)</td>
<td>(0.67)</td>
</tr>
<tr>
<td>Vaughn Index</td>
<td>0.60</td>
<td>0.69</td>
<td>1.04*</td>
</tr>
<tr>
<td></td>
<td>(0.51)</td>
<td>(0.56)</td>
<td>(0.62)</td>
</tr>
<tr>
<td>Sufficiency of affidavit discussed</td>
<td>0.18</td>
<td>-0.19</td>
<td>-0.15</td>
</tr>
<tr>
<td></td>
<td>(0.56)</td>
<td>(0.620)</td>
<td>(0.669)</td>
</tr>
<tr>
<td>NGO plaintiff</td>
<td>-0.75</td>
<td>-0.95</td>
<td></td>
</tr>
</tbody>
</table>
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. Of the four cases in which the DC Circuit granted disclosure, three were decided by panels that included two Democratic

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appointees, and three Democratic appointees decided one of the cases. 217  
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.218  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.219  We have also identified an important difference among 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: DC Circuit Only

<table>
<thead>
<tr>
<th>Appointing President</th>
<th># cases (%)</th>
<th># P wins* (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Republican</td>
<td>5 (.14)</td>
<td>0 (.00)</td>
</tr>
<tr>
<td>2 Republican 1 Democratic</td>
<td>10 (.28)</td>
<td>0 (.00)</td>
</tr>
<tr>
<td>2 Democratic 1 Republican</td>
<td>15 (.39)</td>
<td>3 (.20)</td>
</tr>
<tr>
<td>All Democratic</td>
<td>7 (.19)</td>
<td>1 (.14)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>37</td>
<td>4</td>
</tr>
</tbody>
</table>

217. *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 (D.C. Cir. 1974) (2 Democrat panel, giving burden of proof to government agency, as well as giving plaintiff 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, Inc. v. Bell*, 603 F.2d 945, 949-50 (D.C. Cir. 1979) (two Democrat panel defining a more limited understanding of FOIA exemptions by analyzing legislative intent and requiring more than substantial compliance on the government’s behalf).

218. 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 < 0) = 0.06.

Table 3b: Panel composition summary: All Circuits besides DC

<table>
<thead>
<tr>
<th></th>
<th># cases</th>
<th># P wins*(%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Republican</td>
<td>10 (.14)</td>
<td>4 (.40)</td>
</tr>
<tr>
<td>2 Republican Democratic</td>
<td>1 23 (.33)</td>
<td>7 (.30)</td>
</tr>
<tr>
<td>2 Democratic Republican</td>
<td>1 24 (.34)</td>
<td>4 (.17)</td>
</tr>
<tr>
<td>All Democratic</td>
<td>13 (.19)</td>
<td>5 (.38)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>70</td>
<td>20</td>
</tr>
</tbody>
</table>

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 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 majority of Republican-appointees there. This is generally consistent with the observation that panel effects are strong at the appellate courts.

Our single most consistent finding is that repeat players seem to have an advantage in FOIA litigation. This is consistent with a long literature that emphasizes the informational advantage of repeat players in various litigation contexts. Repeat players can choose which cases to bring, and can also exploit their superior knowledge to select cases to settle. Presumably, in the context of FOIA Exemption One, experienced

These case were distributed as follows: 1st Circuit–6 cases; 2d Circuit–14 cases; 3d Circuit-7 cases; 4th Circuit-3 cases; 5th Circuit-5 cases; 6th Circuit-2 cases; 7th Circuit-4 cases; 8th Circuit-2 cases; 9th Circuit-20 cases; 10th Circuit-1 case; 11th Circuit-5 cases; Federal Circuit-1 case.

221 See Epstein, Landes & Posner, supra note 215, at ch. 4, 153–54. Note that the Epstein et al. book does not include an analysis of FOIA cases specifically.


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. The very concept of a war on terror means that the United States can continually exist in what Georgio Agamben calls the “state of exception,” where legitimate governments expand their powers and suspend the rule of law in response to emergencies. 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. Agamben identified the actions taken by President Bush after September 11th – what we have come to call the “war on terror” - as an example of a continuing state of exception. 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.

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 to for disclosure.


[225. STATE OF EXCEPTION, supra note __, at 2-6.]

[226. 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).]

[227. Id. at 3 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 POWs as defined by the Geneva Convention).]


[229. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 332-34(1973)]
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. The first volumes actually contain contemporaneous dispatches; until the end of the century FRUS published dispatches that were only a few months old. Originally, the State Department originally did not really keep secrets, but as the national security state has expanded, so has the amount of time that dispatches remained secret. In 2013, the first volume of dispatches from the Carter Administration (1977-1981) was published, over thirty years after Carter left office.

