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Articles

The Implausibility of Secrecy

MARK FENSTER*

Government secrecy frequently fails. Despite the executive branch's obsessive hoarding of certain kinds of documents and its constitutional authority to do so, recent high-profile events—among them the WikiLeaks episode, the Obama administration's infamous leak prosecutions, and the widespread disclosure by high-level officials of flattering confidential information to sympathetic reporters—undercut the image of a state that can classify and control its information. The effort to control government information requires human, bureaucratic, technological, and textual mechanisms that regularly founder or collapse in an administrative state, sometimes immediately and sometimes after an interval. Leaks, mistakes, and open sources all constitute paths out of the government's informational clutches. As a result, permanent, long-lasting secrecy of any sort and to any degree is costly and difficult to accomplish.

This Article argues that information control is an implausible goal. It critiques some of the foundational assumptions of constitutional and statutory laws that seek to regulate information flows, while complicating and countering the extensive literature on secrecy, transparency, and leaks that rest on those assumptions. By focusing on the functional issues relating to government information and broadening its study beyond the much-examined phenomenon of leaks, the Article catalogs and then illustrates the formal and informal means by which information flows out of the state in a series of case studies. These informal means play an especially important role in limiting both the ability of state actors to keep secrets and the extent to which formal legal doctrines can control the flow of government information. The same bureaucracy and legal regime that keep open government laws from creating a transparent state also keep the executive branch from creating a perfect informational dam. The Article draws several implications from this descriptive, functional argument for legal reform and for the study of administrative and constitutional law.

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TABLE OF CONTENTS

INTRODUCTION.....	310
I. SECRECY’S LAWS AND NORMS.....	317
A. SECRECY LAW.....	317
B. SECRECY NORMS.....	321
C. SECRECY’S LEGAL AND INSTITUTIONAL LIMITS.....	322
II. INSTITUTIONAL AND INFORMAL CONSTRAINTS ON SECRECY.....	324
A. LEAKS AS DELIBERATE INFORMATIONAL FLOWS.....	325
B. LEAKS AS ACCIDENTAL INFORMATIONAL FLOWS.....	328
C. INFORMATION FLOWS OUTSIDE OF THE STATE’S CONTROL.....	330
D. SECRECY AS INFORMATION.....	331
III. VICE PRESIDENT CHENEY AND THE EXECUTIVE BRANCH’S IMPERFECT INFORMATION CONTROL.....	333
A. THE INFORMATION CONTROL NARRATIVE.....	334
B. THE LEGAL FIGHT OVER NEPDG INFORMATION.....	337
C. THE LIMITS OF INFORMATION CONTROL.....	340
IV. REDACTION FAILURES: IMPERFECT INFORMATION CONTROL IN THE RELEASE OF DOCUMENTS.....	344
A. INFORMATION CONTROL AND RELEASE IN REDACTION LAW....	345
B. HOW REDACTION FAILS.....	347
C. REDACTION’S MEANING.....	350
V. “SECRET HISTORY”: THE STRUGGLE TO CONTROL INFORMATION ABOUT COVERT OPERATIONS.....	352
A. PUBLIC SECRETS AND PUBLIC HISTORY LAW.....	353
B. GUATEMALA’S SECRET HISTORY.....	355
CONCLUSION.....	360

INTRODUCTION

The federal government keeps an enormous number of secrets—far too many, according to transparency advocates,¹ the press,² government

1. See, e.g., Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 401–07 (2009) (a criticism of expansion of classification system by a leading open government activist); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133–34 (2006) (noting the excessive expansion of the classification system after the 9/11 attacks).

2. See, e.g., Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20 (complaining that “the government’s addiction to secrecy is making an unnecessary casualty of the openness vital to democracy”).

commissions,³ and courts.⁴ The volume of classified records rises endlessly, as does the cost of keeping them, resulting in an enormous secrecy program that regulates the flow of information in the executive branch.⁵ And yet, the executive branch's efforts to keep secrets frequently fail, as a series of worried government commissions have concluded over the past several decades.⁶ The WikiLeaks episode constitutes the most spectacular unauthorized disclosure of classified information,⁷ while the Obama administration's ongoing prosecution of leaks stands as an effort to correct an apparently pervasive and perhaps unfixable problem.⁸ At the same time, high-ranking officials regularly leak and plant classified information for political gain, often with explicit or implicit authorization.⁹

3. See, e.g., REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2 (1997) (noting the problem and the history of its study); THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 417 (2004) ("Current security requirements nurture over-classification and excessive compartmentation of information among agencies."); DEF. DEP'T COMM. ON CLASSIFIED INFO., REPORT TO THE SECRETARY OF DEFENSE BY THE COMMITTEE ON CLASSIFIED INFORMATION 2-6 (1956) (noting the problems created by over-classification).

4. See, e.g., *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (identifying the "unfortunate tendency of government officials to over-classify information").

5. See *infra* notes 31-32 and accompanying text.

6. See, e.g., DEPUTY INSPECTOR GEN. FOR INTELLIGENCE & SPECIAL PROGRAM ASSESSMENTS, REPORT ON SENSITIVE COMPARTMENTED INFORMATION LEAKS IN THE DEPARTMENT OF DEFENSE, REP. NO. 2012-056 (2012) (confirming unauthorized disclosures of classified national intelligence from Department of Defense between December 2008 and December 2011); COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 381-84 (2005) (summarizing classified version of report and previous government studies that have identified noting "[h]undreds of serious press leaks" and calling for more aggressive and coordinated investigation of leaks).

7. See generally Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448 (2012); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011); Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753 (2012).

8. Shane Harris, *Plugging the Leaks*, WASHINGTONIAN (July 21, 2010, 12:00 AM), <http://www.washingtonian.com/articles/people/plugging-the-leaks>; Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 12, 2012, at SR5.

9. See, e.g., David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1 (reporting on classified program, based in part on internal administration sources); Austin Wright, *John McCain Demands Leak Investigation*, POLITICO (June 5, 2012, 7:32 PM), <http://www.politico.com/news/stories/0612/77089.html> (legislators criticizing the Obama administration's self-leaking). For a further discussion on the disjunction between the Obama administration's practice of both leaking and decrying leaks, see Jack Goldsmith, *President Obama's Non-Credible Statement on Leaks*, LAWFARE (June 8, 2012, 4:18 PM), <http://www.lawfareblog.com/2012/06/president-obamas-non-credible-statement-on-leaks>. Notably, the George W. Bush administration engaged in the same seemingly contradictory practice. See Robert Pear, *Politics Can Get in the Way of Keeping Papers Secret*, N.Y. TIMES, Apr. 10, 2004, at A9 (detailing incidents when the Bush administration allowed "political imperatives [to] force officials to set aside the government's normal procedures for classifying and declassifying national security information"). Members of Congress, especially those opposed to the President, regularly complain of such leaks. See, e.g., Steven

The *New York Times*' 2005 disclosure of the National Security Agency's (the "NSA") warrantless surveillance of domestic communication appears to support both contradictory claims—that the government both retains and loses too many secrets: the George W. Bush administration engaged in extraordinary, seemingly successful efforts to maintain the program's secrecy—efforts that ultimately failed when the program's outlines leaked to the press.¹⁰

Some commentators have resolved the conflict between these two competing claims by hypothesizing that excessive secrecy *causes* inadvertent leaks—that the government loses classified information precisely because it classifies too much.¹¹ Marginal increases in secrecy are nothing new, however. Indeed, the complaint that the state hoards too much information has a long history in the United States¹² and in critiques of bureaucratic secrecy.¹³ The United States has also regularly

Aftergood, *McCain Calls for Special Counsel to Investigate Leaks*, *SECURITY NEWS* (June 6, 2012), http://www.fas.org/blog/security/2012/06/mccain_leaks.html.

10. The program remained secret to the public for three years, from its inception in 2002 until its disclosure in the *New York Times* in 2005, a year after the newspaper had first learned of it. See ERIC LICHTBLAU, *BUSH'S LAW* 194–99 (2008); JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 44–60 (2006); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 145–47 (2010); see also ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 72–78, 232–33 (2006) (describing the unraveling of the Bush administration's efforts to control information about the invasion of Iraq and of detainee abuses in Iraq and Guantanamo Bay).

11. See, e.g., Bellia, *supra* note 7, at 1518–19 (listing over-classification, along with digital technology and the quantity of classified documents and individuals with access to it, as "interrelated factors [that] shape the environment for leaks"); Fuchs, *supra* note 1, at 139 (arguing that over-classification and excessive secrecy "undermine the effort to keep truly sensitive information secret"); Heidi Kitzrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 889 ("[T]he potential for leaks grows with the number of official secrets and official secret-keepers."). This complaint is also time-honored. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) ("[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.").

12. The fact that unauthorized leaks constitute a grievous problem has been as widely acknowledged, as has the fact that the government over-classifies the information it wants to control. For a list of the ten government reports issued between 1956 and 2004 that have addressed and condemned the problem of secrecy and government leaks, see GARY ROSS, *WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS* 17–20 (2011).

13. For at least the past century, scholars have understood that secrecy in organizations, including government entities, is an inevitable product of the bureaucratic attempt to control information flows. See, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 5–6 (1983) (defining secrecy as the intentional concealment of information); GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 345 (Kurt H. Wolff ed. & trans., 1950) (noting how organizations that control secret information use secrecy to "determine[] the reciprocal relations among those who share it in common"); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 992 (Guenther Roth & Claus Wittich eds., 1968) ("Bureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can."); Richard W. Wilsnack, *Information Control: A Conceptual Framework for Sociological Analysis*, 8 *URB. LIFE* 467 (1980) (attempting to develop a conceptual field for the study of how organizations maintain control over access to information).

lost information since its founding.¹⁴ A less secret government might lose proportionally fewer secrets, but it could not stop all secrets from escaping its control. To be sure, the state can protect some information, especially “deep secrets”—the “unknown unknowns”¹⁵ which the public does not know exist because they circulate within strict limits and benefit from exceptional technological and logistical efforts to confine them.¹⁶ Notwithstanding the state’s enormous precautions, many of its deepest secrets ultimately come to light anyway. As with the NSA’s surveillance program,¹⁷ the effort to keep deep secrets can delay disclosure, but it often cannot prevent it entirely.¹⁸

These secrecy failures occur because of the state’s bureaucratic structure and the difficulties of both storing and communicating information. The state must depend for its internal decisionmaking process on the flow of information from sources dispersed within and outside government.¹⁹ Like all large organizations engaged in complex tasks, the administrative state neither circulates nor processes information internally in a mechanical, coordinated, fully rational way.²⁰ There is no reason to think, therefore, that an organization which cannot perfectly control or manage its internal flow of information can stop information at the borders of its bureaucracy.²¹ Put simply, the effort to control state information requires human, organizational, technological, and textual mechanisms that often fail in the checks and balances of a democratic state, sometimes by design and sometimes by the weakness of bureaucratic control. Secrecy of any sort and to any degree is costly and

14. See, e.g., ROSS, *supra* note 12, at 9–11; Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 432–41 (2006).

15. This phrase is commonly associated with former Secretary of Defense Donald Rumsfeld, who used it to refer to information about Iraq’s effort to develop weapons of mass destruction. Press Release, U.S. Dep’t of Def., DoD News Briefing—Secretary Rumsfeld and Gen. Myers, (Feb. 12, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636>.

16. See generally David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

17. See *supra* note 10.

18. Pozen, *supra* note 16, at 327–31 (discussing “deep secrets” that later came to light).

19. See Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839, 1842–43 (2013) (noting the crucial role that the Office of Information and Regulatory Affairs (the “OIRA”) plays for the President and White House by acquiring information and knowledge that are dispersed within and outside of the administrative state).

20. Authoritative descriptions of this organizational phenomenon appear in JAMES G. MARCH, *DECISIONS AND ORGANIZATIONS* 385–403, 410–25 (1988), HAROLD SEIDMAN & ROBERT GILMOUR, *POLITICS, POSITION, AND POWER* 219 (4th ed. 1986), and Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955). For an insightful explanation of the relationship between information and foreign policy development that explains the imperfect means by which administrations and presidents manage the internal flow of information, see MORTON H. HALPERIN ET AL., *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 139–80 (2d ed. 2006).

21. See HALPERIN ET AL., *supra* note 20, at 181–203 (describing the means by which information flows out of the state, and the various motivations of those who allow it to do so).

difficult to accomplish and can only stem the *authorized* flow of official information.²²

This is not, however, how the vast majority of reformers, activists, and academics understand the issue. Transparency proponents view secrecy as an inefficient and harmful bureaucratic practice whose overregulation of information flows demands correction.²³ It is a correctable bug in the system, one that the right mix of legal and institutional reforms can fix by allowing information to flow to the public.²⁴ Secrecy's proponents view the issue from an opposite, though parallel, position. Their concern for national security, foreign relations, and law enforcement—and for allowing an autonomous, unitary executive to protect the flow of information—leads them to view secrecy as a crucial administrative goal.²⁵ Like transparency proponents, secrecy proponents frame their dissatisfaction as a solvable *legal* problem: if we design laws and institutions to protect the executive's privilege to control information, then we can re-establish a correct balance between transparency and secrecy.²⁶ The bug in governance that secrecy advocates trust law to correct is excessive disclosure, not the excessive protection of information.

But perfect information control of whatever sort is in fact an implausible goal.²⁷ The laws and legal norms that ensure limited,

22. This Article considers only government secrecy in the United States and makes no claims about the portability of its conclusions to other nations and especially to other political systems. It should be noted, however, that information still flows even in autocratic and secretive regimes: it just does so more, and often much more, through rumors, gossip, and figurative forms (like the arts) than through a private press or formal civil society institutions. This was particularly the case in the Soviet Union, for example. See GEOFFREY HOSKING, *RULERS AND VICTIMS: THE RUSSIANS IN THE SOVIET UNION* 51 (2006); Raymond A. Bauer & David B. Gleicher, *Word-of-Mouth Communication in the Soviet Union*, 17 *PUB. OPINION Q.* 297, 298–300 (1953); Thomas Remington, *The Mass Media and Public Communication in the USSR*, 43 *J. POL.* 803, 803–05 (1981).

23. See, e.g., DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 59 (1998) (characterizing secrecy as a correctable form of regulation).

24. See, e.g., Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 *WASH. U. L. Q.* 1, 15–17 (1976) (arguing for “right to know” with broad standing component for public to seek judicial enforcement); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 *UCLA L. REV.* 909 (2006) (arguing for the development of “platforms” of constitutional concepts enabling more rigorous judicial review of information access issues). See generally Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 *U. PIT. L. REV.* 443 (2012) (chronicling the history of open government advocacy and its focus on legal solutions to government secrecy).

25. See GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* (2010); NATHAN ALEXANDER SALES, *Secrecy and National Security Investigations*, 58 *ALA. L. REV.* 811, 818–21 (2007).

26. A preeminent proponent of this position is former Vice President Dick Cheney. See *infra* Part IV.B.

27. To be clear, this is *not* an argument that “information wants to be free.” See generally John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age*,

imperfect secrecy and transparency do not lend themselves easily to legal reform; rather than bugs in the system of governance, they are part of its operating code. Like the open government laws that cannot always force the flow of information from a sprawling, stubborn bureaucracy,²⁸ laws that authorize the government to keep secrets cannot construct a perfect informational dam against the leaks caused by that same bureaucracy. Information can flow as a result of formal legal requirements; it can leak out from sources within government; it can be found in open sources besides the state; and it can become visible due to official mistake. Furthermore, secrecy engenders public speculation about what is being withheld, while the process of keeping secrets, once made public, itself communicates important information about the state and its governance strategy. Under-enforced and often unenforceable laws and regulations, bureaucratic inertia and resistance, and the push and pull of an advanced democracy with vibrant civil institutions render both transparency *and* secrecy implausible.

This Article critiques some of the foundational assumptions of constitutional and statutory laws that seek to regulate information flows, while complicating and countering the extensive literature on secrecy and leaks that rest on those assumptions. Unlike most articles in this area, my concerns are not normative: this Article will not argue in favor of transparency or against secrecy, principles that are typically espoused in persuasive rhetoric that finds deep secrecy morally repugnant to a democratic state.²⁹ Nor will it argue that efforts to control information are benign or have no ill effect. They can, for example, delay disclosure even when they cannot prevent it permanently. Instead, this Article focuses on why the control of government information that secrecy proponents and critics assume is possible cannot in fact be achieved on a regular and programmatic basis. Outlining the limits to information control and discussing several instances of notable control failures in detail, this Article contends that secrecy is in fact implausible.

My purpose is to better understand what information control can and cannot accomplish, and what effects it actually has—and, as a consequence, both the powers and limits of the executive's ability to govern in a unitary and coordinated fashion. The issue requires a broad

WIRED, Mar. 1994 (establishing that phrase, and its libertarian implications, in the technophilic lexicon). Information neither wants to be free nor wants to be controlled. It is a thing; it cannot want. Rather, information circulates in a social environment that makes it difficult to control.

28. Cf. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 914–15 (2006) [hereinafter Fenster, *Opacity*] (critiquing assumptions embedded in the concept of “transparency”).

29. This is particularly true in the field of constitutional law. For recent arguments against deep secrecy's constitutionality, see Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 522–27 (2006); Pozen, *supra* note 16, at 305–23.

consideration of the legal, administrative, and social means by which the state both controls and loses control of information, as well as the ethical and political checks on that control. To that end, Part I of this Article identifies the laws and bureaucratic norms that allow and encourage secrecy, and notes the important but incomplete formal legal limits on secrecy. Part II outlines the various informal impediments—bureaucratic, political, and technological—to the state’s ability to control information.

Understanding this phenomenon also requires a grasp of the very different ways that the state can lose control of information. Through case studies,³⁰ Parts III through V present illustrative secrecy failures in instances when the state has tried it’s hardest to keep secrets. Part III chronicles the effort by the George W. Bush administration to keep secret Vice President Dick Cheney’s National Energy Policy Development Group (“NEPDG”), a key pre-9/11 episode that foreshadowed later struggles over executive branch secrecy. Its significance is more than as a mere prelude to the broader efforts to control information that followed. The Vice President’s efforts to keep NEPDG’s actions secret relied upon the most well-articulated theory of executive control over information, which Cheney had helped develop in writings that he had overseen and published. Notwithstanding this explicit attempt to deploy the theory of perfect information control in practice, the myriad legal and extralegal ways by which NEPDG information escaped the Vice President’s control illustrate secrecy’s limits and implausibility. Part IV describes the attempted redaction of classified information as a general type of secrecy failure that has occurred in several recent instances. Part V discusses the difficulty that the government faces in controlling even its most prized secrets about covert operations, focusing on one of the most significant such operations in twentieth century United States history: the CIA-led coup in Guatemala in 1954, which deposed that country’s popularly elected president.

