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Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy

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SUPREMELY OPAQUE?: ACCOUNTABILITY, TRANSPARENCY, AND PRESIDENTIAL SUPREMACY

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INTRODUCTION

From the beginning, it sounded too good to be true. Like a modern-day inventor announcing that she has constructed the world's safest, most environmentally sound, yet fastest and most powerful mode of transportation, the Constitution's Framers boasted that they had crafted a presidency both deeply efficacious and unthreatening to liberty. What is more, the Framers explained that a single ingredient, when added to the Constitution's other structural elements, would facilitate both qualities. That ingredient was unity, whereby one person, not a multi-member body, would serve as President, and the presidency would have no constitutionally annexed council. Unity, promised the Framers and other founding era constitutional proponents, would create "energy" and accountability. With respect to the former, Alexander Hamilton stated in the Federalist that "[u]nity is conducive to energy" because "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . . ."[1] With respect to the latter, Hamilton assured fellow Founders in the very same essay that unity would also conduce to accountability. He explained that "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness." One person "will be more narrowly watched and most readily

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1. THE FEDERALIST NO. 70, at 422–23 (Clinton Rossiter ed., 2003).

suspected."[2] This assurance—that the new presidency's structure would support both energy and accountability—was echoed throughout the framing and ratification debates.[3]

Of course, unity by itself could not achieve all of these benefits. To differentiate the new President from a monarch, the Founders explained that unity would combine with other structural innovations—including presidential election, impeachment, Congress' power to declare war, and the Senate's shared role in the appointment and treaty processes—to balance energy and accountability.[4] Perhaps the most delicate mechanisms in this promised structure were those to control information. A key component of the energy trumpeted by the Founders was secrecy. Yet founding assurances of presidential accountability assumed transparency. It is no accident, after all, that Hamilton spoke of accountability as a product of the executive's being "watched." Other constitutional supporters similarly assumed transparency when they spoke of unity and accountability. For example, William Davie, championing ratification in North Carolina, explained that the Framers' predominant reason for creating a unitary presidency was:

> the more obvious responsibility of one person. It was observed that, if there were a plurality of persons, and a crime should be committed, when their conduct was to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one man.[5]

Similarly, a constitutional proponent wrote in the *Virginia Independent Chronicle* that "secrecy and dispatch" will attach to the unitary presidential office. Yet the author placed greater emphasis on the fact that "[t]he *United States* are the *scrutinizing spectators* of [the President's] conduct, and he will, always, be the distinguished object of *political jealousy*."[6]

How might one reconcile these twin founding promises that Presidents would act both secretly and transparently? Were the Founders "lying liars?"[7] Were they delusional? Elsewhere, I have argued that the seeming

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2. *Id.* at 426–27, 429.

3. *See infra* note 4.

4. *See, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 1, at 414–21; 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VIRGINIA 1097–98 (statement of Edmund Randolph) (John P. Kaminski & Gaspare J. Saladino eds., 1990); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, PENNSYLVANIA 141 (essay of Tench Coxe) (Merrill Jensen ed., 1976); *id.* at 495 (statement from Pennsylvania ratification debates).

5. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 347 (Max Farrand, ed., Yale Univ. Press 1966).

6. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VIRGINIA, *supra* note 4, at 245 (quoting VA. INDEP. CHRON.).

7. This term was famously used, albeit in an entirely different context and not in reference to the Founders, by (now) U.S. Senator from Minnesota, Al Franken. *See* AL FRANKEN, LIES

contradiction is reconciled in the Constitution's ingenious structure for information control.[8] For ease of reference, I refer to this structure as the constitutional framework of "dynamic vigilance." At the core of dynamic vigilance is the basic rule of macro-transparency: while laws may authorize the President to execute them in secret (or with "micro-secrecy"), the laws themselves are transparent (or "macro-transparent"). Another key component of dynamic vigilance is the Constitution's provision for an array of "accountability tools." Congress has much leeway to create such tools through its powers under Article I, § 8 of the Constitution. For example, Congress can pass and has passed legislation requiring the executive branch to keep the congressional intelligence committees apprised of intelligence programs and activities. Such information-sharing measures support and maintain macro-transparency. Without such tools, there would be little to stop the executive branch from secretly circumventing statutory requirements, and thus from transforming micro-secret programs into macro-secrets. Macro-secrets are those about which outsiders—in this case Congress, the courts, and the public—are unaware and thus cannot even try to check.[9] Other accountability tools are provided by the Constitution directly. For example, the First Amendment supports the rights to free speech and a free press, and there is widespread agreement among free speech theorists that the First Amendment exists at least partly to facilitate self-government.[10] Indeed, in championing the original Constitution—which did not, of course, contain a Bill of Rights but which constitutional proponents argued did not authorize Congress to limit the press[11]—proponents were able to point to "the free press" "[a]s a safeguard against

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(AND THE LYING LIARS WHO TELL THEM): A FAIR AND BALANCED LOOK AT THE RIGHT (2003).

8. I have not previously used the term "dynamic vigilance." Otherwise, however, the bulk of this paragraph elaborates on ideas that I have introduced elsewhere. *See generally* Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881 (2008); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008); Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163 (2007); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

9. The concepts of "macro" and "micro" secrecy parallel in important respects those of "deep" and "shallow" secrecy. For more discussion on deep and shallow secrets see, *e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 121-26 (1996); KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 21–22 (1988); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260–61 (2010); Kitrosser, *Secrecy and Separated Powers*, *supra* note 8, at 493–94.

10. *See* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 126–29 (2004). (arguing that self-government and its underlying theoretical premises form part of virtually every major theory of free-speech value); *see also, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (The Lawbook Exch. 2000); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970).

11. *See, e.g.*, 5 THE FOUNDERS CONSTITUTION 122 (Univ. of Chi. Press 1987) (quoting 2 ELLIOT'S DEBATES 448–50 (James Wilson, Penn. Ratifying Convention)).

abuses."[12]

To these elements of dynamic vigilance I would add one more—the very limited constitutional room to depart from statutory restrictions. I refer to this as "extraordinary prerogative." Presidential energy and historic rationales for the same suggest that the President must have discretion to act unilaterally to preserve the nation when, but only when, there is no time for Congress first to enact or amend statutes to avert catastrophe.[13] The limited nature of this exception is as crucial as its substance. Without such limitation the exception would swallow the constitutional rule that lawmaking must be a deliberative, collaborative, and macro-transparent process. Any deviations from statutory limits thus must be timed to coincide not only with an emergency but with the period in that emergency before new legislation can reasonably be sought through the ordinary law-making process. These limits can only be enforced through accountability mechanisms like those described above. For example, absent some degree of First Amendment protection for internal executive branch whistleblowers and the press, congressional power to demand information about executive branch activities, and judicial power to scrutinize executive efforts to block lawsuits through state secrets claims, the President could too easily hide transgressions.