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. Then, in 1950, Truman issued a new Executive Order for military secrets and another in 1951 that, for the first time, (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).

230. *See generally About the Foreign Relations of the United States Series U.S. Department of State Office of the Historian* https://history.state.gov/historicaldocuments/about-frus (last visited Aug. 29, 2014) (the Foreign Relations of the United States (FRUS) series is 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).


232. *Id.* (quoting John Bassett Moore, once the Assistant Secretary of State, who said that “the State Department before the First World War had no secrets whatever, except for personnel reports”).

233. 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, Joshua Botts, Peter Cozzens & Aaron W. Marx, Toward “Thorough, Accurate, and Reliable”: A History of the Foreign Relations of the United States Series, U.S. Department of State Office of the Historian* (preview edition, Jan. 23, 2014), http://history.state.gov/historicaldocuments/frus-history. (“The historical evidence this book presents indicates that the most significant negative 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.”).


allowed any department or agency to classify information when it seemed “necessary in the interest of national security.”236 In 1955, Eisenhower replaced it with Executive Order 10501.237 This changed the classification standard from “national security” to “national defense” and cut back on the number of agencies that could be classified.238 These executive orders created entrenched security bureaucracies and the executive branch has never looked back.239 Congress started studying overclassification,240 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.241 The argument is that whatever is happening now is so extraordinary that the founders could not possibly have imagined emergencies of such magnitude.242 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 danger of any in its long future existence.”243

The exigency argument has been made, successfully, and courts have

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238. Id.

239. THE IMPERIAL PRESIDENCY, supra note 229, at 340.


241. 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)


243. Id.
approved violations of civil liberty that, in hindsight, were clearly unnecessary; those decisions are a blot on American history.\textsuperscript{244} Cases brought under the Espionage Act of 1917\textsuperscript{245} and the Sedition Act of 1918\textsuperscript{246} were upheld, but after the war, every convicted person received amnesty.\textsuperscript{247} Korematsu v. United States\textsuperscript{248} is the paradigmatic example of a bad law upheld for the wrong reasons\textsuperscript{249}. 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.”\textsuperscript{250}

The increased Supreme Court scrutiny started in the 1970s with the Pentagon Papers,\textsuperscript{251} but has not trickled down to the lower courts, the gatekeepers for FOIA requests.\textsuperscript{252} The range of matters covered by “national security” keeps expanding. In the four epochs of national security that Laura Donohue has identified,\textsuperscript{253} our era is characterized by a move towards using national security claims to balance competing risks.\textsuperscript{254}

\textsuperscript{244} See National Security v. Civil Liberties, supra, note 245.
\textsuperscript{245} 40 Stat. 217 (1917) (prohibiting interference with military recruitment, support of national enemies during wartime, or insubordination in the military).
\textsuperscript{246} 40 Stat. 553 (1918) (extending the Espionage Act to limit certain civil liberties—especially speech).
\textsuperscript{247} National Security v. Civil Liberties, supra note 232, 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).
\textsuperscript{249} National Security v. Civil Liberties, supra note 245, at 2212 (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).
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 2210–2211; 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).
\textsuperscript{252} The Freedom of Information Act Trial, supra note 13 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.)
\textsuperscript{254} Id. at 1589 (risks include “climate change, pandemic disease, drugs, and organized crime... national security persists in its position of dominance, constantly expanding to envelop other issues.”). See also Bridget Rose Nolan, Information Sharing and Collaboration in the United States Intelligence Community: An Ethnographic Study of the National
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 FOIA courts to perform their functions of review—referees, experts, and masters have not been utilized and discovery is not normally available—but the FOIA courts do have one tool they have crafted to help make decisions: the Vaughn Index. As we have seen from the empirical study, the presence of a Vaughn Index in FOIA litigation is the one indicator that requesters might get documents.

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 court system effectively and efficiently to evaluate the factual nature of disputed

Counterterrorism Center 158 (2013) (Ph.D. dissertation, University of Pennsylvania), available at http://cryptome.org/2013/09/nolan-nctc.pdf (last accessed September 7, 2014) (There are those who part of the problem with the current security state is the sheer size of the security bureaucracy; “For the analysis, 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 Robert Steele, Steven Aftergood: To Fix US Intelligence, Shrink It!, PUBLIC INTELLIGENCE BLOG, Sept. 30, 2013, http://www.phibetaiota.net/2013/09/steve-aftergood-to-fix-us-intelligence-shrink-it/ (last accessed Sept. 7, 2014) (This 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, 2013, available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR114/RAND_RR114.pdf (discussing a contrary view).