The Conclusion draws three implications from secrecy’s implausibility: first, that law has limited effects on secrecy’s possible success, leaving politics and ethics as levers that play crucial roles in limiting and imposing secrecy; second, that we would be better served to

30. This Article’s argument asserts that legal and bureaucratic systems of control fail and that information can and will escape in a myriad of ways—even in those cases in which the government tries hardest to protect its secrets. To prove and illustrate this argument, the case study method’s sensitivity to historical specificity and contingency outweighs its limitations in scale and the danger that each case is anomalous. This Article’s three different sets of case studies—which concern varied methods by which the state has sought to control information about domestic policy development, intelligence operations, and covert action—demonstrate the argument’s application across a variety of state actions.

re-conceptualize the availability of information in terms other than as a binary between secrecy and disclosure; and third, because secrecy proves increasingly implausible in the long run, reform efforts should focus on express pre-commitments to the timely, if delayed, systematic release of the executive branch's most prized information.

I. SECRECY'S LAWS AND NORMS

The contemporary state keeps secrets—an enormous quantity of them, in fact. In the United States, government over-classification of information is excessive secrecy's most obvious and outrageous manifestation. As a regulatory regime developed to protect Cold War secrets, information classification has mushroomed to a multi-billion dollar regulatory program—\$11.36 billion in fiscal year 2011, a figure that has steadily risen since 1995 and that does not include the enormous costs borne by the major intelligence agencies, whose budgets are themselves classified.³¹ Thousands of officials with delegated authority classify and then seek to protect documents as secret; hundreds of thousands of documents are classified annually; tens of millions of government documents incorporate classified information and in the process become part of a universe characterized as “derivative classification.”³² The state's ability to control information to this extent depends not only upon the formal legal doctrines that allow the executive branch to protect secrets, but also the informal institutional norms that impose professional and social obligations on executive branch officers to respect and uphold an agency's secrecy regime.

A. SECRECY LAW

Both explicitly and implicitly, law enables—and even encourages—executive branch secrecy. The Constitution's construction of separate powers provides the most significant, as well as the most abstract, source of legal authority for the executive's protection of information. The Supreme Court has found that Article II confers on the President the power to classify and control information regarding national security and foreign policy, especially where Congress has not provided otherwise.³³ Congress can only limit presidential control over executive branch information if it does not prevent the President from accomplishing his

31. NAT'L ARCHIVES & RECORDS ADMIN., INFO. SEC. OVERSIGHT OFFICE, 2011 COST REPORT 2–3 (2012).

32. NAT'L ARCHIVES & RECORDS ADMIN., INFO. SEC. OVERSIGHT OFFICE, 2011 REPORT TO THE PRESIDENT 1–9 (2012).

33. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); *Haig v. Agee*, 453 U.S. 280, 291 (1981).

“constitutionally assigned functions.”³⁴ Congress can, for example, require executive branch agencies to respond to private individuals’ informational requests and can delegate to the federal courts the authority to resolve disputes between agencies and requesters, but only so long as the documents demanded do not impinge on the President’s privilege to withhold certain types of information.³⁵

This protection from interbranch intrusion provides the President and executive branch with the privilege to hold certain secrets from Congress and against Congress’s wishes.³⁶ The privilege’s abstract and highly contested contours appear in a cluster of related doctrines, some of which fall within the formal doctrine of “executive privilege.” The D.C. Circuit has distinguished three separate privileges that compose the doctrine: (1) a classic but somewhat narrow, absolute privilege to withhold information “crucial to fulfillment of the unique role and responsibilities of the executive branch of our government;” (2) a broader privilege to withhold “presidential communications” among the President and his closest advisors, which is subject to a deferential judicial balancing test; and (3) a qualified “deliberative process privilege” protecting information from the process of government decision-making.³⁷ The concept of privilege extends to include the “state secrets” doctrine, which allows the Department of Justice to bar plaintiffs from access to national security information in tort litigation filed against the military or other government agencies.³⁸ And the executive branch can broadly protect its deliberative process by designing or using groups to seek advice in performing its constitutional duties without disclosing information produced by and for them, notwithstanding legislation that seeks to impose openness mandates on advisory committees.³⁹ Viewed broadly, “privilege” serves as a legal concept that refers to the executive’s authority to control information; viewed in its strongest form, as the

34. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (upholding the Presidential Recordings and Materials Preservation Act against constitutional challenge for violating the separation of powers).

35. *EPA v. Mink*, 410 U.S. 73, 83 (1973).

36. *See United States v. Nixon*, 418 U.S. 683, 705–06 (1974) (recognizing the executive’s “supremacy . . . within its own assigned area of constitutional duties”).

37. *In re Sealed Case*, 121 F.3d 729, 736–40 (D.C. Cir. 1997).

38. *United States v. Reynolds*, 345 U.S. 1, 6–10 (1953) (establishing the state-secrets doctrine). *See generally* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *Geo. Wash. L. Rev.* 1249, 1270–1308 (2007) (surveying executive branch’s use of doctrine).

39. *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 442, 466–67 (1989) (interpreting the Federal Advisory Committee Act (the “FACA”) narrowly to avoid the “formidable constitutional difficulties” that would arise if it were applied to the President’s use of the American Bar Association’s Standing Committee to receive advice on Supreme Court nominations). *See generally infra* Part III.B (summarizing and analyzing underlying separation of powers issues in dispute over FACA’s application).

George W. Bush administration advocated more forcefully than its recent predecessors,⁴⁰ the Constitution's textual commitment of the "Executive Power," among other authorities, grants the President a "zone of autonomy" from congressional intrusion.⁴¹

Beyond specific doctrines, the privilege concept affects the institutional relationship between the executive and judiciary. Courts defer to executive branch claims or avoid potential constitutional conflicts with the executive branch by construing statutes narrowly.⁴² In *Nixon v. United States* (which rejected the President's effort to use the deliberative privilege to withhold White House tapes from the special prosecutor investigating Watergate), the Supreme Court used sweeping language to recognize the President's authority to shield privileged information in certain circumstances.⁴³ *Nixon* can thus be read in two ways, both of which enable secrecy as a matter of law or practice. *Nixon* represents either, as William Van Alstyne characterized it, "an oblique invitation to the President to throttle judicial review by presenting a claim of executive privilege in the cellophane wrapper of 'national security,'"⁴⁴ or it more expressly invites endless political struggles over information between the executive and legislature.⁴⁵ Political struggle, which has proven the most frequent means to resolve executive privilege disputes over information,⁴⁶ will favor the political branch that holds the information, giving a great advantage to the executive. If the executive privilege claim is colorable, and if courts slowly and only occasionally resolve disputed instances of its use, a presidential administration can use

40. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1094–97 (2008). But see Mark J. Rozell, *The Clinton Legacy: An Old (or New) Understanding of Executive Privilege?*, in THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 58, 70 (David Gray Adler & Michael A. Genovese eds., 2002) (arguing that President Clinton's misuse of executive privilege gave the doctrine a "bad name").

41. Brief for Petitioners at 34, *Cheney v. Dist. Court*, 542 U.S. 367 (2004) (No. 03-475) (citing U.S. Const. art. II, §§ 1, 2, cl. 1, 3, cl. 1); see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 407 (2008) (identifying the government's argument in its brief in *Cheney* as a key example of how the Bush administration "staunchly protected the autonomy of the executive branch in the courts"). This Article discusses the Court's decision in this case, and the circumstances surrounding the litigation, in Part III, *infra*.

42. Kitrosser, *supra* note 29, at 501–02.

43. *United States v. Nixon*, 418 U.S. 683, 705–07 (1974) (holding that deliberative privilege loses in a balance against the need for information in a criminal prosecution, while recognizing a broad privilege "to protect military, diplomatic, or sensitive national security secrets").

44. William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 123 (1974).

45. Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 219–20 (2008); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 404 (2002).

46. Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 735 (1993).

the doctrine to keep secrets, at least temporarily. Between the President's occasional successes in the courts, the costs required to challenge exercises of executive authority, and the delays caused by a President's resistance to disclosure, executive privilege grants the President the practical and legal ability to control information.⁴⁷

Non-constitutional authorities parallel and extend the constitutional privilege. In its open government legislation, Congress typically respects the President's authority by protecting certain kinds of documents⁴⁸ and certain types of government entities⁴⁹ and advisors⁵⁰ from disclosure mandates. The classification system, largely developed and overseen by the executive branch itself, enables agencies with classification authority to keep information secret almost indefinitely and without interbranch oversight.⁵¹ The Freedom of Information Act (the "FOIA") explicitly excludes classified documents from disclosure,⁵² while the Espionage Act criminalizes the knowing and intentional unauthorized disclosure of classified information.⁵³ The Whistleblower Protection Act specifically excludes from its protection personnel in the intelligence community,⁵⁴ more generally excludes civil servant positions of a "confidential, policy-determining, policy-making, or policy-advocating character,"⁵⁵ and grants the President authority to exempt any positions when the President finds it "necessary and warranted by conditions of good administration."⁵⁶ It explicitly precludes from protection disclosures of information "specifically prohibited by law *and* if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."⁵⁷ The Intelligence Community

47. LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 257–59 (2004).

48. 5 U.S.C. § 552(b)(1)–(9) (2006) (exempting certain documents from disclosure under the Freedom of Information Act (the "FOIA")).

49. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that FOIA does not apply to close presidential advisors); 50 U.S.C. § 3507 (2013) (exempting the Central Intelligence Agency (the "CIA") from any law requiring "disclosure of the organization, functions, names official titles, salaries, or numbers of personnel employed by the Agency").

50. *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 462–65 (1989) (interpreting FACA narrowly to restrain its reach from purely private groups "not formed at the behest of the Executive or by quasi-public organizations whose opinions the Federal Government sometimes solicits").

51. Executive Order No. 13,526, 3 C.F.R. 298, § 1.2(a)(1)–(3) (2009) (authorizing the classification system by means of Obama administration's executive order). In dicta, the Supreme Court has found classification authority in the Constitution's Commander in Chief Clause. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527–28 (1988).

52. 5 U.S.C. § 552(b)(1).

53. See 18 U.S.C. § 793(d)–(e) (2006); see also *infra* notes 160–162 and accompanying text.

54. 5 U.S.C. § 2302(a)(2)(C)(ii).

55. *Id.* § 2302(a)(2)(B)(i).

56. *Id.* § 2303(a)(2)(B)(ii).

57. See Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1537 (2008); see also 5 U.S.C. § 1213(a)(1)(B).

Whistleblower Protection Act (the “ICWPA”) covers intelligence community employees and identifies appropriate mechanisms for reporting items of concern (fraud, waste, abuse, illegal activity) in an appropriate manner, but notably does not include disclosures to the media.⁵⁸ Congress has thereby created or permitted the creation of laws and executive branch authorities that sanction the regular production and protection of secrets.

B. SECRECY NORMS

No presidential administration welcomes unauthorized leaks, and most—including the alleged “hermetic seal”⁵⁹ of the administration of George W. Bush—attempt to threaten those officials who leak without authorization with criminal punishment. But threats of criminal sanction are only one means of stopping leaks. Bureaucratic structures and practices also establish norms of official behavior that create and protect secrets. Organizational control of information works to define the organization’s boundaries: those inside enjoy access to the shared, exclusive knowledge that members possess; those outside are excluded from the organization’s secrets.⁶⁰ Secrecy thereby produces a paradox; it commands an organization’s members both to practice control and silence around outsiders and demands that they share, discuss, and obsess over information among those within the organization.⁶¹ A secrecy regime thus requires collective self-discipline built from a strong sense of privileged exclusion.⁶² Formal legal protections for the maintenance of secrecy must rely heavily on such informal organizational means that government entities use both to protect and to communicate secrets.

These informal means can prove quite powerful. Daniel Ellsberg, who leaked the *Pentagon Papers* to the press, characterizes such norms as the “psychosocial aspects” of organizational membership. By building self- and professional identity around membership, an organization that holds secrets threatens to exclude those who break their promise not to share information with outsiders.⁶³ Informing outside authorities about an organization’s secrets thus breaches an individual member’s loyalty to

58. The Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 701, 112 Stat. 2396 (1998) (codified at 5 U.S.C. app. 3 § 8H) (containing the ICWPA); *id.* § 702 (containing an identical provision applicable to the CIA and codified at 50 U.S.C. § 403q(d)(5) (2013)).

59. Peter Baker, *What’s Leaking Out of the White House?*, WASH. POST (Apr. 8, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040601818.html>.

60. SIMMEL, *supra* note 13, at 332; Gary Alan Fine & Lori Holyfield, *Secrecy, Trust, and Dangerous Leisure: Generating Group Cohesion in Voluntary Organizations*, 59 SOC. PSYCHOL. Q. 22, 29–30 (1996).

61. Beryl L. Bellman, *The Paradox of Secrecy*, 4 HUM. STUD. 1, 8–9, 21 (1981).

62. T. M. Luhrmann, *The Magic of Secrecy*, 17 ETHOS 131, 161–62 (1989).

63. Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, 77 SOC. RES. 773, 777 (2010).

the organization and to the organization's hierarchical authority.⁶⁴ As a result of their actions, those who tell an organization's secrets face significant costs to their career, including retaliatory suspension or termination from their jobs and the loss of informational privileges like security access that might be required for their profession.⁶⁵ Whistleblowers and leakers can irrevocably shatter their professional and personal lives through their actions, facing exile from the community to which they had belonged,⁶⁶ as well as their access to an exciting, exclusive world that enlivened the professional, bureaucratic mundanity of their work lives.⁶⁷ Organizational and professional membership pulls individuals into the world of secret information and binds them there, in the process shoring up the formal legal secrecy system by discouraging members from leaking information, and at times by encouraging them to destroy or keep hidden information from investigators.⁶⁸

C. SECRECY'S LEGAL AND INSTITUTIONAL LIMITS

Of course, legal and structural restraints on secrecy do exist, even in the face of executive branch resistance. Courts do not always shy away from constitutional clashes over information and do not always view the zone of constitutional privilege expansively.⁶⁹ In the federal system, Congress has the authority and legal tools to oversee agencies, investigate the White House, and leverage its ability to punish agencies and individuals to lift the veil on executive branch secrecy.⁷⁰ It does so through its oversight authority, committee structure, subpoena and impeachment

64. BOK, *supra* note 13, at 214–16.

65. Amanda C. Leiter, "Whistle . . . and You've Got an Audience", 36 *FORDHAM URB. L.J.* 747, 757–58 (2008); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 *IND. L.J.* 233, 248 (2008); Scott Shane, *There Are Leaks. And Then There Are Leaks*, *N.Y. TIMES*, Apr. 30, 2006, at A4 (providing examples of officials who have lost their jobs as a result of their leaking information).

66. C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 119–21 (2001); MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 133–66 (1989).

67. Lührmann, *supra* note 62, at 141.

68. See, e.g., David A. Wallace, *Implausible Deniability: The Politics of Documents in the Iran-Contra Affair and Its Investigations*, in *ARCHIVES AND THE PUBLIC GOOD* 91, 111–12 (Richard J. Cox & David A. Wallace eds., 2002) (describing how those involved in the Iran-Contra scandal blocked investigators from key documents).

69. *United States v. Nixon*, 418 U.S. 683, 708–13 (1974) (considering presidential privilege "in light of our historic commitment to the rule of law," and holding that the President's privilege claim did not outweigh the interest in "the fair administration of criminal justice").

70. Jack M. Beermann, *Congressional Administration*, 43 *SAN DIEGO L. REV.* 61, 104–05 (2006); Mathew P. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 *J. L. ECON. & ORG.* 243, 259–60 (1987).

powers,⁷¹ appropriation authority,⁷² and by using its legislative power to create public rights in executive branch information and to protect whistleblowers from retaliation.⁷³ Courts, too, limit secrecy in a number of ways beyond high-profile constitutional disputes. They enforce statutory disclosure mandates,⁷⁴ and they oversee the discovery process in criminal prosecution and in private tort suits against the government.⁷⁵

These formal limits on executive branch secrecy are famously imperfect. Congressional oversight, especially of national security matters, is fragmented among numerous committees that are variable in strength and focus, and it is frequently quite deferential.⁷⁶ The institutional interbranch rivalry that should theoretically lead the legislature to probe executive branch performance is often overwhelmed by an interparty rivalry that colors oversight by producing either overly deferential or politically antagonistic (rather than objectively probing and curious) congressional committees.⁷⁷ Moreover, Congress may enjoy even less public credibility than the executive branch, limiting their leverage against the President as well as the efficacy of their oversight. The open government laws that Congress has enacted include exceptions that sometimes swallow the statutory mandates whole.⁷⁸ Presidential administrations and the bureaucracies they oversee have failed to perfectly comply with the demands that statutes place on them.⁷⁹ At the same time, courts have often proven less than fully fearless in their willingness to enforce legal mandates against resistant government entities, deferring to formal executive privilege claims and more general

71. FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 22–32 (2011); Mathew P. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984).

72. U.S. CONST., art. I, § 9, cl. 2; Beermann, *supra* note 70, at 84–90.

73. *See, e.g.*, 5 U.S.C. § 552 (2006) (FOIA); *id.* § 552b (Government in the Sunshine Act); 44 U.S.C. §§ 2201–07 (2006) (Presidential Records Act); Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1994) (codified as amended at scattered sections of 5 U.S.C.).

74. 5 U.S.C. § 552(a)(4)(B) (granting federal district courts jurisdiction under the FOIA to order production of documents “improperly withheld”).

75. *See generally* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 136–49 (1984) (describing federal rules of civil and criminal procedure as they apply to the government and their interplay with the FOIA).

76. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 25–26 (2010); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1660–73 (2006).

77. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2344–47 (2006).

78. *See supra* notes 48–50 and accompanying text.

79. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1790 (2008).

arguments about the dangers of disclosure to national security.⁸⁰ Similarly, as critics regularly complain, whistleblower laws provide insufficient protection to employees who want to disclose information about government malfeasance.⁸¹

Nevertheless, the assemblage of transparency laws provides a substantive, if imperfect, limitation on government secrecy. Most significantly, it establishes administrative norms from which secrecy is viewed as a departure, and it constructs a legal and ideological beachhead against which transparency advocates and political minorities and other groups seeking to pry information from the state can wage battle.⁸² This formal assemblage resembles a patchwork, one whose fabrics have variable weight and strength and cover significant practices and government entities, but that may be too frail and have too many bare patches to afford complete and comprehensive coverage.

II. INSTITUTIONAL AND INFORMAL CONSTRAINTS ON SECRECY

The bare patches in the formal legal checks on secrecy appear to allow the executive branch to control significant quantities of information. The enormous public funds spent on classification reveal just how much the state thinks it *can* control information and how much it is willing to pay to try.⁸³ But informal constraints on the state's ability to keep secrets raise the costs of information control and lower the state's ability to hold secrets.⁸⁴ This Part briefly identifies and describes four such constraints: (1) the information flows that leaks create from all parts of the state, sometimes as part of an authorized program to achieve institutional political ends, and sometimes by an individual or group acting without authorization that hopes to subvert state policies and harm the current political regime or individual state actors; (2) bureaucratic errors that lead to information becoming public without authorization; (3) open sources that make available putatively "secret" information that the state attempts to protect; and (4) the messages that the state sends in its very

80. Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 486, 490-91 (2006); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 61-63.

81. TERANCE MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 147-48 (1999). See generally Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991).

82. Cf. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1079 (2008) (noting the imperfections but importance and value of FOIA).

83. See discussion *supra* notes 31-32.

84. The use of the term "informal" here and elsewhere attempts to distinguish those practices that occur outside of or as an accident of the authority of formal government institutions. This is, admittedly, a rough distinction, and one that does not fit perfectly in every instance, but is intended as a helpful heuristic rather than a technical distinction.

practice of keeping secrets. This Part introduces the broad range of informal means by which information moves from the state, means that the remainder of the Article illustrates in detailed case studies.

A. LEAKS AS DELIBERATE INFORMATIONAL FLOWS

Unauthorized disclosure is the most well-known and widely discussed means by which information flows outside the state informally without either government sanction or legal obligation.⁸⁵ “Unauthorized” in this context can mean quite different things depending on the leaker’s identity and purpose—a problem that efforts to legislate against leaks must confront.⁸⁶ High-ranking officials frequently provide information “off-the-record” or “not for attribution” to a reporter as part of a coordinated plan to communicate with, cajole, or pressure outsiders—including other agencies and branches of government, political parties, private interests, and the general public.⁸⁷ Such leaks are pervasive in Washington, ubiquitous elements in a competitive democratic system served by competitive private news organizations.⁸⁸ They are only “unauthorized” insofar as they provide information in an informal manner outside of official channels and formal disclosure processes.⁸⁹

85. Recent works on leaks include JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY* 51–82 (2012); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1467–70 (2008); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns, and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

86. On the complexity of defining “unauthorized disclosure” and Congress’s recent efforts to define it, see Steven Aftergood, *What Is an Unauthorized Disclosure?*, SECRECY NEWS (Aug. 1, 2012), http://www.fas.org/blog/secrecy/2012/08/unauthorized_disclosure.html; Josh Gerstein & Scott Wong, *Bill to Plug Leaks Doesn’t Reach White House*, POLITICO (July 31, 2012, 11:36 PM), <http://www.politico.com/news/stories/0712/79237.html#ixzz22Jo2Qfcr>; David Ignatius, *Senate’s Anti-Leaking Bill Doesn’t Address the Real Sources of Information*, WASH. POST (July 31, 2012), http://www.washingtonpost.com/opinions/david-ignatius-senates-anti-leaking-bill-doesnt-address-the-real-sources-of-information/2012/07/31/gJQAPBEINX_story.html.

87. See Keith V. Erickson, *Presidential Leaks: Rhetoric and Mediated Political Knowledge*, 56 COMM. MONOGRAPHS 199, 201 (1989); Adrienne M. Jamieson, *The Messenger as Policy Maker: Thinking About the Press and Policy Networks in the Washington Community*, in *DEMOCRACY AND NORTH AMERICA* 118–19 (Alan Ware ed., 1996); Leon V. Sigal, *Official Secrecy and Informal Communication in Congressional-Bureaucratic Relations*, 90 POL. SCI. Q. 71, 72–74 (1975).

88. Affidavit of Max Frankel ¶ 5, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (71 Civ. 2662), 1971 WL 224067 (noting that extensive government secrecy is “unrevealed by that same Government, by Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information”). Frankel recently wrote that the phenomenon continues to exist more than three decades later. Max Frankel, *The Washington Back Channel*, N.Y. TIMES MAG., Mar. 25, 2007, at 40, 43.

89. The Obama administration, for example, coordinated access to information about the raid on Osama bin Laden’s hiding place in Pakistan for a sympathetic filmmaker even as federal agencies refused to disclose the same documents in response to FOIA requests. Glenn Greenwald, *WH leaks for Propaganda Film*, SALON (May 23, 2012, 5:32 AM), <http://www.salon.com/2012/05/23/>

High-ranking officials also leak frequently, usually passing information (including some that is classified) to writers and reporters in order to burnish or solidify their own reputations.⁹⁰ These reciprocal relationships between source and press allow officials to trade information in exchange for publicity and status, among other things.⁹¹

Unlike the high-level leakers or their agents who bear little or no risk of reprisal or prosecution, informal leaks made outside of the bureaucratic or political command chain—or, worse, in specific opposition to the state or administration—bear some risk of prosecution.⁹² Government employees enjoy little legal protection from retaliation by their employers when the employees' actions are not subject to statutory whistleblower protection.⁹³ When their leaks contain classified information, they may face prosecution under the Espionage Act—prohibiting unauthorized disclosure of “information respecting the national defense”⁹⁴—and the Intelligence Agencies Identity Protection Act—prohibiting disclosure of “information identifying [a] covert agent.”⁹⁵ The First Amendment offers leakers only thin protection, if any at all,⁹⁶ and the reporters to whom they leak enjoy no First Amendment right to shield their sources' identities—although they may have a common law federal right to do so, as well as statutory rights in some states.⁹⁷ The news organizations that

wh_leaks_for_propaganda_film; Andrea Stone, *Obama Officials Gave Hollywood Filmmaker Access to Team That Killed Bin Laden, Records Show*, HUFFINGTON POST (May 23, 2012, 10:11 AM), http://www.huffingtonpost.com/2012/05/23/white-house-kathryn-bigelow-bin-laden_n_1538847.html.

90. See GOLDSMITH, *supra* note 85, at 70–71.

91. Itzhak Galnoor, *Government Secrecy: Exchanges, Intermediaries, and Middlemen*, 35 PUB. ADMIN. REV. 32, 40–41 (1975).

92. David Pozen persuasively argues that the institutional dynamics within the executive branch, which create incentives not only for individuals to leak but excellent reasons for the Department of Justice to under-enforce anti-leaking laws, lead to few formal criminal prosecutions of leakers and, as best as he could learn, few formal administration sanctions. Pozen, *supra* note 85, at 594. Left unclear, however, is the extent to which informal sanctions attach to mid- and low-level employees who leak without authorization—especially if they leak in a way that harms the administration or the agency that employs them.

93. On the limits of whistleblower statutes, see *supra* notes 54–57, 81 and accompanying text.

94. 18 U.S.C. § 793(a) (2012).

95. 50 U.S.C. § 421(a)–(b) (2011).

96. See *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). Scholars vigorously disagree over this proposition. Compare Vladeck, *supra* note 57, at 1537–42 (asserting that recent Supreme Court precedent provides no First Amendment protection outside of statutory whistleblower protection), with Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2119 (2010) (characterizing current doctrine as distinguishing between government employee speech when on-duty, when First Amendment protections do not apply, and when off-duty, when they do), and Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409, 421–26 (2013) (arguing in favor of First Amendment protection based on “constitutional text, structure, and principle”).

97. It is unlikely that reporters enjoy a First Amendment right to protect the identity of their leaks against criminal prosecution, and it is unclear if they enjoy a federal common law right to do so. See *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972) (finding no First Amendment right to protect

publish leaks enjoy First Amendment protection against prior restraint,⁹⁸ although they may still face prosecution under the Espionage Act for leaks of classified information.⁹⁹ But notwithstanding the recent upticks in leak prosecutions by the Obama administration (some of which are being pursued as holdovers from the Bush administration), prosecutions for illegal disclosures are difficult for the government to pursue and win. The threat of prosecution and the cost of mounting a criminal defense might nevertheless be sufficient to deter many from leaking.¹⁰⁰

And yet, unauthorized disclosures by mid-level government personnel are common, despite the minimal protection from retaliation and prosecution that law provides whistleblowers, and despite of the normative punishments and constraints that further increase the risks and costs that government employees face in leaking information.¹⁰¹ For decades, internal government reports have regularly complained of the prevalence of classified information leaks¹⁰²—the most embarrassing leaks for the government, and the ones for which leakers face the greatest risks of punishment and prosecution. Indeed, this phenomenon is as old as the nation itself.¹⁰³ It occurs even in the most secretive and paranoid administrations, such as that of Richard Nixon, which sprung numerous, unauthorized leaks despite its illegal efforts to stop them.¹⁰⁴ Truly

identity of sources from a criminal investigation); *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1145–49 (D.C. Cir. 2006) (holding that *Branzburg* foreclosed a First Amendment right for reporters to shield sources against a grand jury investigation); *id.* at 1149–50 (noting a split opinion among three-judge panel on the question of common law privilege, but deciding that it would not apply in this case). On shield laws generally, see Sandra Davidson & David Herrera, *Needed: More than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277 (2012). For a compendium of state shield laws, see REP. COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/privilege/shieldmap.html> (last visited Jan. 15, 2014).

98. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

99. *See id.* at 743–48 (Marshall, J., concurring) (stating that the government can criminally prosecute newspapers after publication); *id.* at 733, 737 (White, J., concurring) (stating he would have “no difficulty” sustaining a conviction under the Espionage Act after publication).

100. *See* Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES, June 20, 2012, at A14.

101. *See* Kielbowicz, *supra* note 14, at 478–80. *Cf.* Pozen, *supra* note 85, at 535–36 (arguing that the minimal formal legal protections for leaking belies the Department of Justice’s practice of under-enforcing criminal sanctions).

102. *See, e.g.*, DEPUTY INSPECTOR GEN. FOR INTELLIGENCE & SPECIAL PROGRAM ASSESSMENTS, REPORT ON SENSITIVE COMPARTMENTED INFORMATION LEAKS IN THE DEPARTMENT OF DEFENSE, REP. NO. 2012-056 (2012); COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 381–84 (2005).

103. *See* Kielbowicz, *supra* note 14, at 433.

104. *See* STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 108–25 (1990).

successful bureaucratic secrecy requires powerful group identity and a common cause—and even then, the protected secrets emerge over time.¹⁰⁵

Nevertheless, this is not a perfect system for defeating excessive secrecy; indeed, it is not a system at all. The media to whom sources leak information are unregulated and largely unaccountable, except by professional norms of conduct and as market actors.¹⁰⁶ The personal and institutional competition that drives journalists and their editors toward the “scoop” can render their reporting biased, partial, or even factually incorrect.¹⁰⁷ Insofar as leaks merely check a system of information control, they do so randomly, and therefore lead to under- and over-disclosure depending upon individual officials’ willingness to risk leaking and the government’s ability to stop them. Despite their non-systemic and nonobjective qualities and their seeming randomness, leaks commonly and regularly move information from the state, undercutting efforts to control information and raising the costs and risks of secrecy.

B. LEAKS AS ACCIDENTAL INFORMATIONAL FLOWS

Bureaucracies can also simply fail to hold information. Lax security, for example, has resulted in unauthorized information disclosure by allowing dissidents to access, remove, and copy secret material. This occasionally results in the equivalent of leaks, though on a massive scale—most famously, in the cases of Daniel Ellsberg and Chelsea (born Bradley) Manning’s thefts of physical and digital documents, which produced the massive *Pentagon Papers* and WikiLeaks disclosures respectively.¹⁰⁸ In each instance, the state had granted or enabled access to information to officials, the officials grew disillusioned, and took advantage of their access to copy classified documents, which their superiors and the information security system failed to notice. Although the leaks were intentional, they were the consequence of mistakes—especially in Manning’s case. The bureaucratic apparatus had expanded

105. See, e.g., CHRISTOPHER GREY, *DECODING ORGANIZATION: BLETCHLEY PARK, CODEBREAKING, AND ORGANIZATION STUDIES* 121–32 (2012) (describing the role of secrecy in Bletchley Park, Britain’s highly successful World War II cryptographic unit, as well as its ultimate disclosure).

106. Jack Goldsmith, *Secrecy and Safety*, *NEW REPUBLIC*, Aug. 13, 2008, at 31, 34; SCHOENFELD, *supra* note 25, at 263–65.

107. See ELIE ABEL, *LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST?* at 68 (1987); Note, *Media Incentives and National Security Secrets*, 122 *HARV. L. REV.* 2228, 2236–44 (2009).

108. For further discussion on Ellsberg and the *Pentagon Papers*, see generally DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* (2002); DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 33–47 (1996). For further discussion on Manning, see DAVID LEIGH & LUKE HARDING, *WIKILEAKS: INSIDE JULIAN ASSANGE’S WAR ON SECRECY* 72–89 (2011); GREG MITCHELL, *THE AGE OF WIKILEAKS: FROM COLLATERAL MURDER TO CABLEGATE (AND BEYOND)* 38–50 (2011).

access to supposedly dreadful military secrets to individuals who in turn betrayed those secrets quite willingly.¹⁰⁹

Mistakenly allowing malfeasance is just one bureaucratic failure; sometimes officials inadvertently disclose information by simple mistake. As *Washington Post* reporters Dana Priest and William Arkin have documented, large quantities of classified and sensitive information are available via simple Internet searches and peer-to-peer file sharing software, often as a result of government employees' insufficient security measures.¹¹⁰ In one recent example, the NSA mistakenly posted an unredacted version of a classified internal research article and then hastily declassified it in order to cover up the agency's error.¹¹¹ In another, a contractor hired by the Food and Drug Administration mistakenly posted on a public website documents produced in a vast surveillance program that the agency had undertaken to monitor the e-mail traffic of several dissident employees.¹¹² As the number of government employees and private contractors with security clearance expands, the likelihood that more massive leaks of electronic documents will occur also expands. In addition, in a reverse of the "mosaic theory" under which the government argues that otherwise non-classified information cannot be released under the FOIA because enemies can use it to piece together classified information,¹¹³ government officials can unknowingly provide small pieces of information that a reporter can piece together to form an accurate accounting of secret government action without an actual "leak."¹¹⁴ The completed mosaic can in turn be delivered to the public in disparate forms like spy novels—even those published outside the United States.¹¹⁵

109. See DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* 267 (2011) (noting the series of security errors that allowed Manning to take and leak data).

110. *Id.* at 263–66.

111. Steven Aftergood, *NSA Declassifies Secret Document After Publishing It*, *SECURITY NEWS* (May 14, 2012), http://blogs.fas.org/secret/2012/05/nsa_secret.

112. Eric Lichtblau & Scott Shane, *Vast FDA Effort Tracked E-mails of Its Scientists*, *N.Y. TIMES*, July 15, 2012, at A1, 15.

113. See generally Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 *ADMIN. L. REV.* 845 (2006); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628 (2005).

114. See MARTIN LINSKY, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* 170–71, 192 (1986); see, e.g., FED. RESERVE, *TRANSCRIPT OF MEETING OF THE FEDERAL OPEN MARKET COMMITTEE ON OCTOBER 30–31, 2007*, at 4, available at <http://www.federalreserve.gov/monetarypolicy/files/FOMC20071031meeting.pdf> (transcribing the complaints of Federal Reserve Chairman Ben Bernanke about the disclosure of confidential Federal Reserve policy as a result of a journalist's having had many individual conversations with official sources, each of whom gave him "a little of the story").

115. See, e.g., Robert Pear, *Tom Clancy's Books Put Bits and Pieces Together*, *N.Y. TIMES*, Aug. 30, 1987, at A5; Robert F. Worth, *The Spy Novelist Who Knows Too Much*, *N.Y. TIMES MAG.*, Feb. 3, 2013, at 18 (regarding Gérard de Villiers).

Mistaken and inadvertent disclosures are not systematic and many of them are never spotted or exploited, but in the aggregate they undercut government efforts to keep information secret. Whether kept in electronic form and therefore vulnerable to easy transfer by mistake or theft, or stored in someone's memory and capable of being spoken, information is akin to liquid—capable of flowing from the place it is stored in directions and at a speed that make it impossible to fully control.¹¹⁶

C. INFORMATION FLOWS OUTSIDE OF THE STATE'S CONTROL

The universe of information that constitutes the “secrets” that the state protects includes information that is available from non-state sources. Indeed, the intelligence community has increasingly relied on, and made public its reliance upon,¹¹⁷ what is called “open source intelligence”—information gathered from widely available sources, including mass media, government entities, and academic and professional journals.¹¹⁸ The fact that it is “open,” however, does not keep it from becoming “secret,” at least as a matter of law. The government has argued, with some success in the courts, that the open information it gathers can become secret when it is classified as a source, on the theory that disclosure of the state's use of that information for national security purposes would allow the state's enemies to learn its sources and piece together its knowledge and methods.¹¹⁹ No matter how one views the government's claim that it can transform the open into the secret merely by possessing it, the existence of open source intelligence makes plain a salient fact: a great deal of valuable information exists and flows outside of the state's ambit, and many of the state's secrets are themselves based on public information.¹²⁰

116. JOEL BRENNER, *AMERICA THE VULNERABLE: INSIDE THE NEW THREAT MATRIX OF DIGITAL ESPIONAGE, CRIME, AND WARFARE* 207–09 (2011).

117. Robert E. Barnsby *So Long, and Thanks for All the Secrets: A Response to Professor Telman*, 63 ALA. L. REV. 667, 686–87 (2012); Danley K. Cornyn, Note, *The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers' Right of Free Speech*, 87 TEX. L. REV. 463, 464 (2008).

118. RICHARD A. BEST, JR. & ALFRED CUMMING, CONG. RESEARCH SERV., No. RL34270, *OPEN SOURCE INTELLIGENCE (OSINT): ISSUES FOR CONGRESS* 6 (2007). See Stephen C. Mercado, *Sailing the Sea of OSINT in the Information Age*, 48 STUD. IN INTELLIGENCE 45 (2004).