The notion of extraordinary prerogative owes a debt to John Locke's concept of executive prerogative, with which the Constitution's Founders were deeply familiar. The basic idea of Lockean prerogative is that an executive may at times be warranted in acting without or even against legal authority to address emergencies. However, whether the actions are warranted are for the people to judge. Furthermore, where an executive acts in the absence of, or against legislation in response to unforeseeable events, he is expected to do so only until "the [legislature] can conveniently be assembled to provide" appropriate legislation.[14]

Political and legal theorists have applied derivations of Lockean prerogative to the U.S. Constitution. A key contribution of these derivations is the notion that the people or their representatives must have an opportunity to review and deliberate on an act of prerogative shortly after the fact in order to ratify or punish it. Some argue, for example, that the

12. DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 34 (1981).

13. *Cf., e.g.*, FORREST MCDONALD, THE AMERICAN PRESIDENCY 173 (1994) (recounting argument made by Madison and Gerry at constitutional convention that the Executive must be empowered to "repel sudden attacks").

14. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 421–27 (Cambridge Univ. Press 1963); *see also* BENJAMIN A. KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER 67 (2009) (explaining Locke's view that, if the executive exercises prerogative outside of "the standing laws for the public good," "a properly designed Constitution should seek that the 'Legislative' soon 'be Assembled to provide for it'").

President may exceed the Constitution in an emergency but that he must then throw himself on the judgment of Congress or the people.[15] Some members of the founding and early post-founding generations took this view.[16] Others have argued that subsequent ratification can retroactively make such actions constitutional.[17] Under either variant, mechanisms of dynamic vigilance are crucial to prevent the President from cloaking or misrepresenting his actions so that they cannot meaningfully be judged.[18]

The dynamic vigilance framework stands in sharp contrast to an increasingly influential school of thought that I refer to here as "presidential supremacy." Presidential supremacists read the President's constitutional powers to preclude Congress or the courts from limiting, overseeing, or otherwise checking presidential actions in many cases. Supremacy encompasses, but is not limited to, the school of thought sometimes called "exclusivity." Exclusivity is the view that statutes that unduly restrict the President's discretion in either his commander-in-chief or executive capacity are unconstitutional.[19] Exclusivity has received some sustained scholarly attention of late.[20] This is fitting, as exclusivity has risen from near-obscurity to substantial influence over the past several decades.[21] For purposes of this article, exclusivity is important for the threat that it poses to the transparency and accountability mechanisms that the Constitution builds around the Presidency's capacities. Most obviously, exclusivity poses such a threat to the extent that it justifies presidential circumvention of statutory openness requirements. It poses an even larger threat, however, where it is

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15. *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099–1100, 1111–15 (2003); Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 321–24, 329–30 (1952).

16. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392–97 (1989); Wilmerding, *supra* note 15, at 323–29, 338.

17. *See* KLEINERMAN, *supra* note 14, at 9–10.

18. On a similar note, many scholars observe that while President Lincoln took a number of actions without prior congressional consent and of questionable constitutionality in the midst of the Civil War, he did so transparently and threw himself on the judgment of Congress to ratify or reject his actions after the fact. *See, e.g.*, Michael A. Genovese, *The Roots and Development of Executive Prerogative in the United States*, paper presented at 2009 Annual Meeting of American Political Science Association, 21–22, 24–25; KLEINERMAN, *supra* note 14, at 177–87; DANIEL FARBER, LINCOLN'S CONSTITUTION 24, 137–38, 194–95 (2003).

19. *See, e.g.*, Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1401–02 (2010) (describing exclusivist reasoning); David J. Barron & Martin S. Lederman, *The Commander-in-chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1027 (2008) [hereinafter Barron & Lederman II] (invoking the term "presidential exclusivity" to describe this school of thought); David J. Barron & Martin S. Lederman, *The Commander-in-chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 694 (2008) [hereinafter Barron & Lederman I] (describing exclusivist reasoning).

20. *See supra* note 19.

21. *See* Kitrosser, *supra* note 19, at 1405–06, 1421–33; *id.* at nn. 126–28 and accompanying text (citing to Barron & Lederman II, *supra* note 19, and Barron & Lederman I, *supra* note 19, for their findings as to the relative newness of exclusivity).

used to justify secret law. Secret law occurs when the President not only circumvents a statute, but when he does so in secret. In such cases, the President effectively amends public law without the knowledge of the public or the other branches and without going through the macro-transparent processes mandated by Article I, § 7 of the Constitution.

Exclusivity does not exist in isolation, which is why I refer to the larger school of thought—presidential supremacy—of which it forms a part. It is important to understand this larger school of thought for at least two reasons. First, supremacist arguments, taken together, are directed against virtually every means through which presidential misdeeds may be brought to light by members of the executive branch, by the other branches, or by the press and the people. The reasoning that underlies exclusivity—the notion that the other branches may not unduly restrict the President's discretion as commander-in-chief or chief executive—also supports the supremacist view that an executive decision to classify information obviates any First Amendment concerns over criminally punishing conveyance of the same. It further underscores supremacist arguments to the effect that courts should defer to executive and state secrets privilege claims without examining the documents at issue. This Article describes four forms of supremacist reasoning directed against transparency-based checks on the executive: executive privilege, state secrets privilege, exclusivist arguments in support of secret law, and "classified speech" arguments to the effect that classifying information effectively removes it from the protections of the First Amendment.

Understanding this array of arguments helps one to grasp supremacy's implications for the structural balance between energy and accountability, and between secrecy and transparency. At its core, supremacy conflates the President's energetic capacities, including secrecy, with a constitutional right to exercise the same in the face of inter-branch checks. From the perspective of dynamic vigilance, supremacy halves the constitutional plan, clearing away the accountability mechanisms that are meant to block abuses of presidential energy.