256 See supra n. 22.

257. See supra Table 3 and preceding text.
There are many justifications for openness and transparency in government. The justifications emphasize the role of openness in curbing fraud, corruption and despotism, the role of openness in curing social and industrial diseases, and the role of openness in informed and enlightened government decisionmaking. Another benefit of openness is preventing new attacks. As the 9/11 Commission found, more publicity could have prevented 9/11. 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. 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 argues compellingly that the climate of secrecy engendered by Cold War politics created such an atmosphere of political distrust that people did not believe the government

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260 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 . . . .”).
261 Daniel 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.
262 The 9/11 Commission Report, supra note 43, 476 (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. 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 and John Macgregor Vise, Culture + Technology: A Primer 2005 84; This Day in History: Sep. 19, 1995: Unabomber Manifesto Published, http://www.history.com/this-day-in-history/unabomber-manifesto-published (last accessed Sept. 7, 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 the Comm. on Gov’t Reform, 109th Cong. at 5–6 (Mar. 2, 2005) (statement of Thomas S. Blanton, National Security Archive).
even when the government was telling the truth.264

Proponents of transparency emphasize the role of openness in curbing fraud, corruption and despotism,265 the role of openness as the cure for social and industrial diseases,266 and the role of openness in informed and enlightened government decisionmaking.267 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.268 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 play 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.269 And it is in fact true that there


266. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants. . ." Brandeis, supra note 24, at 92.

267. Daniel Moynihan, Secrecy: How America Blew It, supra note 24, 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.

268. See, e.g., Justin Fox and Richard Van Weelden, Costly Transparency, 96 J. of Pub. Econ. 142 (2012) (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”). The 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 voter’s interest. Id. Fear of the results actually becoming known militates against voting against the war. Id.

269. 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, Capstone Study, American Military University, Aug. 10, 2010,
are enemies of the United States. But as the enemies have become more 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.” 270 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.271 His comment referred specifically to the leak of a classified FISA court order; that classification prevented a necessary public debate, and the order should not have been classified. In fact, the FISA Court recently issued an order stating that all FISA court orders would be reviewed and released as appropriate.272 These acknowledgements and concessions are not possible without concluding that the orders were originally overclassified.273

When reviewing the denial of a FOIA request, all Article III judges are competent to balance national security and the public interest; nothing in

http://ssrn.com/abstract=1677496 (last accessed September 7, 2014). 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.


271. Dilanian, supra note 3. James Clapper, the current Director of National 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.” 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. Not “improperly” classified, but classified when not classifying the information would not have harmed national security. See comments on Dubin v. United States supra, note 11
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 was a Vaughn Index ordered in CIEL I.274

We end with another case that has generated lots of headlines, International Counsel Bureau v. U.S. Department of Defense.275 In ICB v. DOD I, the district court held the government’s declarations to a standard of specificity and adequacy.276 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, photographic and other recorded documents about four named detainees. The Department of Justice 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.”277 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.”278 After the Department’s response, the parties again cross-filed for summary judgment.279

This time around, the government’s search was found adequate, but the all of the claims of exemption were not.280 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." The court found this insufficient and sent the government back to try one last time.

Back for the third time, the government tried again. 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.” 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.” The court ordered the government to produce three representative videotapes for the Court’s in camera review. The government complied, and, despite the court’s previous statement that it would not give the government another chance, accepted new declarations. And found the new declarations 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.’”

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, 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.

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281. Id. at 64.
283. Id. at 105.
284. Id. at 106.
285. 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, supra note 97, at 212, in which the district court did not trust the government to be impartial in its choices. See Wald, Some Exceptional Condition, supra note 97, at 408.
286. ICB v. DOD II, supra note 216, at 65: “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.”
287. ICB v. DOD IV, supra note 17.
288. Id.
289. This was also a problem in CIEL. See discussion in Part II, supra at 6. It is particularly troubling when the government does not raise the national security exemption until all other efforts have failed.
CONCLUSION

In light of the overwhelming evidence that agencies routinely overclassify documents, courts can play an important role in breaking into that routine by taking seriously their obligation to perform de novo and in camera review of documents agencies claim are exempt under the first exemption to the FOIA and by asking for the assistance of experts in analyzing these claims. As the ICB v. DOD case demonstrates, 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,” 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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