119. See *supra* note 114.

120. See ROBERTS, *supra* note 10, at 38–39. For example, environmental and geospatial information that the federal government sought to remove from the Internet after the September 11 attacks was nevertheless available from “industry and commercial businesses, academic institutions, Non-governmental organizations, state and local governments, international suppliers, and even private citizens who publish their own relevant materials on the Internet.” JOHN C. BAKER ET AL., *MAPPING THE RISKS: ASSESSING THE HOMELAND SECURITY IMPLICATIONS OF PUBLICLY AVAILABLE GEOSPATIAL INFORMATION* 124 (2004).

Covert operations, for example, are the most secret of a state's actions, and the actions that the state most assiduously attempts to keep secret. They will produce an enormous number of internal documents sent by and to management and operations personnel that the state can at least theoretically control. But the state cannot easily control official information that it does not possess.¹²¹ A covert operation will have real world effects that civilian witnesses and the local news media can observe (which may provide the basis for reports and investigations by broader media sources that receive international distribution), and that government officials whose rule is being challenged and officials of other states can discover.¹²² Journalists and then the public first learned about the CIA's post-9/11 "rendition" program, which flew suspected terrorists to various locations on private jets, through foreign newspapers, private websites run by aviation enthusiasts, and human rights advocates, all of which rely on public sources of information and eyewitnesses.¹²³ Any informational sources outside of the state's control that duplicate a "secret" state document or make available its content, or that allow outsiders to infer some secret, lessen the state's ability to keep secrets.¹²⁴

D. SECRECY AS INFORMATION

Finally, the very act of publicly keeping secrets—that is, of controlling information in a manner that allows the public to know of the secrecy process—cannot stop the flow of information *about* secrecy, as well as speculation about what the secrets contain. To help understand these phenomena, assume the existence of both known and unknown secrets.¹²⁵ The first category ("known unknowns") includes information that the government is known to possess; all that is secret is the precise content of the information. For example, a publicly declared military operation will have numerous operational secrets; the public knows that such operations will exist and assumes the existence of secrets regarding those operations. Indeed, controlling such secrecy is a long and widely accepted prerogative of the President—it is as clear an application of the privilege doctrine as exists.¹²⁶ Nevertheless, the content of such secrets

121. See Galnoor, *supra* note 91, at 34–35.

122. See *infra* Part V.B (analyzing a covert operation where multiple sources of information were available to contemporary observers and to historians after the fact).

123. BRENNER, *supra* note 116, at 168–69.

124. See *infra* Part IV.B (providing case studies of redacted documents whose "secret" contents were available through public sources).

125. See *supra* notes 15–18 and accompanying text.

126. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that [at time of war] a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."); *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (quoting *Near*).

can be the subject of speculation, as can the steps the military and government take to control information about their operations. The second category (“unknown unknowns”) includes unknown information such as a successfully covert operation of which the public has not become aware. The secrecy of such a program is complete and deep—the public is not even aware of its own ignorance, and thus cannot speculate about its context.¹²⁷

Now, assume that at some point after the covert operation’s completion, the public learns of its existence, whether from official, authorized disclosures or via leaks or open sources. This Article contends that many, if not most, of such secrets migrate to the known-secrets category over time by the means that this Part and the previous one identified—legal disclosure mandates, leaks, mistakes, and open sources.¹²⁸ The once-covert operation is now known, and at least some of its secrets have been disclosed. Other formerly unknown-unknown secrets have now become known unknowns, or secrets about a known event, and some of them can be inferred from disclosed information. Having learned of this covert operation, the public has also become aware of the government’s willingness to keep information secret and its ability to do so.

Two consequences flow from this. First, informed members of the public—especially the press—will infer both from the fact of the past covert operation and the fact that certain kinds of secrets were kept that the government might have engaged in or might be developing similar operations. Some investigative reporters and interested individuals will try to uncover any such additional operations. Their efforts might prove easier now that the first operation has become public. Some government officials who are troubled either by another operation or by its secrecy might be more willing to leak information to the press about the additional operation(s), while reporters will now have a better sense not only of what to look for but of where to look and whom to ask. Perhaps the operation’s previous success at maintaining control over information proves difficult to repeat, or the circle of individuals included in the covert group widens, increasing the likelihood of leaks and mistakes. The unknown unknowns will thereby become more difficult to keep secret.

Second, now that the broader, less-informed public knows that such secret programs exist, some of them, and particularly those opposed to the current government, will begin to speculate about additional secret

127. This secrecy does not preclude the President’s required reporting of his finding that the action “is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States” to congressional intelligence committees in at least a “timely fashion.” 50 U.S.C. § 413b(a) (2011). Congressional access to the information is strictly limited by statute. *Id.* § 413b(c).

128. For more on the temporary nature of most deep secrets, see discussion *supra* note 18.

programs. Their speculation might be wrong, perhaps even wildly wrong, but it can affect the government's broader legitimacy, and especially the legitimacy of its secret programs.¹²⁹ As the sociologist Georg Simmel wrote, the "natural impulse to idealization, and the natural timidity of men, operate to one and the same end in the presence of secrecy; viz., to heighten it by phantasy, and to distinguish it by a degree of attention that published reality could not command."¹³⁰ Secrecy thus cannot stop the production of information and of meaning about government actions. It can control information about "deep secrets" of which the public is fully ignorant, but its success in doing so may prove only temporary. Once its extraordinary efforts to retain secrets are revealed—that is, once the government can no longer control information about its own secrecy—the state faces greater resistance against its further efforts to control the flow of government information and must satisfy a more skeptical public that is more prone to speculation and investigation.¹³¹ In this regard, the practice of keeping secrets itself constitutes information.

These are broad categories of the ways that secrecy fails. This Article presents them here to lay the groundwork for the case studies below. These studies illustrate the complex ways, both formal and especially informal, by which secrecy proves difficult to maintain. Each case exhibits the same pattern: the state fails to keep secrets despite its extraordinary, legally permissible efforts to control information.

III. VICE PRESIDENT CHENEY AND THE EXECUTIVE BRANCH'S IMPERFECT INFORMATION CONTROL

This Part proceeds from the uncontroversial assumptions that the George W. Bush administration attempted to protect executive branch information more closely than any president since Richard Nixon, and that within the Bush White House no figure appeared more obsessed

129. KATHRYN S. OLMSTED, *REAL ENEMIES: CONSPIRACY THEORIES AND AMERICAN DEMOCRACY, WORLD WAR I TO 9-11* at 238–40 (2009); Kermit L. Hall, *The Virulence of the National Appetite for Bogus Revelation*, 56 MD. L. REV. 1, 36–38 (1997).

130. Georg Simmel, *The Sociology of Secrecy and of Secret Societies*, 11 AM. J. SOC. 441, 465 (1906).

131. In one recent episode, the Obama administration has continued to claim that its use of drone aircraft to attack terrorists in foreign countries is classified and therefore exempt from the Freedom of Information Act long after members of the administration have bragged of the program's successes. See Conor Friedersdorf, *The Increasingly Absurd Conceit That Drone Strikes Are Secret*, ATLANTIC (June 22, 2012, 10:54 AM), <http://www.theatlantic.com/politics/archive/2012/06/the-increasingly-absurd-conceit-that-drone-strikes-are-secret/258842>. It has done so despite the fact that the program's existence was extensively documented in a largely flattering portrayal in a prominent national newspaper. See Jo Becker & Scott Shane, *Secret "Kill List" Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1. The administration's unwillingness to concede the program's existence officially by declassifying relevant documents has delegitimized its efforts to keep secrets about other programs, as well as its commitment to transparency.

with controlling information than Vice President Cheney.¹³² Although the administration and Cheney ultimately hitched their obsession to the fast-moving expansion of military and intelligence operations in response to the 2001 terrorist attacks,¹³³ they had begun to limit public and congressional access to information well before then. During the first months of Bush's first term, Cheney sought to establish tight control over executive branch information in his management of the administration's energy policy.¹³⁴ Cheney won this legal battle, as the formal mechanisms intended to limit secrecy could not contain the formal mechanisms that allow it.¹³⁵ This Part begins with a narrative telling of this control, which includes a sketch of the theoretical justification that Cheney, among others, developed for it. But the Vice President's formal legal victories could not foreclose the seepage of information from the executive branch. The remainder of this Part describes the complex set of leaks—along with journalists' and advocates' informed and uninformed inferences about the work Cheney oversaw—that undercut the ideals that the Vice President's theory of executive privilege presumes. These leaks reveal how Cheney's effort functionally lost the battle he launched to control information.

A. THE INFORMATION CONTROL NARRATIVE

George W. Bush established the NEPDG soon after his inauguration.¹³⁶ The NEPDF was intended, as its name declared, to organize the incoming administration's development of a comprehensive national energy policy. The task force was chaired by Vice President

132. See MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 423 (2006); ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 46 (2007); ALASDAIR ROBERTS, THE COLLAPSE OF FORTRESS BUSH: THE CRISIS OF AUTHORITY IN AMERICAN GOVERNMENT 135–36 (2008); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491–92 (2007); Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 198 (2008).

133. NANCY V. BAKER, GENERAL ASHCROFT: ATTORNEY AT WAR 176–96 (2006).

134. Biographical studies of Cheney offer a general introduction to the episode, as well as an inside glimpse of Cheney and the Office of the Vice President's work on the energy policy task force. See BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 81–82, 90–94, 104–07 (2008); STEPHEN F. HAYES, CHENEY: THE UNTOLD STORY OF AMERICA'S MOST POWERFUL AND CONTROVERSIAL VICE PRESIDENT 310–18, 323–27 (2007).

135. Expansive treatments of the legal and political issues in this episode, which are uniformly critical of the administration and especially of the Vice President, include FISHER, *supra* note 47, at 183–96; Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1, 12–27 (2008). See generally Eric R. Dannenmaier, *Executive Exclusion and the Clustering of the Cheney Energy Task Force*, 16 N.Y.U. ENVTL. L.J. 329 (2008).

136. NAT'L ENERGY POLICY DEV. GRP., NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE viii (2001) [hereinafter NEPDG REPORT].

Cheney and run by members of Cheney's staff.¹³⁷ The project did not begin from a blank slate: one of the Bush campaign's early key policy goals was to prioritize energy development over environmental concerns, and a unit of President Bush's post-election transition team had begun to develop an energy policy for the incoming administration.¹³⁸ Given the issue's significance, the administration clearly viewed NEPDG's formation as a key moment in the early days of the new presidency. The task force's membership included presidential cabinet members who directed the agencies that would implement many of the group's recommendations, as well as high-ranking appointees in the Executive Office of the President who would oversee and organize presidential oversight of the resulting energy policy.¹³⁹ The Vice President would ultimately lead a centralized, top-down policy development process in which the President's and especially the Vice President's preferences would drive the committee's deliberations and conclusions.¹⁴⁰

The task force only existed briefly, and disbanded when its final report was released four months after its formation. During that period, however, its principals met with hundreds of corporate executives and interest group representatives, the vast majority of whom represented the energy industry and especially the extractive industries.¹⁴¹ Task force members and staff almost entirely ignored environmental organizations, and any access the latter enjoyed to NEPDG was pro forma.¹⁴² Indeed, the final report's most significant prescriptions reflected the extractive industries' preferences. It advocated efforts to seek new domestic sources of oil and gas, including on public lands (such as the Arctic National Wildlife Refuge) and offshore, and diplomatic and commercial efforts to forge global trade alliances that would expand American access to foreign oil.¹⁴³ It also championed regulatory support for the expansion of

137. HAYES, *supra* note 134, at 311–13; Mike Allen & Dana Milbank, *Cheney's Role Offers Strengths and Liabilities*, WASH. POST, May 17, 2001, at A1.

138. Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341, 343 (2002); Susan Milligan, *Energy Bill a Special-Interests Triumph*, BOS. GLOBE, Oct. 4, 2004, at A1.

139. NEPDG REPORT, *supra* note 136, at v.

140. See GEN. ACCOUNTING OFFICE, ENERGY TASK FORCE: PROCESS USED TO DEVELOP THE NATIONAL ENERGY POLICY 6–8 (2003) [hereinafter ENERGY TASK FORCE REPORT]; GELLMAN, *supra* note 134, at 88–91; RON SUSKIND, THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL 146–49 (2004); Allen & Milbank, *supra* note 137, at A1.

141. See Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, at A1.

142. *Id.*

143. See NEPDG REPORT, *supra* note 136, at 5-20 to 5-22 (summarizing recommendations for increasing domestic energy supply); *id.* at 8-1 to 8-3 (discussing “Strengthening Global Alliances”). For summaries of the policy, see Bryner, *supra* note 138, at 359–80; Michael T. Klare, *The Bush/Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy*, 36 N.Y.U. J. INT'L L. & POL. 395, 397–403 (2004). For the immediate political reaction to it, see Joseph Curl, *Bush Sees Dual Goals of*

nuclear power generation. Although such prescriptions may have proved politically controversial and widely contested as a matter of policy—particularly for environmental groups opposed to many of NEPDG’s priorities—the report’s substantive conclusions and influence on policy seemed to represent the standard stuff of policy development for a first-term Republican president. They could not have surprised anyone.¹⁴⁴

The task force’s intentional and well-planned commitment to secrecy,¹⁴⁵ however, was both controversial and surprising. NEPDG did not open its meetings and deliberations to the public, nor did it provide a list of the private entities and individuals with whom it met to the public, press, or even Congress. Cheney also directed the energy industry executives with whom he and NEPDG met not to mention their involvement in the NEPDG to the press or public.¹⁴⁶

This informational strategy was itself part of Cheney’s strong commitment to implementing a constitutional theory of unitary executive power.¹⁴⁷ The theory began to emerge as a prevailing concept in contemporary conservative constitutional theory with then-Representative Cheney’s direction of the *Minority Report* to Congress’s formal investigation of the Iran-Contra affair, which concerned the Reagan administration’s covert operation to evade legislative restrictions on supporting Nicaraguan Contra rebels through secret arms sales to Iran.¹⁴⁸ Focusing largely upon the extent of the President’s sole authority over foreign affairs, the *Minority Report* discussed why the President must be free from extensive congressional intervention—whether from direct congressional oversight or from legislation that would force the executive branch to open itself to public view.¹⁴⁹ Its claim did not connect the President’s prerogative to a particular, well-defined legal authority or doctrine, nor did it limit its reach to trump particular legislative enactments

Energy, Environment, WASH. TIMES, May 18, 2001, at A1; Carolyn Lochhead, *Bush Faces Tough Fight on Energy Strategy—Reaction: Criticism from Environmentalists*, S.F. CHRON., May 18, 2001, at A1.

144. See LOU DUBOSE & JAKE BERNSTEIN, VICE: DICK CHENEY AND THE HIJACKING OF THE AMERICAN PRESIDENCY 6 (2006).

145. See SUSKIND, *supra* note 140, at 143–44.

146. See GELLMAN, *supra* note 134, at 92.

147. ROBERTS, *supra* note 10, at 62–64.

148. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. Rep. No. 100-433, S. Rep. No. 100-216, at 431–585 (1987) [hereinafter IRAN-CONTRA AFFAIR REPORT]. For narrative accounts of Cheney’s intellectual development that place the *Minority Report* at its center, see HAROLD H. BRUFF, BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR 58–59 (2009); DICK CHENEY & LIZ CHENEY, IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 143–48 (2011); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 86–88 (2007); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2098–2100 (2009) (tying the *Minority Report* to the “unitary executive” theory).

149. IRAN-CONTRA AFFAIR REPORT, *supra* note 148, at 457–469.

that constrained the President; rather, using an amorphous ideal of separate powers, the *Minority Report* reasoned both formalistically and tautologically that the President has the inherent power within his separate and distinct sphere of authority because he is the President:¹⁵⁰ the elected leader of an essential, wholly independent unit with muscular, well-defined powers.¹⁵¹

An integral element of this concept is the President's legal and political control over executive branch information—an argument that Cheney had pressed while a White House aide during the Ford administration.¹⁵² The President must be able to have significant control over when and how the information on which he relies and the information that he produces is disclosed,¹⁵³ as he is best suited to take decisive action with the “decision, activity, secrecy, and dispatch” that foreign policy and other key tasks delegated by the Constitution to the President often require.¹⁵⁴ The multi-headed fractious Congress, by contrast, can neither act decisively nor keep its plans or the information that it receives secret, and therefore should have limited access to certain kinds of information and no authority to undercut the President's ability to keep secrets.¹⁵⁵ And it was in the struggle over energy policy information that Cheney began his effort from within the White House to establish this theory's preeminence in the executive branch and in the courts.

B. THE LEGAL FIGHT OVER NEPDG INFORMATION

In May 2001, in response to a request from two Democratic members of Congress, the Government Accountability Office (“GAO”) began to investigate the membership of NEPDG.¹⁵⁶ Using its broad

150. *Id.* at 387–92, 457–59 (citing THE FEDERALIST No. 48 (James Madison)).

151. The key works in contemporary unitary executive theory began to appear in the decade after the *Minority Report*. See generally Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

152. BRUCE P. MONTGOMERY, *SUBVERTING OPEN GOVERNMENT: WHITE HOUSE MATERIALS AND EXECUTIVE BRANCH POLITICS* 5 (2006); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 34–38 (2007).

153. See Dick Cheney, *Congressional Overreaching in Foreign Policy*, in *FOREIGN POLICY AND THE CONSTITUTION* 101, 115 (Robert A. Goldwin & Robert A. Licht eds., 1990).

154. IRAN-CONTRA AFFAIR REPORT, *supra* note 148, at 459–60 (quoting THE FEDERALIST No. 70 (Alexander Hamilton)); see also *id.* at 468 (citing THE FEDERALIST No. 64 (John Jay) (advocating that the President, not the Senate, should have the sole power to negotiate foreign treaties because of his ability to maintain secrecy)).

155. *Id.* at 437–38, 576–79.