The trouble is not that supremacists ignore accountability completely. Rather, they seem to assume that supremacy leaves avenues for accountability open or even enhances accountability. A typical refrain, for example, is that while supremacy may prevent Congress from curtailing certain national security programs, Congress is free to cut off funding for or investigate such programs, and individuals wronged by them are free to bring lawsuits alleging statutory or common law violations.[22] Supremacists

22. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS 125–56 (2006); *Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 131, 134–35, 137–38 (1978) (testimony of Robert Bork).

add that the degree of presidential control that they champion enhances accountability because it makes it easy for the public to understand who to blame—the President, naturally—should they dislike particular programs.[23] Yet such arguments overlook supremacy's impact on the ability of Congress, the people, and the courts to know or learn of the information that would enable them to take responsive actions through oversight, litigation, or voting.

A second reason to analyze supremacist arguments involving information control as a group is the light that such analysis sheds on their common features. Viewing the arguments together, for example, enables one to identify as a common core the conflation of presidential capacities with a legal entitlement to exercise the same in the face of inter-branch checks. It also illuminates the fact that supremacist claims exist on a larger spectrum of arguments—ranging from more to less radical—that reason from the President's capacities. In the classified speech context, for example, executive appeals for serious judicial consideration of the executive's dangerousness judgment that do not preclude the judiciary's making the ultimate substantive determination under the First Amendment are not particularly radical and do not warrant the supremacist label. This is a very different thing from an argument to the effect that the executive's decision to classify a piece of information effectively removes any First Amendment protections—and thus any substantive judicial role—regarding conveyance of the same.

Overall, then, this article has two main goals, and they are largely descriptive. First, it explores major supremacist arguments and their potentially deep impact on transparency and accountability. Second, it seeks to shed more light on supremacist reasoning, the range of supremacist argument, and the relationship between supremacist claims and other less radical claims. These observations have obvious normative implications. Indeed, I have already suggested here my own view that supremacy's relationship to information control calls into question its constitutional legitimacy. Furthermore, recognizing that not all executive privilege, state secrets, or classified speech claims are equally radical can undermine supremacist arguments that equate relatively non-radical historical examples with far more radical contemporary claims. Yet, while I make no bones about these normative implications, this article's major, immediate

23. *See, e.g.*, MINORITY REPORT, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 460 (1987) (Founders left national security and foreign affairs largely to the President in part for democratic reasons: "there would be no way for the people to hold any one person accountable for a legislative decision."); *cf.* YOO, *supra* note 22, at 180 (noting that "[o]ur nation had a presidential and congressional election after Abu Ghraib and the leaking of the OLC memos. If the people had disagreed with administration policies, they could have made a change.").

goals are the descriptive ones just identified.

Part I elaborates on the concept of supremacy and its major justifications. Part II explains that supremacist claims exist along a spectrum ranging from non-radical, non-supremacist arguments (for example, claims that assert some but not total deference to presidential secrecy judgments and that do not assert exclusivity, or a right to circumvent statutes) to very radical supremacist claims (such as those that assert an exclusivist right to secretly circumvent statutes). Part III elaborates on four types of supremacist claims and their relationships to transparency.

I. PRESIDENTIAL SUPREMACY: THE CONCEPT INTRODUCED

Supremacists read the President's constitutional powers to preclude Congress or the courts from limiting, overseeing, or otherwise checking presidential actions in many cases. Rather than a single theory, supremacy can more accurately be described as an interpretive tendency with multiple manifestations. Below, I discuss several major forms of supremacy and their justifications. Initially, however, I wish to explain the more basic textual and historical points that underlie supremacy generally.

One core justification for supremacy is that the President has a duty to protect national security that cannot constitutionally be compromised by legislative or judicial restrictions.[24] The second core justification for supremacy is that the President has a constitutional discretion to protect the confidentiality of high-level executive branch communications and that this discretion may not be unduly hindered by legislative or judicial information-sharing demands.[25]

These justifications are not always linked explicitly to particular constitutional clauses. When supremacists do draw such links, however, they tend to focus on one or both of two clauses. The first is Article II's Vesting Clause. It reads, "The executive Power shall be vested in a President of the United States of America."[26] Supremacists start with the notion—sometimes called the "Vesting Clause thesis"[27]—that the clause does not merely introduce the more specific powers and duties subsequently detailed in Article II, such as the power to appoint judges and executive branch officers "by and with the Advice and Consent of the Senate."[28]

24. *See* Kitrosser, *supra* note 19, at 1401–02.

25. *See, e.g., infra* text accompanying notes 70–72.

26. U.S. CONST., art. II, § 1, cl. 1.

27. *See* Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 376 (2008) (referring to the "Article II Vesting Clause thesis" as "one of the most hotly debated propositions in modern constitutional law").

28. U.S. CONST. art. II, § 2, cl. 2.

Rather, the clause is itself a grant of substantive power.[29] Supporters of the Vesting Clause thesis argue that, at the time of the founding, the term "executive power" was understood by educated persons to encompass the prerogatives of the British Crown, including exclusive control over foreign affairs and national security. Through the Vesting Clause, the Founders bequeathed these prerogatives to the President, excepting only those parts explicitly delegated to the Senate or the Congress as a whole in other parts of Articles I or II.[30] This scheme is confirmed by constitutional text and structure, say Vesting Clause proponents. For example, they contrast the language of Article II's Vesting Clause with that of Article I's Vesting Clause. Article I explicitly vests Congress only with "all legislative Powers *herein granted*."[31] The difference in language, they say, indicates that Article II's Vesting Clause does more than simply reference powers enumerated elsewhere in Article II. Rather, it grants all powers that the Founders understood to be executive in nature, with the exception only of those explicitly delegated elsewhere.[32]

Of course, even if an interpreter supports the Vesting Clause thesis, they still must determine what "the executive power" meant to the founding generation, and what parts of it were left to the President and not delegated elsewhere in the Constitution. Depending on one's answers to these questions, exclusivity need not follow from the thesis.[33] For example, some modern proponents of the Vesting Clause thesis have advanced it only to support a fairly modest set of powers—such as powers to articulate foreign policy or "protective" powers—that are subject to statutory limits.[34]

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29. JOHN YOO, CRISIS & COMMAND 35, 43–47 (2009); Lawson, *supra* note 27, 389–91. For earlier supremacist uses of the Vesting Clause thesis, *see, e.g.*, Lawrence J. Block & David B. Rivkin, Jr., *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J. L. & PUB. POL'Y 303, 307–20 (1989); Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was* Congress *the Real Lawbreaker?*, 11 HOUS. J. INT'L. L. 83, 91–99 (1988–89).

30. *See infra* n. 32. For uses of the Vesting Clause not necessarily supremacist in nature, *see infra* nn. 34–35 and accompanying text.

31. U.S. CONST. art. I, § 1 (emphasis added).

32. *See, e.g.*, Lawson, *supra* note 27, at 390. Supporters also cite the plain language of the Vesting Clause, the etymology of the word "vest," the analogy between its uses in Article II and Article III, and the fact that it is used to signify a substantive grant of power elsewhere in the Constitution. *Id.* at 386–88 (summarizing arguments made elsewhere by Lawson, Guy Seidman, Christopher Moore, Steven Calabresi and Kevin Rhodes).

33. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 38 (2006) ("The content of the 'executive Power' granted to the President by the Vesting Clause is an issue separate from whether the Article II Vesting Clause grants power."); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553 (2004) ("even if the Article II Vesting Clause were read as a power-conferring provision, the argument would not tell us which powers the Clause encompasses").

34. *See, e.g.*, Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 22–24, 31–32, 38, 65–66, 69–74 (1993). (deeming the executive power to include a limited protective power to act absent statutory authority, but not to act against statutory

Furthermore, some scholars who rely on the Vesting Clause thesis to support a separate theory—unitary executive theory—have explicitly distanced themselves from aspects of supremacy.[35]

What sets supremacists apart in their use of the Vesting Clause is this: through their readings of "the executive power" and of constitutional clauses that distribute parts of that power outside of the presidency, supremacists find a wide berth of presidential discretion that is supreme over contrary congressional or judicial actions. Among other things, supremacists find fairly broad presidential prerogatives to determine when Congress and the judiciary must be kept in the dark or when statutory directives should be ignored. These conclusions are deeply tied to both their reading of history and their conflation of the President's structural capacities with a constitutional discretion to exercise the same as he chooses. For example, in explaining why supremacist conclusions follow from the Vesting Clause, John Yoo writes:

> At the time of the Constitution's framing, executive power was understood to include the war, treaty, and other general foreign affairs powers. . . . Thus, when the Framers ratified the Constitution, they would have understood that [the Vesting Clause] continued the Anglo-American constitutional tradition of locating the foreign affairs power generally in the executive branch.
>
> Hamilton and the other Federalists did not look to the executive to manage war and peace for tradition's sake. They understood the executive to be functionally best matched in speed, unity, and decisiveness to the unpredictable high-stakes nature of foreign affairs. As Edward Corwin observed, the executive's advantages in foreign affairs include: "[T]he unity of office, its capacity for secrecy and dispatch, and its superior sources of information, to which should be added the fact that it is always on hand and ready

authority); *see also, e.g.*, Lawson & Seidman, *supra* note 33, at 41–42, 45–62 (describing a residual executive power over foreign affairs that is not clearly or necessarily supremacist in nature); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 234–35, 253–56, 262–65 (2001) (describing residual executive foreign affairs powers that do not preclude roles for Congress, though reading some important limits into the latter); *id.* at 238–40 (criticizing theories of "presidential primacy" in foreign affairs).

35. *See* Steven G. Calabresi & Christopher S. Yoo, THE UNITARY EXECUTIVE 18–21 (2008) ("[t]he classic vision of the unitary executive" . . . "had absolutely nothing to do with claims of implied, inherent presidential domestic and foreign policy power of the kind asserted by the [George W. Bush] administration"). *But see* Julian G. Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. PA. J. CONST. L. 615, 615–16, 621 (2010) (arguing that unitary executive theory itself is a form of presidential exclusivity); John C. Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1937–38, 1965–66, 1976–85 (2009) (positing that the reasoning underlying unitary executive theory also supports supremacy).

> for action, whereas the houses of Congress are in adjournment much of the time."[36]

Gary Lawson employs similar reasoning, albeit more tentatively and indirectly, to conclude that the Vesting Clause empowers the President to conduct wartime intelligence gathering operations that Congress likely cannot restrict. In explaining that the Vesting Clause encompasses such exclusive powers, Lawson cites among other things to a defense of the "terrorist surveillance program" or "TSP" by Professor John C. Eastman. The TSP was the program whereby the Bush Administration secretly engaged in warrantless wiretapping for several years despite a statute—the Foreign Intelligence Surveillance Act [FISA]—mandating warrants. Eastman deemed the TSP within the President's powers and not subject to congressional restriction partly because "[o]ur nation's Founders created . . . [an executive] strong enough to 'protect the community against foreign attacks,' with 'secrecy' and 'dispatch' if necessary."[37]

Similar arguments were ventured in the late 1980s, inspired by perceptions that Congress had over-reached in response to the Iran-Contra Affair. A more indirect source of inspiration was the belief that Congress had been unduly fettering the presidency since the 1970s in the wake of Vietnam and Watergate. For example, Robert F. Turner invoked the Vesting Clause thesis as partial explanation for his view that some of the statutory restrictions at issue in Iran-Contra were unconstitutional usurpations of executive power that could be legally circumvented. Turner observed that foreign affairs powers traditionally belonged solely to the executive because "legislative bodies were [deemed] 'incompetent' to manage foreign affairs because they lacked the essential qualities of unity of design, secrecy, and speed of dispatch."[38]

The second major textual hook that supremacists invoke is the commander-in-chief clause of Article II, which reads: "The President shall be Commander-in-Chief of the Army and Navy of the United States."[39] Supremacists sometimes cite this clause alone and sometimes in tandem with the Vesting Clause for the proposition that the President's judgment is supreme as to which national security activities and secrecy measures are necessary to further a wartime effort, to defend against future attacks, or

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36. John C. Yoo, *supra* note 35, at 1984–85.

37. *See* Lawson, *supra* note 27, at 389–93; *id.* at 389–90 n.93 and accompanying text (citing John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 49, 57 (2006)); *see also* Eastman, *supra* this note, at 55–57 ("FISA...may well be unconstitutional" if it restricts the President's power of surveying "communications with enemies of the [U.S.] and people he reasonably believes to be working with them").