156. *Walker v. Cheney*, 230 F. Supp. 2d 51, 55 (D.D.C. 2002); Jerry Seper, *Justice Asks Court to Dismiss GAO Suit Against Cheney*, WASH. TIMES, May 23, 2002, at A3.

statutory authority to investigate executive branch expenditures,¹⁵⁷ the GAO formally requested NEPDG's records.¹⁵⁸ Cheney and his legal counsel, David Addington, denied the GAO's request, declaring first to the GAO and then ultimately to Congress that such congressional demands for information "intrude into the heart of Executive deliberations," and that the documents were constitutionally privileged.¹⁵⁹ The denial provoked the Comptroller General, who leads the GAO, to take the unprecedented step of filing suit against the Vice President to demand the records' disclosure.¹⁶⁰

The Vice President deployed the same strategy to defeat claims that the NEPDG owed any duty to reveal information directly to the press and public. Executive branch control had been intentionally embedded in NEPDG's structure and organizational DNA, as Addington had specifically designed NEPDG to avoid falling within the purview of the Federal Advisory Committee Act (the "FACA"),¹⁶¹ the federal statute that imposes open record and open meeting obligations on advisory committees within the executive branch that are not entirely composed of federal employees.¹⁶² In June 2001, while Cheney was in the midst of his dispute with the GAO over disclosures to Congress, Judicial Watch (a conservative governmental watchdog group) and the Sierra Club (an environmental group) submitted requests under the FOIA and FACA for the same documents that the GAO sought.¹⁶³ After their requests were denied, these groups separately filed suit against NEPDG and a panoply of officials associated with it, claiming, among other things, violations of FOIA and FACA.¹⁶⁴

Cheney ultimately won all of his legal battles to keep NEPDG's internal records secret. The GAO litigation ended in December 2002 after the trial court granted Cheney's motion to dismiss the Comptroller General's complaint, ruling that he lacked standing to sue under Article III.¹⁶⁵ Defeated during the post-9/11 period and following a midterm election that saw the administration's political popularity and governmental authority rise to great heights, the GAO decided not to

157. See 31 U.S.C. § 712 (2006) (requiring the Comptroller General to investigate executive agency expenditures of public money).

158. Jeff Gerth, *Accounting Office Demands Energy Task Force Records*, N.Y. TIMES, July 19, 2001, at A20; Jerry Seper, *Justice Asks Court to Dismiss GAO Suit Against Cheney*, WASH. TIMES, May 23, 2002, at A3.

159. See GELLMAN, *supra* note 134, at 104; see also Walker, 230 F. Supp. 2d at 57.

160. See Walker, 230 F. Supp. 2d at 54.

161. Federal Advisory Committee Act, 5 U.S.C. app. § 2 (2006).

162. GELLMAN, *supra* note 134, at 91; HAYES, *supra* note 134, at 313-14.

163. Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d 20, 25 (D.D.C. 2002).

164. *Id.*

165. See Walker, 230 F. Supp. 2d at 74-75.

appeal, although it has continued to assert that the court's decision was incorrect.¹⁶⁶

Though more legally and procedurally complicated, the Judicial Watch and Sierra Club suits, which were consolidated and concerned requests for documents from officials affiliated with NEPDG besides the Vice President, met a similar fate as the GAO's suit. Having defeated some of the defendants' motions to dismiss in district court,¹⁶⁷ the plaintiffs appeared poised to begin receiving through civil discovery the NEPDG documents that they hoped would assist them in their claim that FACA applied to NEPDG. The Vice President immediately sought a writ of mandamus from the D.C. Circuit that would halt the District Court's discovery order on the grounds that it constituted a breach of executive authority and privilege that violated the constitutional separation of powers. Although he lost in the D.C. Circuit,¹⁶⁸ Cheney prevailed in the Supreme Court.¹⁶⁹ The Court held both that the D.C. Circuit could issue a writ of mandamus,¹⁷⁰ and that the District Court's discovery order to assist plaintiffs in pursuit of their claims was not narrow enough.¹⁷¹ On remand, the D.C. Circuit, sitting en banc, issued the writ and directed the case's dismissal.¹⁷² Strictly construing FACA in light of the separation of powers concerns, the court held that the group was not an advisory committee subject to FACA because only its official members, all of whom were government employees, could vote on matters before the NEPDG.¹⁷³

Cheney emerged victorious from his battles with Congress and the public interest groups that sought to open the energy policy he oversaw. His success seemed to validate his long-term strategy of establishing control over executive branch information, which he carried out through NEPDG's institutional design and the aggressive litigation strategy that turned initial legal setbacks into ultimate triumph. Cheney prevailed by brandishing an expansive ideal of executive privilege over information. His victory over Congress and public interest environmental groups sent a signal to opponents: the White House would use its vast financial, legal,

166. See ENERGY TASK FORCE REPORT, *supra* note 140, at 3 n.7; PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 126 (2009); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 391-92 (2002); Peter Brand & Alexander Bolton, *GOP Threats Halted GAO Cheney Suit*, THE HILL, Feb. 19, 2003, available at <http://www.commondreams.org/headlines03/0219-12.htm>.

167. *Judicial Watch*, 219 F. Supp. 2d at 56-57.

168. *In re Cheney*, 334 F.3d 1096, 1108 (D.C. Cir. 2003).

169. *Cheney v. Dist. Court*, 542 U.S. 367, 378 (2004).

170. *Id.* at 382, 391.

171. *Id.* at 387-88.

172. *In re Cheney*, 406 F.3d 723, 731 (D.C. Cir. 2005) (en banc).

173. *Id.* at 728.

and political resources to resist the release of any information that it did not want to disclose.¹⁷⁴

C. THE LIMITS OF INFORMATION CONTROL

Cheney's victories seemed to confirm his constitutional and political theory of the executive branch's paramount authority to control information. It helped, of course, that his theory had already gained significant purchase through republican appointments to the federal bench¹⁷⁵ and its circulation by conservative public law scholars in the legal academy.¹⁷⁶ But an administration cannot achieve full control over the complex network of executive branch agencies that interacted with the NEPDG merely through the support of a majority of appellate judges in high-profile cases.¹⁷⁷ The Bush administration had lost a number of battles along the way to winning the various lawsuits seeking information. By the time of the D.C. Circuit's dismissal of the public interest groups' lawsuit under the FOIA and FACA, several agencies had already complied with the District Court's discovery orders, in the process releasing some documents that Cheney continued to withhold to the plaintiffs and therefore to the public.¹⁷⁸ The National Resources Defense Council obtained documents in early 2002 through a suit against the Department of Energy that showed pervasive industry influence over the resulting administration energy policy.¹⁷⁹ Along with communications

174. See GELLMAN, *supra* note 134, at 93–94.

175. The separate Supreme Court opinions in *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), line up to some degree along a continuum, with Justices Ginsburg and Souter in dissent, Justice Stevens offering a much more limited concurrence, a four justice plurality (with, to be sure, Justice Breyer joining), and Justices Thomas and Scalia providing a partial concurrence that emphasized the serious constitutional concerns for the separation of powers and the relative autonomy of the executive branch if the public interest groups could proceed with discovery. See *id.* at 392 (Stevens, J., concurring); *id.* at 393–94 (Thomas, J., concurring in part and dissenting in part); *id.* at 396 (Ginsburg, J. dissenting). More strikingly, Republican appointees decided the key lower court decisions in the administration's favor. See *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 133 (D.C. Cir. 2005) (Ginsburg, J.) (Reagan appointee); *In re Cheney*, 406 F.3d at 731 (en banc) (Randolph, J.) (George H. W. Bush appointee); *Walker v. Cheney*, 230 F. Supp. 2d 51, 74–75 (D.D.C. 2002) (Bates, J.) (George W. Bush appointee).

176. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 147–169 (2008). The unitary executive theory has also made inroads into center-left jurisprudence, where a version holds sway among proponents of a strong presidency to manage the administrative state. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001).

177. See generally Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 636–37 (2010) [hereinafter Fenster, *Seeing the State*] (noting how the sprawling complexity of the federal administrative state makes transparency difficult to impose).

178. *In re Cheney*, 406 F.3d at 726 n.1.

179. See generally *Order, Nat'l Res. Def. Council v. Dep't of Energy*, 191 F. Supp. 2d 41 (D. D.C. 2002) (granting plaintiff's motion for release of responsive records); *The Cheney Energy Task Force*, NAT'L RES. DEFENSE COUNCIL (Mar. 27, 2002), <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. This

between oil and gas lobbyists and NEPDG officials that demonstrated the Group's close relationship to industry,¹⁸⁰ Judicial Watch obtained from the Department of Commerce a series of maps documenting oil fields and prospects for contracts and projects to extract oil in the Middle East, including Iraq.¹⁸¹

Other sources also allowed information to seep out. While the NEPDG worked, major print media frequently discussed the administration's ties to the energy industry and predicted that these favored interests would gain from Bush's energy plan.¹⁸² At the same time, NEPDG's plans for its report were leaked to the press,¹⁸³ which reported that energy industry representatives, including Enron C.E.O. Kenneth Lay, had met with the Vice President and others in the energy task force.¹⁸⁴ Indeed, Cheney's effort to control information itself became an important media story during the NEPDG's existence, and the press quickly identified secrecy as Cheney's preferred political strategy.¹⁸⁵ In addition to the press's extensive reporting on documents released in connection with the NEPDG litigation showing the energy industry's influence on the administration's energy policy,¹⁸⁶ the *New York Times*

litigation endured until 2005, when the D.C. Circuit ruled in the Department of Energy's favor. *Judicial Watch*, 412 F.3d at 133.

180. SAVAGE, *supra* note 152, at 86 (describing memoranda); *Judicial Watch v. National Energy Policy Development Group*, et al., JUDICIAL WATCH, <http://www.judicialwatch.org/cases/judicial-watch-v-national-energy-policy-development-group-et-al> (June 27, 2012) (describing documents as the result of litigation).

181. *Maps and Charts of Iraqi Oil Fields*, JUDICIAL WATCH (Feb. 14, 2012), <http://www.judicialwatch.org/bulletins/maps-and-charts-of-iraqi-oil-fields>.

182. Joseph Kahn & David E. Sanger, *President Offers Plan to Promote Oil Exploration*, N.Y. TIMES, Jan. 30, 2001, at A1; Jim VandeHei, *Democrats Take Aim at Bush Weak Spot: Administration's Ties to Energy Industry*, WALL ST. J., May 16, 2001, at A24; Dan Morgan, *Coal Scores With Wager on Bush*, WASH. POST, Mar. 25, 2001, at A05; Tom Hamburger, Laurie McGinley, & David Cloud, *Influence Market: Industries That Backed Bush Are Now Seeking Return on Investment*, WALL ST. J., Mar. 6, 2001, at A1.

183. See e.g., Peter Behr & Alan Sipress, *Energy Panel Seeks Review of Sanctions & Oil Production in Iraq, Iran and Libya Seen as Critical*, WASH. POST, Apr. 19, 2001, at A13; Bob Davis, *Bush Energy Plan Increases Reliance on Nuclear Power—Task Force Aims to Boost Supplies of Natural Gas with Pipelines, Drilling*, WALL ST. J., Apr. 9, 2001, at A3; Kahn & Sanger, *supra* note 182, at A1.

184. See Bob Davis & Rebecca Smith, *Power Politics: In Era of Deregulation, Enron Woos Regulators More Avidly Than Ever—CEO Lay Leaves an Imprint on Bush Energy Plan, Seeks Friends at FERC—An Interstate for Electricity*, WALL ST. J., May 18, 2001, at A1; Kahn & Sanger, *supra* note 182; Mike Allen & Dana Milbank, *Cheney's Role Offers Strengths and Liabilities*, WASH. POST, May 17, 2001, at A1; Dana Milbank & Eric Pianin, *Energy Task Force Works in Secret; Like Clinton Health Effort, Cheney Group Aims to Limit Leaks, Flak*, WASH. POST, Apr. 16, 2001, at A1.

185. See Milbank & Pianin, *supra* note 184.

186. See Dana Milbank, *Bush Energy Order Wording Mirrors Oil Lobby's Proposal; Directive Targeted Regulations With "Adverse Effects"*, WASH. POST, Mar. 28, 2002, at A27; Dana Milbank & Mike Allen, *Energy Task Force Belatedly Consulted Environmentalists; Documents Show Administration Sought Input Only After Protests*, WASH. POST, Mar. 27, 2002, at A02; Mike Allen, *Cheney, Aides Met With Enron 6 Times in 2001; Counsel: Energy Policy Was Topic*, WASH. POST,

revealed that eighteen of the top twenty-five contributors to the Republican Party enjoyed special access to the NEPDG—including, in Enron’s case, access to the Vice President himself.¹⁸⁷ Less than eighteen months later, the GAO issued its report on the process that NEPDG used to draft its report, which authoritatively documented Cheney’s tight-fisted control of the NEPDG, as well as contacts among the Office of the Vice President, other principal NEPDG members, and energy industry executives and representatives.¹⁸⁸ The GAO report also revealed the Vice President’s efforts to keep the NEPDG’s work secret.

Cheney’s failed efforts to control information paralleled the NEPDG’s failure as a political entity. Vocal and institutional opposition to what many suspected would emerge as the administration’s energy policy coalesced soon after the NEPDG’s formation, raising doubts about whether the administration would offer anything more than industry’s preferred policies.¹⁸⁹ The NEPDG Report did not influence Congress, as a bill that the administration supported and the Republican-controlled House had passed failed in the Senate, which had a bare majority of Democrats, while the Senate passed its own energy bill.¹⁹⁰ It was not until 2005, after President Bush’s reelection and with larger Republican majorities in both houses of Congress, that Congress finally enacted a new energy bill—one that, notably, did not include some of the most controversial NEPDG proposals, such as opening the Arctic National Wildlife Refuge to drilling.¹⁹¹ Public opinion polls taken soon after the Report’s release suggested that the Report also failed to

Jan. 9, 2002, at A3; Don Van Natta, Jr. & Neela Banerjee, *Bush Energy Paper Followed Industry Push*, N.Y. TIMES, Mar. 27, 2002, at A20.

187. Don Van Natta, Jr. & Neela Banerjee, *Top G.O.P. Donors in Energy Industry Met Cheney Panel*, N.Y. TIMES, Mar. 1, 2002, at A1.

188. ENERGY TASK FORCE REPORT, *supra* note 140, at 6–8, 15–18.

189. See Jeanne Cummings, *Power Politics: Energy Crisis Offers Clues to the Workings of Bush Administration—Cheney Does Heavy Lifting and Bush Rides Agenda; Taste for Horse-Trading—“A Lot of Pain in the West”*, WALL ST. J., Feb. 16, 2001, at A1; John J. Fialka & Jeanne Cummings, *White House Sets Cabinet-Level Study to Develop a National Energy Policy*, WALL ST. J., Jan. 30, 2001, at A6; Kahn & Sanger, *supra* note 182.

190. Eric Pianin, *A Stinging Repudiation Engineered by 3 Democrats*, WASH. POST, Apr. 19, 2002, at A09. The Republican-controlled House of Representatives had introduced and passed a bill that contained about eighty percent of the task force’s proposals soon after the NEPDG Report was issued. See Juliet Eilperin & Eric Pianin, *House GOP Energy Bill Trims President’s Plan*, WASH. POST, Aug. 1, 2001, at A2. In late 2001, Senate Democrats introduced their own bill that focused on conservation, efficiency, and developing new energy sources, which the Senate passed in April 2002. See Helen Dewar, *Senate Approves Energy Measure; Scaled-Back Bill Pushes Conservation*, WASH. POST, Apr. 26, 2002, at A01. The two bills were never reconciled. Mike Allen, *Bush’s Energy Plan Stalled; Partisan Differences and President’s Priorities Created Impasse*, WASH. POST, Aug. 23, 2003, at A06.

191. Energy Policy Act of 2005, Pub. L. 109-58, 119 STAT. 594 (2005); See Charles Babington & Justin Blum, *On Capitol Hill, a Flurry of GOP Victories; Key Measures Advance After Long Delays*, WASH. POST, July 30, 2005, at A01.

persuade the public that its prescriptions were objectively wise and worth pursuing, as many Americans thought that Bush was “too closely tied to the energy industry and insufficiently devoted to conservation.”¹⁹² The NEPDG’s substantive prescriptions might have proved so unpopular and politically untenable that even the most transparent and accessible advisory committee that offered the same prescriptions would have suffered the same fate. But secrecy certainly did not help the administration’s efforts to sell its policy and might well have hurt them—a hypothesis espoused even by some members of the administration.¹⁹³

Environmental non-governmental organizations likely agreed, as they used the NEPDG’s secrecy, and their legal challenges to it, as both symbol and evidence of the administration’s capture by oil and gas interests. The Sierra Club, for example, trumpeted its litigation efforts to its donors, using it as an opportunity to demonstrate its essential role in fighting what it characterized as Cheney’s secretive, lawless behavior.¹⁹⁴ As one commentator sympathetically noted about the environmental groups opposed to the Bush administration, the Sierra Club and the National Resources Defense Counsel seemed more exercised about the secretive and exclusionary process by which the energy policy had been developed than about the policy itself.¹⁹⁵ The stealth process, environmental groups argued, suggested that more than mere policy was at stake in the energy debate.

Administration critics generally viewed the NEPDG episode through such inferences. The authors of *Vice: Dick Cheney and the Hijacking of the American Presidency* characterized the NEPDG as “a government-sanctioned industry cabal” that had drawn up a self-dealing and destructive energy policy and had worked in secret to cover up the corrupt enterprise.¹⁹⁶ Some critics accused Cheney of trying to hide his efforts to enrich his friends in the energy industry.¹⁹⁷ Some imagined far worse, particularly when viewing the NEPDG retrospectively through

192. Greg Hitt, Shailagh Murray, & Jeffrey Ball, *Increasingly Skeptical Congress Takes up Bush Energy Plan—NAS Study Deals Blow by Concluding Auto Makers Can Sharply Boost SUV Fuel Economy*, WALL ST. J., July 31, 2001, at A20.

193. See GELLMAN, *supra* note 134, at 93; HAYES, *supra* note 134, at 324. Cf. SAVAGE, *supra* note 152, at 90 (quoting associate White House counsel as acknowledging that the documents sought in the litigation contained “nothing of interest”).

194. See, e.g., SIERRA CLUB, SUCCESS HIGHLIGHTS: CELEBRATING SIERRA CLUB’S 2010 CHARITABLE VICTORIES 4 (2010) (identifying its role in litigation as evidence of its chairman’s “leadership”); SIERRA CLUB FOUND., 2004 ANNUAL REPORT 6–7 (2004) (identifying its role in litigation as one of the year’s “highlights”).