38. Turner, *supra* note 29, at 92.

39. U.S. CONST. art. II, § 2, cl. 1.

otherwise to protect the national security.[40] Supremacists often deem it self-evident that the commander-in-chief clause precludes Congress from directing battlefield tactics—e.g., from telling the President, "take that hill." They analogize from that example to other directives that they deem unconstitutional.[41] In defending the TSP, for example, the Department of Justice argued in a public memorandum released shortly after the New York Times revealed the program, that the TSP involved "tactical military decisions" on a global "battlefield."[42]

As with the Vesting Clause thesis, supremacists who invoke the commander-in-chief clause or make inferences from Article II as a whole tend to draw from history. While some arguments are originalist in nature, others use evolving history. In invoking the latter, supremacists argue that the President's role has expanded and Congress' contracted throughout American history, particularly with regard to national security. A long history of presidential initiative and congressional acquiescence in a particular area, they say, supports supremacy in that realm.[43] They often mix such historical points with reasoning conflating presidential capacities and presidential prerogatives.

An example of influential supremacist reasoning that draws on these various factors—founding era history, evolving history, and conflation of capacity with legal right—is the well known report of a minority of congresspersons (hereinafter "Minority Report") who dissented from the Report of the Congressional Committees Investigating the Iran-Contra Affair in 1987. The Minority Report was joined by Senators James

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40. *See, e.g.*, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT, at 6–7, 29–35 (2006) [hereinafter DOJ WHITEPAPER] (positing an exclusivist argument by reference to the Commander-in-chief clause); YOO, *supra* note 22, at 103, 114, 119–22 (describing justifications for wartime exclusivity grounded partly in the Commander-in-chief clause). Of course, the Commander-in-chief argument is not exclusive of the Vesting Clause argument. *See, e.g.*, *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Judiciary Comm.*, 110th Cong. 4 (2008) (written testimony of Michael Stokes Paulsen) (identifying large realm of exclusivist presidential power regarding military and foreign affairs under the commander-in-chief clause and executive power); Lawson, *supra* note 27, at 384 ("[A]lthough the [DOJ WHITEPAPER] does not articulate the Vesting Clause thesis with clarity, it seems clear that the Vesting Clause thesis lurks beneath the argument and provides it with substance."); YOO, *supra* note 22, at 103 (combining Vesting Clause and commander-in-chief arguments); Eastman, *supra* note 37, at 53 (underscoring supremacist argument by reference to commander-in-chief clause, executive power, and the President's "inherent power as the organ of U.S. sovereignty on the world stage.").

41. *See* Barron & Lederman I, *supra* note 19, at 694–95, 705, 750–52 (describing such arguments). *See also, e.g.*, Turner, *supra* note 29, at 118–19 (making such an argument).

42. DOJ WHITEPAPER, *supra* note 40, at 28–35.

43. *See, e.g.*, Kitrosser, *supra* note 19, at 1402–03 (discussing original and evolving history arguments for exclusivity); Barron & Lederman I, *supra* note 19, at 694–98 (citing under-examined exclusivist assumptions about original and evolving history).

McClure and Orrin Hatch and by Representatives Dick Cheney, William S. Broomfield, Henry J. Hyde, Jim Courter, Bill McCollum, and Michael DeWine.[44] Years later, as Vice President, Dick Cheney would point to the Minority Report—written partly by David Addington, then a committee staff member and later chief of staff to Vice President Cheney—as embodying his views on presidential power.[45] The Minority Report argues that some of the statutory directives that President Reagan and his subordinates were said to have violated in the Iran-Contra affair were unconstitutional infringements that the President was free to ignore. The Report cites the founding era premise that a single President would be capable of "decision, activity, secrecy [and] dispatch," and would be relatively accountable for his actions.[46] From this, the Report draws a constitutional presumption that activities that call for such capacities or that involve case-by-case decision-making for which a single person can most readily be held to account belong to the President alone.[47] Among the activities in this category are "the deployment and use of force (but not declarations of war), together with negotiations, intelligence gathering, and other diplomatic communications (but not treaty ratification)."[48]

The Minority Report argues that this founding design has been borne out by actions of the political branches throughout history. The report cites instances in which the President took unilateral action without seeking congressional approval, including through covert operations, intelligence gathering, uses of force, and actions taken pursuant to the President's interpretation of treaties. The report deems it unsurprising that Presidents have frequently asserted rights to act without congressional sanction. It quotes Gary Schmitt's observation to the effect that such assertions follow naturally from the President's structural capacities:

> To some extent, the enumerated powers found in Article II are deceiving in that they appear understated. By themselves, they do not explain the particular primacy the presidency has had in the governmental system since 1789. What helps to explain this fact is the presidency's radically different institutional characteristics, especially its unity of office. Because of its unique features, it enjoys—as the Framers largely intended—the capacity of acting with the greatest expedition, secrecy and effective knowledge. As a result, when certain stresses, particularly in the area of foreign affairs, are placed on the nation, it will "naturally" rise to the forefront.[49]

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44. *See* MINORITY REPORT, *supra* note 23.

45. *See* FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 154–55, 159–60, 200 (2007).

46. MINORITY REPORT, *supra* note 23, at 459–60.

47. *Id.* at 460; *see also id.* at 478.

48. *Id.* at 460.

49. *Id.* at 465–66.

II. CATEGORIZING SUPREMACY CLAIMS INVOLVING INFORMATION CONTROL

A. SUBSTANTIVE CLAIM TYPES

As noted, presidential supremacy takes a number of forms with respect to information control. The most obvious respect in which supremacist claims differ from one another is by the substantive nature of the claim. That is, by the type of information that the executive seeks to protect or the type of action that it seeks to justify, and/or by the underlying constitutional rationale/s for the claim. This Article explores the following four substantive claim categories and their relationship to transparency: executive privilege; state secrets privilege; an exclusivist prerogative to violate statutes in secret as the President deems necessary to protect national security or the autonomy of his office; and a presidential prerogative to effectively criminalize speech—without triggering the usual strict judicial review required by the First Amendment—by deeming information classified.

The first two claims are, in some contexts, simply more specific versions of exclusivity—or assertions of a right to violate statutes. That is, supremacists sometimes argue that a particular statute can constitutionally be circumvented or should not be passed in the first place because it violates the President's constitutional discretion to protect executive privilege or state secrets. The first two claims can also be raised in forms distinct from exclusivity, such as where the President objects to disclosing information on executive privilege or state secrets grounds when the disclosure is sought not as a matter of statutory right but of inherent judicial power or a congressional committee's internal rules.

The fourth type of claim is somewhat different in nature from the first three. While the executive branch at points has argued that Congress cannot constitutionally interfere with its classification powers, the claim on which this Article focuses is triggered where Congress has delegated power to the executive branch. Specifically, it is triggered in cases where Congress has criminalized certain speech based at least in part on its classified nature. Supremacy comes into play when the executive responds to speakers' First Amendment defenses. A typical response is that the executive's decision to classify information effectively removes it from the purview of the First Amendment. The supremacist argument, in short, is that the executive's decision to classify speech essentially replaces—and thus precludes, or is exclusive of—the rigorous inquiry in which the judiciary would otherwise engage where speech is punished for its content.

B. LEVELS OF RADICALISM

Another respect in which supremacist claims differ from one another is by level of radicalism. Indeed, while I refer loosely to executive privilege, state secrets, and classified speech claims as "supremacist," some incarnations of these claims are so low in radicalism as to be non-supremacist. We can thus start by differentiating between two broad categories of claims. First, exclusivist claims are all sufficiently radical to be considered supremacist. Still, the differences in radicalism levels among exclusivist claims are worth examining. Second, non-exclusivist claims—that is, those involving a privilege claim where the information request is not based on a statute, and those involving classified speech—range from those very high in radicalism to those so low in radicalism as to be non-supremacist in nature.

1. Exclusivist Claims

To appreciate what makes a claim more or less radical, it is important to understand the many layers in which information exists and can be conveyed and protected throughout the constitutional system. As the earlier discussion of dynamic vigilance suggests, the most basic mechanism for government transparency is the general rule of macro-transparency. That is, the rule that the laws that the President executes are themselves transparent and result from a relatively public, deliberative legislative process. Thus, even where the President has leeway to execute statutes in secret, and hence to exercise micro-secrecy, the larger legal framework under which he operates itself is transparent and subject to public reconsideration and change.

The basic rule of macro-transparency is intertwined with, and requires for its support, accountability tools to guard against secret statutory circumvention and other instances of secrecy-cloaked abuse or incompetence. For example, Congress may pass legislation that requires the intelligence community to provide classified reports to specified members of Congress. Congress may further, by statute or through internal chamber rules, craft means to protect the information so transmitted—for example, through internal ethics rules and staff security clearance requirements. It may also provide outlets for broader publication should disclosures reveal abuses—for example, through committee voting procedures to authorize wider disclosures.

The most radical exclusivity claims are those that most threaten macro-transparency. Claims of a right not only to circumvent statutes, but to do so in secret for indefinite periods of time, are at the apex of radical exclusivity. Through the TSP, for example, the Bush Administration secretly circumvented existing statutory protections over the course of several years. During this time, the Office of Legal Counsel in the Department of Justice

("the OLC") issued a classified, very closely held memorandum deeming the TSP legal based on exclusivist reasoning.[50] These actions were extremely radical with respect to macro-transparency. They replaced publicly determined and publicly known statutes with secret, and secretly justified, executive branch law.

Somewhat less radical in nature are *ex ante* claims against passing particular statutes in the first place on the basis of exclusivity. Such claims are openly made and thus do not directly generate secret, executive-made law. Nonetheless, they seek to avoid statutory limits on executive discretion and thus to give the executive greater room to operate, quite possibly in secret, without macro-transparent constraints. Such claims also may implicitly or explicitly condone secret law by indicating that the executive branch could circumvent particular proposed laws were they to pass. For example, in the years after the TSP's existence was revealed by the New York Times, Congress considered new legislation to govern electronic surveillance. Ultimately, a Democratic Congress passed the FISA Amendments Act of 2008 ("FAA"). The FAA granted the Bush Administration much of the wiretapping discretion that it had sought.[51] In a fascinating exchange in one of the congressional hearings held to consider legislation before the FAA's passage, an administration official urged the Senate Judiciary Committee to grant the administration wide discretion to avoid unconstitutionally constraining it. The official suggested that present or future administrations might circumvent a more restrictive statute. He said, "I believe that you'll . . . see that if we have a scheme which is much more—which we can use much more easily to protect the nation, there's going to be even less need for this president or future presidents to go outside of FISA."[52]

A still less intrinsically radical claim is one that raises a case-specific objection to a particular disclosure request, where the disclosure right was created by statute. In this case, macro-transparency is not deeply threatened, as the statute is neither circumvented in secret nor blocked from existing in the first place. What is undermined, however, is the ability of the macro-transparent legislative process to generate effective accountability tools.

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50. *See* Office of the Inspector Gen. of the Dep't of Defense et al., Report No. 2009-0113-AS, (U) Unclassified Report on the President's Surveillance Program 10–12 (2009), available at http:// www.fas.org/irp/eprint/psp.pdf.

51. Indeed, critics derided the FAA as essentially codifying the TSP. *See, e.g.*, Patrick Radden Keefe, *Legislating in the Dark*, INDEX ON CENSORSHIP, Nov. 1, 2008 at 26; Samantha Fredrickson, *Tapping into the Reporter's Notebook*, THE NEWS MEDIA AND THE LAW, Fall 2008 at 11.

52. *FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 16 (2007) (statement of Kenneth L. Wainstein, Asst. Att'y Gen. for Nat'l Security, U.S. Dep't of Justice).

The radicalism of such a claim also depends on the scope of executive discretion that it demands. For example, where a court reviews an information-sharing dispute, a claim that the court must defer entirely to the executive's view and should not even review the disputed information *in camera*, is quite radical. Less radical is an argument that the court should apply a presumption in the executive's favor but must ultimately make the call by independently reviewing the disputed information and weighing the costs and benefits of disclosure.

Not all exclusivist claims thus are equally radical. Nonetheless, all threaten macro-transparency by challenging the efficacy or very creation of macro-transparent, statutory restrictions and accountability tools. As such, all are sufficiently radical as to be considered supremacist in nature.