195. See Dannenmaier, *supra* note 135, at 375–76.

196. DUBOSE & BERNSTEIN, *supra* note 144, at 21.

197. See ROBERT BRYCE, CRONIES: OIL, THE BUSHES, AND THE RISE OF TEXAS, AMERICA’S SUPERSTATE (2004); JOHN W. DEAN, WORSE THAN WATERGATE, 42–53 (2004); GELLMAN, *supra* note 134, at 93–94; JOHN NICHOLS, DICK: THE MAN WHO IS PRESIDENT (2004).

the lens of the 2003 invasion of Iraq. Both the existence of the Iraq oilfields map that was disclosed in discovery,¹⁹⁸ along with the fact that it had been kept secret, suggested to critics that the war in Iraq and the administration's hawkish, neoconservative foreign policy were products of the administration's energy policy.¹⁹⁹ Worse still, according to those who believe the administration either knew or was involved in the 2001 terrorist attacks, the entire episode unveiled the administration's secret conspiracy to achieve global domination for an imperial America.²⁰⁰ Such theories no doubt would have developed even in a more information-rich environment where authoritative official documents and their provenance were available and widely acknowledged. But they positively blossomed in conditions that were defined by the grand, dramatic struggle to obtain documentary evidence.

The Vice President may have thought he was controlling access to information—an assumption that his most vociferous critics share—but he could not contain either the circulation of information or the interpretation of that which circulated. The most significant pre-9/11 battle over government secrecy and the executive branch's authority to control information demonstrated the power of laws protecting executive privilege, the potential of formal laws and legal processes to force the disclosure of information and to focus political pressure on the government, and ultimately, the difficulty of keeping secrets.

IV. REDACTION FAILURES: IMPERFECT INFORMATION CONTROL IN THE RELEASE OF DOCUMENTS

Vice President Cheney sought to maximize the executive branch's legal authority to control executive branch information; by contrast, some executive branch secrecy practices work within limits that the Constitution and Congress set on the state's ability to keep information from the public. When it releases documents from which text has been "redacted" (that is, obscured with a black mark or erased) for security purposes, the executive branch simultaneously discloses information and quite explicitly and clearly keeps it secret. The public can see the document, it just cannot see every word—or perhaps any word at all if the entire document or page has been redacted. An agency sometimes redacts a document that it is otherwise required to release under a legal

198. See *supra* note 181 and accompanying text.

199. DUBOSE & BERNSTEIN, *supra* note 144, at 15–16; Jane Mayer, *Contract Sport: What Did the Vice-President Do for Halliburton?*, *NEW YORKER*, Feb. 16, 2004, at 80.

200. See Jon Gold, *The Facts Speak for Themselves*, 911TRUTH.ORG (Sept. 25, 2008), http://www.911truth.org/article_for_printing.php?story=20090104025547844; Michael Kane, *Crossing the Rubicon: Simplifying the Case Against Dick Cheney*, FROMTHEWILDERNESS.COM (Jan. 18, 2005), http://www.fromthewilderness.com/free/ww3/011805_simplify_case.shtml.

mandate; alternatively, an agency may not have been obliged to release a redacted document but decided to declassify or make it public in an effort to meet public expectations or enhance public understanding of an issue. As a surgical removal of privileged information, redaction constitutes a compromise, a second-best alternative to complete secrecy that is better than nothing in this regard. But by making visible that which is kept secret, redaction reveals secrecy's machinery in ways that the complete refusal to release a document does not. Paradoxically, redactions allow citizens to see precisely what they cannot know.

This Part demonstrates that understanding redaction as selective but complete censorship proves to be only partially correct given the myriad ways in which redaction can fail. It begins with a discussion of how laws enable government to use redactions as a strategy to retain control over information, and then illustrates the ways that redaction has failed in recent high-profile cases. It ends by demonstrating how even redaction's textual erasure still produces meaning.

A. INFORMATION CONTROL AND RELEASE IN REDACTION LAW

Government agencies redact information most frequently in response to FOIA requests and as part of the review process of certain employees' publications. The Freedom of Information Act requires federal agencies to provide "[a]ny reasonably segregable portion of a record" of documents when they rely upon one of FOIA's exemptions to deny a document request.²⁰¹ Agencies must make their redactions explicit and obvious by indicating the amount of deleted information, the exemption that authorized the deletion, and, when possible, where in the document the deletion occurred.²⁰² Courts occasionally play an active role in the redaction process.²⁰³

The pre-publication review process that intelligence agencies use for the public writings of their current and former employees also results in

201. 5 U.S.C. § 552(b) (2006); *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984) ("The 'segregability' requirement applies to all documents and all exemptions in the FOIA.").

202. 5 U.S.C. § 552(b).

203. *See, e.g., ACLU v. Dep't of Homeland Sec.*, 738 F. Supp. 2d 93, 110-11 (D.D.C. 2010) (finding that the agency did not sufficiently support full redactions of e-mails and ordering the agency to "re-evaluate this document to ensure that only properly withheld information has been redacted and either make greater disclosure of the content of the e-mail to the plaintiff or provide a more detailed rationale" for withholding text). The fact that courts *can* inspect documents affected by agency redactions and of which an agency denied disclosure does not *require* them to do so. *See Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The D.C. Circuit in particular grants trial courts broad discretion to decide how and to what extent they will conduct in camera review. *See Allen v. CIA*, 636 F.2d 1287, 1296 (D.C. Cir. 1980).

the disclosure of redacted documents.²⁰⁴ The Central Intelligence Agency (the “CIA” or the “Agency”) has long required employees to sign secrecy agreements as a condition of employment.²⁰⁵ These agreements include provisions that require the employees to submit written manuscripts that they plan to publish prior to publication.²⁰⁶ The CIA delegates manuscript review to its Publications Review Board (“PRB”), which must respond to the author within thirty days with proposed deletions.²⁰⁷ Although the PRB’s approach has varied over time as different agency directors use their discretion to set their secrecy policy preferences,²⁰⁸ some authors and critics of the CIA have argued that the PRB over-redacts information, especially when it supports criticism of CIA performance and policy.²⁰⁹ Frustrated employees have challenged agency efforts to enforce the secrecy agreements on First Amendment grounds,²¹⁰ as well as on the grounds that the redacted information is in fact not classified,²¹¹ or had

204. See generally John Hollister Hedley, *Secrets, Free Speech, and Fig Leaves*, 41 *STUD. INTEL.* 75, 77-78, 83 n.1 (1998), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol41no5/pdf/v41i5ao4p.pdf> (describing CIA’s pre-publication review process).

205. Michael L. Charlson, Comment, *The Constitutionality of Expanding Prepublication Review of Government Employees’ Speech*, 72 *CALIF. L. REV.* 962 (1984)

206. See, e.g., *Berntsen v. CIA*, 618 F. Supp. 2d 27, 28 (D.D.C. 2009) (reproducing a pre-publication review provision from an employment contract).

207. See *United States v. Snepp*, 595 F.2d 926, 934 (4th Cir. 1979); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). The PRB often holds manuscripts beyond the deadline. See A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA’s Office of General Counsel? 2* *J. NAT’L. SEC. L. & POL’Y* 201, 239 n.121 (2008); see, e.g., Jason Vest, *Ex-CIA Officer Heads to Court for Second Time over Proposed Book*, *GOV. EXEC.* (Oct. 13, 2005), <http://www.govexec.com/dailyfed/1005/101305v1.htm> (describing author’s frustration when PRB took ninety-eight days to return manuscript with a long list of redactions). See generally Richard Willing, *Spy Books Strain CIA Review Board*, *USA TODAY* (Apr. 30, 2007, 9:38 AM), http://www.usatoday.com/news/washington/2007-04-29-spy-books_N.htm (noting that in the period between 2000 and 2007, the number of manuscripts increased four-fold, and between 1980 and 2007, it has increased twelve-fold).

208. Radsan, *supra* note 207, at 241–42; Scott Shane & Mark Mazzetti, *CIA Crackdown Seeks to Tighten Agency’s Secrecy*, *N.Y. TIMES*, Apr. 24, 2006, at A1.

209. See Scott Shane, *C.I.A. Fighting Memoir of 9/11 By F.B.I. Agent*, *N.Y. TIMES*, Aug. 26, 2011, at A1 (reporting complaints from a former Federal Bureau of Investigations (“FBI”) agent about CIA redactions to his manuscript); Laura Miller, *Censored by the CIA: A 23-Year-Old Veteran of the Agency Reveals How the Vetting Process is Used to Stifle Critics of the War*, *SALON* (Aug. 30, 2011, 5:31 PM), http://www.salon.com/2011/08/31/censored_by_cia (interviewing former CIA agent complaining about intimidation in the PRB review process); Dana Priest, *Suing Over the CIA’s Red Pen; Retired Operative Says Agency Unfairly Edited His Book*, *WASH. POST*, Oct. 9, 2006, at A15 (recounting a former CIA agent’s threat from the CIA’s executive director that the agency would “redact the [expletive] out of your book” because of its criticism of the CIA).

210. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (upholding the CIA’s pre-publication review process as a “reasonable means” of restricting an employee’s ability to speak not only because of the voluntary nature of the secrecy agreement that its employees sign, but also due to the agency’s “compelling interest” in protecting classified intelligence information essential to national security).

211. *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983).

been officially disclosed previously,²¹² or had been properly classified²¹³— but such challenges do not often prevail.

Redaction's legal authorities thus assume the following: disclosure and secrecy are appropriate, within reason. The two can be reconciled through an agency's precise control of information, down to the page, line, and word whose redaction will keep secret dangerous content. Wielding its black pen or eraser, the government can limit disclosure's ill effects.

B. HOW REDACTION FAILS

Redaction can fail in a variety of ways, however. The information that it tries to suppress might already be in the public domain.²¹⁴ The information can also subsequently leak out or can be inferred from the document or the context in which the redaction appears.²¹⁵ The redactions might not successfully suppress information due to bureaucratic conflict and sometimes technical errors.²¹⁶ Agencies cannot extend the redaction that they are authorized to make to documents outside their control. This Subpart illustrates that despite its status as an explicit form of information control, redaction often reveals secrecy's malfunction. Redaction's failure thus illustrates the difficulty of maintaining secrecy and questions the effort to protect information.

Consider first the redactions to former CIA agent Valerie Plame Wilson's best selling memoirs.²¹⁷ Wilson's career had ended when unauthorized leaks to news agencies by members of the Bush

212. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989).

213. *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003).

214. See *infra* notes 276–285 (providing examples).

215. For example, the *New York Times* obtained an un-redacted copy of an internal government history of U.S. efforts to capture Nazis after World War II; the copy revealed significant amounts of information that the Justice Department had redacted in a version it released in response to FOIA litigation. See Eric Lichtblau, *Secret Papers Detail U.S. Aid for Ex-Nazis*, N.Y. TIMES, Nov. 13, 2010, at A1.

216. This can happen with commercial software programs. See NAT'L SEC. AGENCY, REDACTION OF PDF FILES USING ADOBE ACROBAT PROFESSIONAL X at 1; Jaikumar Vijayan, *Analysis: TSA Document Release Show Pitfalls of Electronic Redaction*, COMPUTERWORLD (Dec. 11, 2009, 7:18 AM), http://www.computerworld.com/s/article/9142141/Analysis_TSA_document_release_show_pitfalls_of_electronic_redaction. The problem predates electronic files and redaction; when redaction was on paper, it was sometimes possible to peer past the black mark at the underlying text. See Scott Shane, *Spies Do a Huge Volume of Work in Invisible Ink*, N.Y. TIMES, Oct. 28, 2007, at A4. The problem is not peculiar to American government. See, e.g., Dan Levine & Carlyn Kolker, *Exclusive: Apple versus Samsung Ruling Divulges Secret Details*, REUTERS, Dec. 6, 2011, available at <http://www.reuters.com/article/2011/12/06/us-apple-samsung-ruling-idUSTRE7B425D20111206> (describing court order in private litigation that failed to redact proprietary information); David Millward & Thomas Harding, *Secrets Put on Internet in Whitehall Blunders*, TELEGRAPH (Apr. 17, 2011, 10:00 PM), <http://www.telegraph.co.uk/news/uknews/defence/8457506/Secrets-put-on-internet-in-Whitehall-blunders.html> (reporting that secrets about British nuclear submarines posted online in redacted documents could be revealed by copying and pasting them in new documents).

217. See generally VALERIE PLAME WILSON, *FAIR GAME* (2007).

administration identified her as a covert agent in an effort to disparage her husband, a former diplomat who publicly challenged evidence proffered by the administration of Saddam Hussein's efforts to build weapons of mass destruction.²¹⁸ The resulting scandal paradoxically transformed Valerie Plame Wilson from secret spy to public celebrity, and she sold the rights to her memoirs to a major publishing house for \$2.5 million.²¹⁹ Upon reviewing her manuscript prior to publication, the CIA's PRB required significant redactions, including of factual information about Wilson's career that had been published in popular news accounts and in an unclassified letter from a CIA official that was published in the *Congressional Record*.²²⁰ After losing her administrative and legal appeals of the redactions,²²¹ Wilson and her publisher decided to release the book with large portions of the text hidden behind dull grey lines that represented the censored material. The book's main text thus has whole pages of redactions, as well as pages that combine visible text and single-word or line-by-line redactions. Two chapter titles are blacked out. Parts of Wilson's life story, including her husband's courtship of her and parts of her account of the PRB process itself, are so thoroughly edited as to be almost incomprehensible.²²² The book's redactions stand in protest of a secrecy policy to which Wilson objected, forcing the reader to make sense of an explicitly censored text. They make plain that Wilson had lost control of the telling of her own life.

But the book also demonstrates the absurdity and imperfections of the government's censorship efforts. Much of the content that the CIA had forbidden Wilson to publish appears in an afterword written by Laura Rozen, a foreign policy and intelligence reporter who relied for her nearly one-hundred-page contribution on open source materials and personal interviews of others who knew Wilson.²²³ The CIA could not limit Rozen's access to her sources, and it had no mechanism to censor her use of them in the afterword. For example, one of the most significant pieces of information redacted from the main text was the country where Wilson worked undercover and any details that would

218. See *Wilson v. Libby*, 535 F.3d 697, 701–02 (D.C. Cir. 2008); *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1143–44 (D.C. Cir. 2005); GELLMAN, *supra* note 134, at 360–64.

219. Motoko Rich, *Valerie Plame Gets Book Deal*, N.Y. TIMES (May 5, 2006), <http://www.nytimes.com/2006/05/05/books/05cnd-plame.html>.

220. Wilson gives a full account of the PRB process in the memoir. See WILSON, *supra* note 217, at 264–81.

221. See *Wilson v. CIA*, 586 F.3d 171, 196 (2d Cir. 2009) (dismissing Wilson's claims that because the CIA's redactions included information in the public record, the redactions violated the First Amendment and the Administrative Procedure Act).

222. WILSON, *supra* note 217, at 270–73.

223. See Laura Rozen, *Afterword to WILSON, FAIR GAME*, *supra* note 217, at 307–89; see also WILSON, FAIR GAME, *supra* note 217, at ix (explaining Rozen's afterword).

allow a reader to identify the country; indeed, chapters 2 and 3, which cover her early years in the agency, are among the most heavily redacted. As we learn in Rozen's afterword, however, Wilson spent six years undercover in Greece, a fact that was known to Wilson's family (although they did not know that she worked for the CIA at that time), and one that had been widely reported in the news.²²⁴ The reader can learn from Rozen's afterword that the information about how she met and ultimately married her husband had appeared in Joseph Wilson's memoir, which had been published three years earlier.²²⁵ *Fair Game* also included an appendix that reproduces public documents, including correspondence between the CIA's PRB and her attorneys, court filings, and entries from the *Congressional Record* that included information Wilson could not get past the PRB's censors.²²⁶ The documents provide further details about Wilson's service in the CIA and the PRB review process that were redacted in her portion of the memoirs. Readers thereby have access to much of the information that the agency had sought to redact.²²⁷

Bureaucratic indifference and conflict rather than absurdly excessive censorship caused another recent redaction failure. *Operation Dark Heart*, Anthony Shaffer's memoir of his experiences as a Defense Intelligence Agency ("DIA") officer in the war in Afghanistan, initially went to press without significant censorship after prepublication review by the Army.²²⁸ As the book was set to be released, however, the DIA and other intelligence agencies sought to stop its publication, asserting that it contained classified information, the release of which could be harmful to national security. The Pentagon purchased and destroyed ten thousand printed copies of the book's original edition, while the book's publisher arranged to publish a second edition with the newly required redactions.²²⁹

The censorship failed, however, because a limited number of advance copies of the original edition were already in circulation.²³⁰ Those with both copies could identify precisely what the DIA had redacted. An investigative news website posted numerous pages from both editions for a side-by-side comparison, revealing many of the

224. *See id.* at 319–31.

225. *Id.* at 351–52; JOSEPH WILSON, *THE POLITICS OF TRUTH* 239–43 (2004).

226. *See WILSON, supra* note 217, at 392–402.

227. *See* Janet Maslin, *Her Identity Revealed, Her Story Expurgated*, N.Y. TIMES, Oct. 22, 2007, at E1 (book review describing dispute with CIA, and characterizing the afterword as "fill[ing] in some of the gaps" created by the redactions).

228. Scott Shane, *Pentagon Tries to Corner Book to Keep Secrets*, N.Y. TIMES, Sept. 10, 2010, at A16.

229. Scott Shane, *In Censored Book's Reprint, Pentagon Redacts Some Not-So-Secret Secrets*, N.Y. TIMES, Sept. 18, 2010, at A9.

230. *Id.*

classified “secrets” that the DIA hoped to hide.²³¹ By January 2013, the Department of Defense had partially reversed course again, declaring that many of the redactions had subsequently been declassified while retaining classification for many of the others.²³²

As with the Wilson memoir, the state could not successfully keep everything it sought to suppress secret because some of it had already become public. In its afterword and appendix, *Fair Game* makes this explicit by revealing some of the redacted information. Similarly, a reader who knows or stumbles upon the story behind *Operation Dark Heart* can more directly and literally find the unredacted text online. These are exceptional cases—though not unique ones.²³³ They reveal the difficulties that the state confronts as it complies with formal statutory and constitutional limitations on secrecy, and as it attempts to overcome the informal checks on secrecy—official and unofficial leaks, intrepid investigative reporting, the activities of political opponents, and bureaucratic conflict and bungling.