2. Other Claim Types

There is more radicalism variation among claims that raise case-specific objections to particular disclosure requests, where the disclosure rights were *not* created by statute but stem from internal congressional chamber rules or inherent judicial power. In such cases, the various costs and benefits of disclosure were not already assessed through the macro-transparent legislative process. There thus is room for debate, whether with members of Congress or with a court and opposing counsel, over the merits of a particular disclosure. While macro-transparency is not directly affected in such a case, accountability tools—such as independent judicial review and congressional oversight—can be very much at stake depending on the level of executive discretion sought. In such cases the degree of radicalism ultimately hinges on the scope of the secrecy right asserted and the extent to which the executive claims discretion to determine the same.

Similarly, claims involving "classified speech" and the First Amendment can range from high to fairly low in radicalism, depending on the nature of the claim. Such claims do not directly challenge macro-transparency as they arise in cases involving statutes that criminalize certain speech. Yet they do threaten a crucial accountability tool that supports macro-transparency. Classified information leaks by government employees—ranging from civil service personnel to the White House inner circle—are the lifeblood of journalism. And leaks by government employees to journalists about secret statutory violations have at times been the only means through which the public and members of Congress eventually learned of such activities. The radicalism of a particular claim thus varies by the extent to which it seeks to diminish the judicial scrutiny that would ordinarily apply to criminal punishments of speech if the speech were not deemed classified. At one end of the spectrum is the very radical claim that anyone who disseminates classified information—whether a government employee or The New York Times reporting on a secret

government program—can be criminally punished consistent with the First Amendment. Less radical are claims that do not deem First Amendment concerns fully vitiated by classification status, but that call for some lesser level of judicial scrutiny than would apply in the context of non-classified speech. Less radical claims may also allow for other fact-specific elements to be taken into account, such as whether the speech at issue was leaked by a government employee or disseminated by the press.

Of course, there is no exact science to separating supremacist claims from non-supremacist claims in the realms of executive privilege, state secrets privilege, and classified speech. Roughly speaking, however, the higher the level of radicalism—that is, the more deference demanded by the executive to its judgment—the more likely the claim is to be supremacist in nature.

III. SUPREMACY AND TRANSPARENCY

A. A WORD ON HISTORICAL TRAJECTORY

As the examples that follow reflect, supremacist claims—again, using the term somewhat loosely to encompass all exclusivist, executive privilege, state secrets, and classified speech claims—have grown increasingly radical, ubiquitous, and influential over time. This conclusion is in keeping with other findings. For example, national security based exclusivity overall is of surprisingly recent vintage. In two recent articles, Professors David Barron and Martin Lederman challenge the exclusivist premise that legislative directions to the President on the battlefield were always understood to be unconstitutional. As noted earlier, exclusivists often invoke this premise as a given. From there, they analogize particular statutory mandates to battlefield instructions to deem the latter unconstitutional. Barron and Lederman demonstrate that in fact, Congress has long passed legislation constraining the President's conduct of military campaigns from the Founding Era through the present.[53] Barron and Lederman also show that presidents almost never explicitly claimed that such constraints were unconstitutional prior to the mid-twentieth century.[54] Similarly, I have demonstrated elsewhere the relative novelty of exclusivist arguments to the effect that Congress is constitutionally limited in its power

53. Barron & Lederman I, *supra* note 19, at 693, 696–97, 704–15; Barron & Lederman II, *supra* note 19, at 947–48, 951–52, 996–97, 1009–15, 1027, 1058–59; *cf.* Barron & Lederman I, *supra* note 19, at 772–86 (noting that actions of the Continental Congress during the Revolutionary War and texts of post-revolution state constitutions reflected the understanding that legislatures could direct details of military campaigns waged by the "commanders in chief").

54. Barron & Lederman I, *supra* note 19, at 697, 718–20, 763–64; Barron & Lederman II, *supra* note 19, at 948–49, 952, 993–94, 999–1004, 1007–09, 1015–16, 1027, 1034–35, 1057–58.

to restrict wiretapping.[55]

The historical trajectory is important partly because exclusivists invoke history on their behalves. Yet in so doing, they sometimes leap from low-radicalism claims of the distant past to more radical contemporary arguments. In the process, they often jump as well from capacity to legal right. Thus, for example, because of the executive's "first-mover" advantage—that is, its structural capacity to simply act absent some affirmative action by another branch—it has managed at times to take actions openly grounded in highly questionable statutory interpretations.[56] To an exclusivist, such action may, decades later, constitute precedent favoring a constitutional right to secretly circumvent statutes.[57] Similarly, founding-era boasts of the President's capacity to keep secrets are, centuries later, invoked as precedent for broad executive discretion to override statutory openness requirements.[58]

B. EXECUTIVE PRIVILEGE

The earliest executive privilege claims in post-founding America were discrete, fact-specific objections to information requests by Congress and, less frequently, by the courts. The case-by-case nature of early claims is evidenced partly by the absence of a standard label for them until 1958, when the Eisenhower Administration coined the term "executive privilege."[59] For clarity's sake, I use that label to refer to all such claims, including those made before 1958. The first executive privilege dispute in American history occurred when a congressional committee sought papers from the Washington Administration regarding a failed military expedition led by General St. Clair. According to the memoirs of Thomas Jefferson—then Washington's Secretary of State—Washington and his cabinet were of the view that the President should withhold papers that might damage the public interest. Yet as the memoirs and subsequent events reflect, the cabinet decided that the release of the St. Clair papers would not be damaging. Washington thus complied with the congressional committee's request.[60] Washington took a similarly fact-tailored approach in the next

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55. Kitrosser, *supra* note 19, at 1421–33.

56. *See* Kitrosser, *supra* note 19, at 1414 n. 84 (citing Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 399 (2009); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 855–56 (1999); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 518 (2008); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677 (2005)).

57. *See e.g.*, Kitrosser, *supra* note 19, at 1406–11.

58. *See, e.g.*, MINORITY REPORT, *supra* note 23, at 459–60.