C. REDACTION’S MEANING

Redaction can fail not only to keep the actual text hidden under the redactions from the public—but also to stop the public from reading, and reading into, the covering lines themselves, which themselves produce meaning. As the anthropologist Michael Powell has written, redaction “transforms the way we read these documents, sparking curiosity and often stirring skeptical, critical, and even cynical readings.”²³⁴ Few readers will share Valerie Wilson’s personal sense of betrayal and outrage at the CIA’s PRB process of *Fair Game*, but many will wonder at the CIA’s motivations and rationality in its extraordinary efforts to redact information that was readily available. Readers are also likely to speculate, whether in an informed or uninformed manner, about what lies under the black marks and about the government’s motivations in

231. See *Redacted and Unredacted Side-by-Side of ‘Operation Dark Heart’*, PROPUBLICA, <http://www.propublica.org/documents/item/redacted-and-unredacted-side-by-side-of-operation-dark-heart>; see also ANTHONY SHAFFER, *Index to OPERATION DARK HEART*, available at <http://www.fas.org/spp/news/2010/09/dark-index.pdf> (providing a side-by-side comparison of redacted and unredacted versions of the book’s index).

232. See Steven Aftergood, *Pentagon Relaxes Censorship of Afghan War Memoir*, SECRECY NEWS (Jan. 24, 2013, 1:44 P.M.), http://www.fas.org/blog/secrecy/2013/01/dark_heart_declass.html.

233. See, e.g., *WikiLeaks Diplomatic Cables FOIA Documents*, Am. Civil Liberties Union, <http://www.aclu.org/wikileaks-diplomatic-cables-foia-documents> (last visited Jan. 15, 2014) (comparing redacted diplomatic cables obtained by FOIA with unredacted documents obtained by WikiLeaks, claiming that the latter show “the government’s selective and self-serving decisions to withhold information” via redaction).

234. Michael G. Powell, [REDACTED] *Out: Our Cultural Romance with Redacted Documents*, BELIEVER MAG., June 2010, at 23, 24.

redacting the text. Sometimes informed speculation will prove accurate;²³⁵ sometimes it will lead the public to imagine the worst, perhaps by assuming the existence of a conspiracy or official incompetence where neither existed—or where the state in fact has done something equally, though differently, culpable.²³⁶ Even when redaction successfully censors information, it cannot obstruct the process of meaning-production about the text that it hides.

Black blots on a document divorced from consideration of the content that they hide can also *create* meaning separate from the hidden content, as contemporary artists have shown by playing with redaction's signification in their work. In his *FBI Files* series (2000–02), the painter Arnold Mesches appropriated documents that he obtained from the investigatory files the Federal Bureau of Investigation (the “FBI”) had produced in their surveillance of his political activities in the 1950s and 1960s.²³⁷ Intermixing the documents into collages with paintings of arresting images from the culture and politics of the era, his works comment on the state that surveilled and infiltrated his life. The collages find beauty in the detritus of official action and satirize the secret, paranoid world in which J. Edgar Hoover's FBI thrived. Similarly, Jenny Holzer's recent series *Redaction Paintings* painstakingly reproduce, in oil paint on linen and in larger size than the original paper, declassified, redacted documents about detainee abuse obtained through FOIA requests filed by the ACLU.²³⁸ In a 2004 exhibition, Holzer projected onto the faces of buildings in the German city of Bregenz redacted documents from the Bush administration that explained and authorized the Global War on Terror.²³⁹ Each set of visual works demonstrates how redactions perform a literal but partial censorship alongside disclosure, while they allow the redactions' black marks and blots to reveal the invisible but programmatic physical violence that the documents record.²⁴⁰ Mesches described the inspiration provided by “the sheer aesthetic beauty of the [redacted] pages themselves—the bold, black, slashing, eradicating strokes” that look like artistic renderings made by the menacing bureaucratic police apparatus.²⁴¹ In reproducing redacted documents as art, he and Holzer reveal redactions' fruitful censorship, which in their work comes to represent the enormity of the security state

235. See *infra* Part V.B.2 (describing historians' efforts to infer the meaning of redactions).

236. See *supra* note 129 and accompanying text.

237. See generally Arnold Mesches, *The FBI Files*, 15 PUB. CULTURE 287 (2003).

238. See generally JENNY HOLZER, REDACTION PAINTINGS (2006).

239. See JENNY HOLZER ET AL., TRUTH BEFORE POWER (2004).

240. Joseph Slaughter, *Vanishing Points: When Narrative Is Not Simply There*, 9 J. HUM. RTS. 207, 211 (2010).

241. Mesches, *supra* note 237, at 292.

that the Cold War and post-9/11 reaction produced, as well as the tremendous efforts the security state takes to keep itself secret.

The same proves true in published texts that reproduce or create redactions. Wilson's *Fair Game* is not the only book that has used extensive black marks to comment on state censorship. Former CIA agent Joseph Weisberg's 2007 novel *An Ordinary Spy*, which narrates the story of an incompetent, conscience-wracked American spy, includes almost as many redactions as Wilson's *Fair Game*, but unlike the latter, Weisberg redacted his own text to heighten the book's authenticity.²⁴² According to one account, the book's black bars "concealed the names of countries, the particulars of tradecraft and other details that might be classified information, *if the story were true*."²⁴³ But the novel was fabricated; Weisberg removed most of the material to which the PRB would have objected, and the board redacted only a little more than what Weisberg had not himself redacted. Moreover, as a novelist, Weisberg could have simply created unobjectionable material to replace that which the PRB redacted.²⁴⁴ Instead, he seemed to hope that redaction would increase the reader's pleasure and sense of the novel's accurate portrayal of the spy's daily life, even as it blacked the details of that life out. Mesches and Holzer, who are more critical of the documents they reproduce than Weisberg, make use of blots and black lines that signify as well as censor. For all three, redactions create meaning even as they attempt to control information. As this Part has illustrated and the next will further show, redaction often fails to achieve its goal.

V. "SECRET HISTORY": THE STRUGGLE TO CONTROL INFORMATION ABOUT COVERT OPERATIONS

By definition, covert state actions are secret. A means by which the President and intelligence community attempt to change the course of history without leaving any historical traces, they are designed and executed in order to be the most unknown of the unknowns. The issue of whether the state should make later disclosures of their existence and details generates fierce debate between historians and members of the intelligence community.²⁴⁵ As the next Subpart explains, the government

242. See Alex Beam, *Espionage realist*, YALE ALUMNI MAG., Sept./Oct. 2011, at 43, 44 (characterizing the redactions as a "major conceit" of the novel and noting that he made most of them).

243. Motoko Rich, *From Undercover to Between the Covers*, N.Y. TIMES, Dec. 22, 2007, at B9 (emphasis added).

244. *Id.*

245. See, e.g., Warren F. Kimball, *Openness and the CIA*, 44 STUD. INTEL. 63 (2001) (arguing for disclosure of past covert actions from the perspective of a diplomatic historian); N. Richard Kinsman, *Openness and the Future of the Clandestine Service*, 44 STUD. INTEL. 55 (2001) (arguing against disclosure from the perspective of a retired CIA official).

has committed itself to disclose some of its past covert activities.²⁴⁶ But these efforts to make historical documents available have faced formal and informal resistance through law and bureaucratic recalcitrance that protect some degree of secrecy about the official past. After introducing the various means by which the federal government attempts to keep some of its historical secrets while making others public, this Part offers a case study of the complex struggle that the executive branch and especially the intelligence community have undertaken to keep secret the United States' covert role in directing the 1954 coup in Guatemala, a key moment in American Cold War history. This "secret history" reveals the difficulty and even implausibility of controlling information about past covert actions.

A. PUBLIC SECRETS AND PUBLIC HISTORY LAW

The United States has long tried, for different reasons and to varied effect, to make public its secret history. The State Department has published the *Foreign Relations of the United States* ("FRUS") series, an official documentary record of foreign policy decisions and diplomatic activity,²⁴⁷ more or less continuously since 1861. The *FRUS* carries on a longstanding tradition of State Department documentary reports to Congress that dates back to the early Republic.²⁴⁸ Since World War II, however, the *FRUS* has faced a more complicated political environment, while at the same time it has needed to document America's greatly changed geo-political position and its vastly larger State and Defense Departments and intelligence services. This has resulted in a *FRUS* publication process fraught with political and bureaucratic conflict.²⁴⁹ To address these concerns, the State Department formed a permanent advisory committee composed of academic historians in 1957,²⁵⁰ and, more recently, Congress enacted legislation requiring the State Department to engage more thoroughly with academic historians and to declassify

246. The post-Watergate period saw the most extensive disclosures of American covert actions. See generally KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI* (1996).

247. 22 U.S.C. § 4351(a) (2012).

248. Recent histories of the *Foreign Relations of the United States* series ("FRUS") and the State Department's Office of the Historian are Kristin L. Ahlberg, *Building a Model Public History Program: The Office of the Historian at the U.S. Department of State*, 30 *PUB. HISTORIAN* 9 (2008); Joshua Botts, *FRUS at 150*, OFFICE OF THE HISTORIAN, DEP'T OF STATE (2011), <http://www.archives.gov/il/NR/rdonlyres/18E1895D-A15E-405F-B4EE-91FE56C7CF65/0/FRUS150Nov29.pdf> (reprinting an essay presented at the 11th International Conference of Editors of Diplomatic Documents).

249. See Botts, *supra* note 248, at 15–27 (describing conflicts over *FRUS* during the Cold War).

250. See Richard W. Leopold, *The Foreign Relations Series: A Centennial Estimate*, 49 *MISS. VALLEY HIST. REV.* 595, 607–09 (1963); Page Putnam Miller, *We Can't Yet Read Our Own Mail: Access to the Records of the Department of State*, in *A CULTURE OF SECRECY 189–94* (Athán G. Theoharis ed., 1998).

documents on a scheduled basis.²⁵¹ Congress' interest in *FRUS* was itself part of broader legislative efforts to advance the declassification of documents concerning particularly controversial historical events.²⁵²

Another statute, the Presidential Records Act (the "PRA"),²⁵³ clarified an uneven and informal practice of making the papers of a departing President publicly available.²⁵⁴ Enacted at the tail end of the post-Watergate period of open government statutes, the PRA addressed the issue that arose from former President Nixon's efforts to control the documents from his presidency, when it became clear both that former presidents could not be trusted to allow public access to their historical papers and that there was wide public demand for such access.²⁵⁵ The statute allows for public access to presidential records through the FOIA beginning five years after the end of the administration, but allows the President to invoke as many as six specific restrictions to public access for up to twelve years.²⁵⁶

These efforts to open the historical record have faced significant resistance. Every struggle over the receding past takes place in the shadow both of an underlying constitutional conflict over presidential privilege,²⁵⁷ and of the bureaucratic barriers that the classification system creates.²⁵⁸ The *FRUS* volumes have come more slowly and sporadically as a result of such battles, especially due to long delays in declassifying documents.²⁵⁹ At the same time, the PRA does not provide unfettered access to the historical record. Presidential records continue to fall within

251. Foreign Relations Authorization Act, Pub. L. No. 102-138, § 198, 105 Stat. 647, 685-691 (1991) (codified at 22 U.S.C. §§ 4351-57); Botts, *supra* note 248, at 29-31; see Philip G. Schrag, *Working Papers as Federal Records: The Need for New Legislation to Preserve the History of National Policy*, 46 ADMIN. L. REV. 95, 139 n.248 (1994).

252. See, e.g., Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998); President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (1992).

253. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201-07 (2000)).

254. On the history of presidential papers before the PRA, see Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 657-66 (2003).

255. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 445-46 n.8, 483-84 (1977) (upholding against constitutional challenge a pre-PRA statute focused solely on President Nixon's records).

256. 44 U.S.C. § 2204 (2012).

257. See, e.g., George Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993 (Oct. 28, 1991), <http://www.presidency.ucsb.edu/ws/print.php?pid=20152> (explicitly declaring the President's constitutional prerogative over diplomatic information statement upon signing the bill authorizing the *FRUS*).

258. Anne Van Camp, *Trying to Write "Comprehensive and Accurate" History of the Foreign Relations of the United States: An Archival Perspective*, in ARCHIVES AND THE PUBLIC GOOD, *supra* note 68, at 229, 241. (noting the key role of the State Department and other agencies in delaying the issuance of *FRUS* volumes).

259. Botts, *supra* note 248, at 30-31.

FOIA's exceptions even after the twelve-year period that allows former presidents to place additional restrictions on public access.²⁶⁰ Presidential administrations also vary in the extent of their willingness to comply with the statute's spirit and letter.²⁶¹ The legal and bureaucratic machinery of secrecy can, at least in theory, continue to hide the state's covert actions.

B. GUATEMALA'S SECRET HISTORY

As in the other case studies in this Article, however, the executive branch's ability to exercise control over the flow of information by overriding formal legislative efforts to open archives is itself frequently undercut by informal means. In the case of information about past American covert operations—among the most controversial and secretive acts in which the nation's intelligence community, diplomatic corps, and military engage—informal disclosure occurs because the operations inevitably have real-world effects that leave a public record and create a public memory where the operation took place.

The struggle over information about American involvement in Guatemalan history perfectly illustrates this dynamic. The CIA's covert operation resulting in the 1954 coup that deposed the popularly elected Guatemalan President Jacobo Arbenz became the model for many similar secret interventions that followed, including the failed Bay of Pigs invasion in Cuba in 1961, and the operation had long-term devastating effects on Guatemala's political and social stability.²⁶² Although direct and extensive American involvement in the coup was widely recognized throughout Latin America and Europe at the time and subsequently,²⁶³ the Eisenhower administration portrayed the coup as a popular

260. 44 U.S.C. § 2204(c)(1) (2012). On FOIA's exceptions, see *supra* notes 48–52 and accompanying text.

261. *Compare* Exec. Order No. 13,233, 3 C.F.R. 13233 (2001), 44 USC § 2204 (2012) (printing George W. Bush executive order allowing former presidents to withhold records as privileged after the twelve year moratorium with the concurrence of the incumbent President), *with* Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 26, 2009) (publishing Obama's revocation of Bush's order). See generally Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 352 (2009); Marcy Lynn Karin, Note, *Out of Sight, But Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 548–52 (2002).

262. See MICHAEL GROW, U.S. PRESIDENTS AND LATIN AMERICAN INTERVENTIONS ix–x (2008); RICHARD H. IMMERMANN, THE CIA IN GUATEMALA 186–201 (1982); John H. Coatsworth, *Introduction* to STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA xv (2005). American involvement, and the CIA's denial of its own involvement in atrocities in Guatemala and efforts to cover it up, continued into the Clinton administration. See Richard A. Nuccio, *Foreword to the 1999 Edition* of STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA xxii–xxvi (1999).

263. See NICK CULLATHER, SECRET HISTORY: THE CIA'S CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA, 1952–1954 at 111–13, 119 (1999).

Guatemalan uprising and, with the complicity of U.S. news editors and publishers, kept the CIA's role relatively secret from the American public.²⁶⁴ The coup continues to float in a kind of historical twilight, at once well-known in Latin America and among historians and Americans well-versed in Central American history, but shrouded in the impenetrable mystery that clings to controversial CIA Cold War covert operations. Numerous monographs on Guatemalan history, memoirs from coup participants, and books that treat covert American interventions in the post-war era more broadly have brought the American role in sponsoring and assisting the coup to at least some light.²⁶⁵ Nevertheless, several historians have complained that the event's details have been lost or remain locked inside government archives.²⁶⁶

Historians' work has been made more difficult because the CIA's files remained off-limits to researchers into the 1990s,²⁶⁷ not least because a 1983 *FRUS* volume, putatively concerning Guatemala, included no documents suggesting CIA involvement in the coup.²⁶⁸ In 1992, however, as part of an "openness" initiative following the Soviet Union's collapse,²⁶⁹ the CIA commissioned Nick Cullather, a recently-minted history Ph.D. and new member of the agency's History Staff, to use full access to the Agency's classified files to write an insider history of the CIA's role in the 1954 coup. The Agency intended the resulting account to serve as a training manual for future covert operatives rather than as a full or official account of the operation; nevertheless, the Agency planned ultimately to release Cullather's text to the public, along with some of the documents on which Cullather relied.²⁷⁰ The openness proved temporary, however, and Cullather's report, completed in 1993, remained classified until it was declassified and deposited in the National

264. IMMERMAN, *supra* note 262, at 4–5; SCHLESINGER & KINZER, *supra* note 262, at 153–56 (2005). For an account of how the CIA and State Department persuaded the *New York Times* to stop reporting on the coup in order to keep the CIA's involvement from Americans, see HARRISON E. SALISBURY, *WITHOUT FEAR OR FAVOR* 478–83 (1980).

265. See PIERO GLEIJESES, *SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES 1944–1954* (1991); E. HOWARD HUNT & GREG AUNAPU, *AMERICAN SPY* 59–84 (2007); IMMERMAN, *supra* note 262; DAVID ATLEE PHILLIPS, *THE NIGHT WATCH* 34–54 (1977); SCHLESINGER & KINZER, *supra* note 262.

266. GLEIJESES, *supra* note 265, at 4; Coatsworth, *supra* note 262, at xi.

267. One of the earliest critical histories of United States' involvement in the 1954 coup relied heavily on documents received via the FOIA—although, notably, not from the CIA, which refused to make disclosures under FOIA. See SCHLESINGER & KINZER, *supra* note 262, at xxxvii (2005).

268. See *Foreign Relations of the United States, 1952–1954, Guatemala*, OFFICE OF THE HISTORIAN, DEP'T OF STATE (2003), <http://history.state.gov/historicaldocuments/frus1952-54Guat>.

269. See James X. Dempsey, *The CIA and Secrecy*, in *A CULTURE OF SECRECY*, *supra* note 250, at 53–55 (discussing the CIA's interest in openness in the early 1990s).

270. CULLATHER, *supra* note 263, at vii–ix, xiv.

Archives in 1997.²⁷¹ Stanford University Press subsequently published it in 1999 with the title *Secret History: The CIA's Classified Account of Its Operations in Guatemala, 1952–1954*, retaining the same redactions the CIA had made upon the manuscript's declassification.²⁷²

In theory, *Secret History* could constitute a milestone text in the disclosure of American Cold War secrets—an institutional CIA history of a key covert operation that had proved enormously influential, not only in Guatemala, but throughout the Western Hemisphere, while it has remained largely unknown to most Americans. Through no fault of Cullather, however, it did not. The declassified version of his manuscript was extensively redacted, with not only names but also parts of the operation removed—including, ironically, a passage on how the Eisenhower administration kept news of the CIA's involvement in the coup secret from Americans.²⁷³ The scope of Cullather's assigned project did not lend itself to serving as a comprehensive history anyway, and the documentary release that the CIA originally stated would accompany Cullather's report included a limited amount of materials.²⁷⁴ *Secret History* only serves as a partial disclosure, then, because the bureaucratic apparatus of the clandestine service appears to have proven capable of retaining history's secrets long after the Guatemala coup it engineered.

Indeed, the historic record remains contested regarding details, personal identities, and especially the larger historiographical questions regarding American motives and the relative moral purity of the nation's intent.²⁷⁵ Was the United States motivated by the desire to protect the United Fruit Company, a powerful American corporation, from nationalization and land reform?²⁷⁶ Or to save Guatemala from communist and especially Soviet influence?²⁷⁷ Or simply to protect national, and perhaps neo-colonial, American interests?²⁷⁸ These questions remain "secret," in the sense that answers, if they exist, may lie buried in some file cabinet in CIA headquarters. Having incrementally increased the historical record, Cullather's account provided confirmation about some aspects of existing historical hypotheses but could not rule out competing

271. NICHOLAS CULLATHER, *OPERATION PBSUCCESS: THE UNITED STATES AND GUATEMALA 1952–1954* (1994).

272. CULLATHER, *supra* note 263, at iii–xv, xvii.

273. *Id.* at 119. See generally Robert Shaffer, *The 1954 Coup in Guatemala and the Teaching of U.S. Foreign Relations*, PASSPORT (2004), available at <http://www.shaftr.org/old/teaching/Shaffer1.pdf>.

274. CULLATHER, *supra* note 263, at xiv–xv; Press Release, Ctr. for the Study of Intelligence, Release of Records on 1952–54 Guatemala Covert Actions (May 23, 1997) (on file with Author).

275. See Richard H. Immerman, Book Review, 106 AM. HIST. REV. 605, 605 (2001) (reviewing CULLATHER, *supra* note 263).

276. See SCHLESINGER & KINZER, *supra* note 262, at 106 (2005).

277. See IMMERMAN, *supra* note 262, at 68, 82.

278. See GLEJESES, *supra* note 265, at 7.

ones or lay bare the full truth.²⁷⁹ Viewed this way, the secrecy apparatus won—some of the operational specifics and the larger motivations of the Guatemala coup remain as obscure today as they were in the coup's immediate aftermath.²⁸⁰

But this view of *Secret History* and the Guatemala coup is incomplete for two reasons, each of which should be familiar by this point in the Article. Despite the CIA's broad use of its classification authority, general and specific information about American involvement was immediately available and known within Guatemala²⁸¹ and throughout Western Europe,²⁸² and it became more widely known in the United States through incidental disclosures and responses to FOIA requests beginning in the 1970s.²⁸³ The intervening decades have seen the disclosure of more information. In 2003, nearly fifty years after the coup, the State Department issued a *FRUS* volume with a more expansive collection of documents about the coup, and the CIA has made thousands of documents (many of them redacted) available on its website.²⁸⁴ Additional documents had previously come to light during Guatemala's truth and reconciliation process, in aid of which the Clinton administration declassified thousands of documents and the National Security Archive produced a documentary history tracing American involvement in Guatemala from the coup through the 1990s.²⁸⁵ Formal and informal mechanisms of information disclosure and circulation have curtailed the secrecy that elements of the state continue to try to impose.

Secret History has therefore become part of the broader unveiling of the secret history of the U.S. role in Guatemala's 1954 coup, some of which has been the consequence of official state action. Much of the CIA's prized secret history was in fact not secret.²⁸⁶ This is not to defend the CIA's effort to keep secrets, nor is it to deny the value of disclosure

279. See generally Stephen M. Streeter, *Interpreting the U.S. Intervention in Guatemala: Realist, Revisionist, and Postrevisionist Perspectives*, 34 HIST. TCHR. 61 (2000).

280. See Immerman, *supra* note 275 (complaining of the CIA's "behavior" in refusing to release unredacted versions of classified documents that could conceivably resolve significant historical disputes).

281. See GLEJESES, *supra* note 265, at 3–7.

282. See Sharon I. Meers, *The British Connection: How the United States Covered Its Tracks in the 1954 Coup in Guatemala*, 16 DIPLOMATIC HIST. 409, 419, 422–23 (1992).

283. CULLATHER, *supra* note 263, at 119–23; SCHLESINGER & KINZER, *supra* note 262, at ix–xi, xxxvii–viii (2005).

284. See *Guatemala*, CENT. INTELLIGENCE AGENCY, <http://www.foia.cia.gov/guatemala.asp>; see also TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 562 (2007); *Foreign Relations of the United States*, *supra* note 268.

285. See NAT'L SECURITY ARCHIVE, DEATH SQUADS, GUERRILLA WAR, COVERT OPERATIONS, AND GENOCIDE: GUATEMALA AND THE UNITED STATES, 1954–1999 (GUATEMALA AND THE U.S.) (2000); William Clinton, *Remarks in a Roundtable Discussion on Peace Efforts in Guatemala City, March 10, 1999*, in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON 340 (1999).

286. See Immerman, *supra* note 275.

and the more complete picture that further access to documents can bring. The CIA's resistance to making the historical record of its operations available to the public within a reasonable period of time is inexcusable. But my argument has been that secrecy proves much more difficult to maintain than its proponents assume. The CIA could only exert its full control over its own secret history, not the history to which the public gained access through other sources and authorities. At the same time, its secrecy merely increased the CIA's mythological status in the United States as a preeminent tool of American foreign policy, and its status elsewhere as a representative of American imperialism.²⁸⁷ If most Americans remain ignorant of their nation's sordid history in Guatemala, the cause is as much ideological as it is the public's difficulty in obtaining information about it.²⁸⁸

In the second edition of *Secret History*, published in 2006, Cullather suggests a second way that secrecy has proven implausible. In explaining his decision to keep the original redactions imposed by the CIA untouched, even though he could have inserted them with information gleaned from open sources, Cullather wrote:

I have received more compliments on the eloquence of the gaps than on any of the legible passages. Readers have found they can check their speculations for fit, and search the blank spaces for clues on the aspects of the operation that the agency, even after 50 years, prefers to cloak in "plausible deniability."²⁸⁹

Redactions might impose secrecy, Cullather's readers told him, but they do not foreclose the effort—informed by other sources—to find the hidden meaning that the state has tried to conceal. "Eloquence" suggests that the empty spaces speak both of the missing content and of what those empty spaces say about the state that has removed their content.²⁹⁰ Secrecy law and practice can render history "secret," but it cannot fully control historical information, practice, and knowledge.²⁹¹ It may keep

287. On the CIA's mythological status both before and after the mid-1970s disclosure of the checkered history of its covert operations, see OLMSTED, *supra* note 246, at 13–15, 186–89.

288. See TIMOTHY MELLEY, *THE COVERT SPHERE* 13 (2012).

289. NICK CULLATHER, *SECRET HISTORY: THE CIA'S CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA* ix (2d ed. 2006).

290. The CIA's redactions of Cullather's original manuscript literally erased text and left square brackets surrounding empty space; the university press edition repeated this technique.

291. The Guatemala case is not unique. After the State Department refused to allow declassification of certain documents related to British Guyana, *New York Times* journalist Tim Weiner discovered the nature of the classified materials by using open source materials not subject to classification. His investigation revealed the existence of an American covert operation, ordered by President Kennedy, to unseat the nation's democratically elected leader. See Tim Weiner, *A Kennedy-C.I.A. Plot Returns to Haunt Clinton*, N.Y. TIMES, Oct. 30, 1994, at A10; see also COLIN A. PALMER, *CHEDDI JAGAN AND THE POLITICS OF POWER* 246–69 (2010); STEPHEN G. RABE, *U.S. INTERVENTION IN BRITISH GUIANA: A COLD WAR STORY* 151–73 (2005); see WEINER, *supra* note 284, at 191–92, 591–92

parts of the state veiled, but it reveals the state's efforts to veil itself—and in the process reveals the United States' antidemocratic tendencies.

CONCLUSION

Deep, long-lasting secrecy proves quite difficult to accomplish in practice. The formal legal limits on secrecy, as well as the informal means by which information flows out of the state, perform the crucial service of making the state more visible. We should not, however, mistake this movement of information for “transparency,” or even for a step towards a gloriously transparent state. As this Article has argued elsewhere, we can never achieve a perfectly visible government—and, in fact, we would not even want one if it were achievable.²⁹² The concept of “transparency,” like the concept of “secrecy,” assumes the law's ability to control information, an assumption belied by decades of frustrating experience with open government laws.²⁹³ Both concepts are implausible.

This is no reason to despair. This Conclusion notes three implications of this implausibility for understanding and responding to government secrecy: (1) recognizing it as a political practice subject to political accountability, (2) conceding law's limits as a means to control information, and (3) developing legal reforms that can hasten official disclosure.

First, secrecy is paradoxically a very public issue, and one for which excessively secretive officials can be held politically accountable. As Cheney has himself noted, secrecy can not only fail, revealing the information it sought to hide, but can also be exposed and criticized as an undemocratic practice. In the “leaky city” of the nation's capitol, Cheney wrote in an essay published three years after completion of the congressional investigation of Iran-Contra, no secret stays buried too long, and no president's failed cover-ups go unpunished.²⁹⁴ Indeed, the *Minority Report* itself conceded that President Reagan was forced “to pay a stiff political price” not only for his appointees' illegal actions in Iran-Contra, but also for their secrecy and attempted concealment of the program.²⁹⁵ The more secrets, and the deeper they are kept, the greater the risk that the President takes in keeping them—a risk that can prove

(describing history that may have been secret in the United States, but was widely known in Guyana); See generally Festus Brotherson, Jr., *The Foreign Policy of Guyana, 1970–1985: Forbes Burnham's Search for Legitimacy*, 31 J. INTERAMERICAN STUD. & WORLD AFF. 9 (1989) (recounting this history in an academic article in 1989); Weiner, *supra* note 284 (quoting the president defeated in part through American intervention in the election, as stating that, “[e]verybody in Guyana knows what happened”).

292. Fenster, *Seeing the State*, *supra* note 177, at 671–72.

293. Fenster, *Opacity*, *supra* note 28, at 914–19.

294. Cheney, *supra* note 148, at 116.

295. IRAN-CONTRA AFFAIR REPORT, *supra* note 148, at 452.

effective as an alternative to formal laws and legal proceedings in disciplining the executive branch. Such political costs cannot replace the formal legal limitations on secrecy that open government laws (not to mention, for criminal conspiracies and perjury, criminal laws) provide, but they serve as a mechanism by which the informal limits on secrecy can punish wrongdoers.

This understanding of secrecy as a tool that has potential political costs suggests a more foundational informal check on information control. If “[t]he cover up is worse than the crime,”²⁹⁶ as the conventional wisdom teaches about Watergate, then secrecy appears to have an ethical dimension based upon a widely-shared, intuitive distinction between legitimate and illegitimate secrecy. Although it lacks precise meaning, the concept of “transparency” functions as a nearly universal liberal democratic value, as is the notion that some secrets are too dangerous to a nation and society to warrant disclosure.²⁹⁷ Partisans might disagree about whether an individual instance of secrecy is excessive, but in doing so they must frame their arguments in widely-acknowledged and used terms. The NEPDG episode illustrates this well: NEPDG’s policy development process appeared absurdly secretive, as opponents and even members of the administration noted, and its secrecy provided the administration no political benefit and likely exacted political costs.²⁹⁸ The more significant and pervasive secrecy that followed in the Bush administration’s post-9/11 anti-terrorism campaign, which the NEPDG episode launched and rehearsed, proved more temporarily effective at controlling information. But information about many of the administration’s programs ultimately leaked to the public over the course of the administration’s second term, from the torture of prisoners and detainees to the warrantless wiretaps of domestic communications.²⁹⁹ By the end of the Bush presidency, the administration—and especially Cheney—had become quite politically unpopular, at least partially because of the seemingly unethical nature of excessive secrecy. Barack Obama explicitly included open government as a platform in his 2008 campaign, in part to contrast himself with the Bush-Cheney White House.³⁰⁰ The first implication of secrecy’s implausibility, then, is that it

296. David Johnston, Coverup: *Watergate’s Toughest Lesson*, N.Y. TIMES, Feb. 15, 1998, at SR5 (“Watergate bequeathed many things to history, including this famous cliché: The cover-up is worse than the crime. Politicians haven’t necessarily absorbed this lesson, but the legal system has.”); Frank Rich, *We’re Not in Watergate Anymore*, N.Y. TIMES, July 10, 2005, at SR12 (“[T]he most basic lesson of Watergate: [T]he cover-up is worse than the crime.”)

297. Fenster, *Seeing the State*, *supra* note 177, at 624–26.

298. See discussion *supra* notes 188–194.

299. Baker, *supra* note 59.

300. For further discussion on Cheney and Bush’s unpopularity following the end of the Bush presidency, see Lydia Saad, *Little Change in Negative Images of Bush and Cheney*, GALLUP POL.

reveals the *political* nature of information control, and it demonstrates how politics serves both as a key motivation to use secrecy and as a crucial check on its overuse.³⁰¹ It also reveals the necessity of these informal means of secrecy, and the importance of avoiding draconian leak laws³⁰² and excessive prosecution of those who do leak.³⁰³

A second implication of secrecy's implausibility is the shift it suggests for the study of secrecy and transparency away from a binary, black-and-white conception of the state as either open and transparent or closed and opaque. As Part V illustrated in its description of historic covert operations, events that are kept in deep secrecy become known as their details leak out over time, whether through formal or informal channels. Most events exist in a gray world of partial secrecy and partial disclosure, where even information about events whose existence the government denies is available from open sources,³⁰⁴ and where even events about which the government has made broad disclosures remain somewhat secret and mysterious.³⁰⁵ Government information is not subject to control via an on-off switch; instead, it appears incrementally over time, both around and in spite of the literal and figurative black marks of government efforts to control its spread.

Third, and as a consequence of the shift from a binary understanding of secrecy and disclosure, legal reform should focus on temporal commitments to disclosure that force the state to recognize the decreasing value of once-secret information and require the state, as a default duty, to release documents after a certain interval.³⁰⁶ This would formalize and

(Apr. 3, 2009), <http://www.gallup.com/poll/117250/Little-Change-Negative-Images-Bush-Cheney.aspx>. For further discussion on their current unpopularity, see George E. Condon Jr., *Romney Embraces Cheney*, *Sort Of*, NAT'L J. (July 17, 2012), <http://nationaljournal.com/politics/romney-embraces-cheney-sort-of-20120717>. For further discussion on Obama's campaign, see Fenster, *Seeing the State*, *supra* note 177, at 624–25.

301. I make this point more explicitly in Fenster, *Transparency Fix*, *supra* note 24.

302. See generally JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 26–30 (2013) (discussing recently proposed legislation that would expand criminal liability for leaks).

303. For further discussion on the Obama administration's excessive leak prosecutions, see Liptak, *supra* note 8; Josh Gerstein, *Despite Openness Pledge, President Obama Pursues Leakers*, POLITICO (Mar. 7, 2011, 4:40 AM), <http://www.politico.com/news/stories/0311/50761.html>; Shane Harris, *Plugging the Leaks*, WASHINGTONIAN (July 21, 2010), <http://www.washingtonian.com/articles/people/plugging-the-leaks>. For an argument about the cyclical, largely symbolic nature of anti-leak campaigns in a political system that requires leaks, see Pozen, *supra* note 85.

304. One famous example of this phenomenon is the case of the Glomar Explorer, a ship that the CIA attempted to use to recover a sunken Soviet nuclear submarine whose existence the CIA continued to try to keep secret despite numerous leaks and front-page stories in major newspapers. See Matthew Aid et al., *Project Azorian: The CIA's Declassified History of the Glomar Explorer*, NAT'L SEC. ARCHIVE (Feb. 12, 2010), <http://www.gwu.edu/~nsarchiv/nukevault/ebb305>.

305. See *supra* notes 268–280 and accompanying text.

306. See Fenster, *Opacity*, *supra* note 28, at 942–45; James A. Goldston et al., *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 486 (1986).

hasten a process that is likely to occur in any event. Laws and regulations have moved in this direction, albeit with varying degrees of success. These include the mandatory declassification of most documents after a certain time period under the current Executive Order establishing the classification system,³⁰⁷ and the staged release of presidential documents under the PRA.³⁰⁸

The fact that neither commitment has proven entirely successful suggests (as ever) the stubborn tendency of the administrative state and the constitutional privilege granted to the executive to resist the disclosure of information.³⁰⁹ Recall, however, the formal and informal means that enable a President and executive branch to control information in certain circumstances for a period of time.³¹⁰ This authority, whose logic is entrenched in the Constitution, will not disappear. If they are properly implemented and enforced, time-based reforms can help compel the regular release of records and force the executive branch to recognize disclosure's inevitability. Law can neither perfect secrecy nor cure its excesses, but—working in a manner consistent with secrecy's implausibility and the difficulty of information control—it might ameliorate some of its ill effects.

307. Exec. Order No. 13,526, § 3.3(a), 75 Fed. Reg. 707, 714 (Dec. 29, 2009) (requiring declassification of documents more than twenty-five years old that are determined to have “permanent historical value,” subject to limitations). This executive order, issued by President Obama, revived the automatic declassification program established first by President Clinton. See Exec. Order No. 12,958, § 3.4, 60 Fed. Reg. 19,825, 19,832 (Apr. 17, 1995), as amended Exec. Order No. 13,142, 64 Fed. Reg. 66,089 (Nov. 19, 1999). For a summary of the Clinton program, see Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain*, 4 I/S: J. L. & POL'Y FOR INFO. SOC'Y 479, 486–87 (2008). The concept itself dates back at least to the *Pentagon Papers* era. See Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1045 n.450 (1973); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 280 (1971).

308. See *supra* notes 253–261 and accompanying text.

309. On the problems with existing automatic and mandatory declassification programs, see Steven Aftergood, *Declassification Advances, But Will Miss Goal*, SECRECY NEWS (July 20, 2012), http://www.fas.org/blog/secrecy/2012/07/miss_goal.html; Steven Aftergood, *NARA Proposes New Rule on Declassification*, SECRECY NEWS (July 11, 2011), http://www.fas.org/blog/secrecy/2011/07/nara_declass.html.

310. See *supra* Parts I, II.