59. MARK J. ROZELL, EXECUTIVE PRIVILEGE 39 (2d ed., rev., Univ. Press of Kan. 2002).

60. *Id.* at 29–30; Saikrishna B. Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1177–79 (1999); Archibald Cox, *Executive*

two information sharing disputes of his administration. In the second dispute, the Senate sought correspondence involving Gouverneur Morris, U.S. Ambassador. Washington transmitted portions of the requested documents, explaining to the Senate:

> After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential.[61]

In the third and final dispute of President Washington's administration, the House of Representatives sought the instructions that the President had given to Chief Justice John Jay to negotiate a treaty with Britain. Washington refused the request on the ground that the House had no constitutional role in the treaty process—treaties are negotiated by the President and subject to supermajority approval by the Senate. Washington explained that disclosing negotiations, even after their completion, would fly in the face of the secrecy concerns that led the Founders to delegate treaty consideration to the President and the Senate alone. Washington stressed that he had provided the Senate with all papers relevant to approving the treaty.[62] The House, which had sought the papers to help decide whether to appropriate funding to implement the treaty, passed two non-binding resolutions in response to Washington's refusal. The first affirmed the House's constitutional role in passing legislation necessary to implement treaties. The second "insisted that the House need never declare the purposes or application of the information, so long as the information related to 'Constitutional functions of the House.'"[63]

It is disputable whether these early claims can be considered supremacist. Washington did not assert a preclusive legal right—as opposed to policy judgments subject to negotiation or even statutory directive—to withhold information from a body with a constitutional interest in receiving it.[64] Nor did the requesting bodies in the first two cases indicate that they thought the President possessed such a right. The congressional committee investigating the St. Clair expedition had nothing to contest, as Washington turned over all requested papers. In the dispute involving Gouverneur Morris, the Senate did not object to Washington's redactions, but this silence could have meant many things. As Saikrishna Prakash points out,

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Privilege, 122 U. PA. L. REV. 1383, 1391–92 (1974); William P. Rogers, *The Papers of the Executive Branch*, 44 A.B.A. J. 941, 943–44 (1958).

61. ROZELL, *supra* note 59, at 30; *see also id.* at 30–31; Prakash, *supra* note 60, at 1179–80.

62. ROZELL, *supra* note 59, at 31; Prakash, *supra* note 60, at 1181–83.

63. Prakash, *supra* note 60, at 1183–84.

64. *Id.* at 1184.

"the Senate's unwillingness to challenge Washington's deletions may have reflected nothing more than a changed political calculus. . . . [Alternatively,] it is entirely possible that the Senate found the furnished materials sufficient for the Senate's needs."[65] In the third case, in which Washington refused to give documents to the House about John Jay's negotiations with Britain, the House made clear its view that it had a right to the same. These early controversies thus do not necessarily stand for more than the notion that the executive can raise policy objections to inter-branch information requests, and that those objections are subject to responses by the requesting parties.

If one does label those early claims supremacist, they are quite low in radicalism. For one thing, each claim was made and explained openly. Furthermore, each was defended in a fact-specific manner. To the extent that President Washington viewed his responses as legal claims, they were legal claims contingent on facts and hence conducive to debate and negotiation. This is distinct from legal claims that seek effectively to preclude debate by cloaking their justifications in secrecy or asserting a legal discretion so sweeping as to elide fact-specific objections.

The seeds of more radical executive privilege claims began to be planted around the mid-19th century, becoming relatively standard by about the mid-20th century.[66] Claims are now typically framed as matters of constitutional right, with the right extrapolated from the President's capacity to keep secrets. Such extrapolation often takes the form of historical argument. For example, executive privilege proponents infer a constitutional right to keep secrets from post-founding examples of presidential secret-keeping, including the Washington Administration examples discussed above.[67] They also infer such a right from founding era statements that celebrate the President's secret-keeping capacity, particularly from two Federalist Paper passages: Federalist 70, in which Alexander Hamilton supports a unitary President because "'[d]ecision, activity, secrecy and despatch [sic] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any great number'" and Federalist 64, in which John Jay champions the relative "'secrecy'" and "'despatch [sic]'" of the executive branch as an advantage in treaty-making.[68]

Modern claims are also much broader than the case-specific objections

65. *Id.* at 1180; *see also* Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975).

66. *See, e.g.*, ROZELL, *supra* note 59, at 32–39 (describing executive privilege claims in the Adams to Eisenhower administrations); Cox, *supra* note 60, 1395–1405 (discussing executive privilege claims from the Washington through Truman administrations).

67. *See, e.g.*, ROZELL, *supra* note 59, at 28–32 (supporting a qualified executive privilege based partly on this history).

68. *See, e.g., id.* at 24–25 (citing these passages in support of a qualified executive privilege).

of the Washington Administration. For example, the Eisenhower administration expressed the view that "the President and the heads of departments have an uncontrolled discretion to withhold . . . information and papers in the public interest."[69] President Eisenhower also "was the first to claim explicitly an executive privilege based simply on an undifferentiated interest in preserving the confidentiality of deliberations and advice throughout the Executive Branch."[70] The latter claim is generally framed as the "candor" rationale—that is, the notion that the President may shield high level executive branch communications when he determines that disclosing the same could inhibit candor in future communications.[71] An early invocation of the claim by the Obama Administration demonstrates its long reach. In the wake of a controversy over security procedures for the White House state dinner, the Administration explained that the White House social secretary is immune from testifying before Congress "[b]ased on the separation of powers" and the need for "the White House staff to provide advice to the [P]resident confidentially."[72]

Modern, relatively radical claims tend to have substantial shadow effects in light of their far-reaching rationales. By "shadow effect," I mean the effect that a doctrine has even when it is not invoked formally in a particular case.[73] A shadow effect of executive privilege, for example, is the fact that congresspersons may forgo seeking information in the first place, or may give up after an initial refusal, because they suspect that their continued insistence will result in nothing more than a years-long court battle. Consider the impact, for example, of the Supreme Court's 1974 decision in *United States v. Nixon*.[74] *Nixon* arose from Richard Nixon's refusal to turn over tapes of oval office conversations subpoenaed in the Watergate prosecutions.[75] While rejecting President Nixon's claim of privilege under the extraordinary circumstances of the case, the Court for the first time recognized executive privilege as a valid constitutional doctrine. Citing the candor rationale, the Court deemed the privilege a presumptive one in favor of the President.[76] The Court also suggested that

69. *Text of Eisenhower Letter and Brownell Memorandum on Testimony in Senate Inquiry*, N.Y. TIMES, May 17, 1954, at 24.

70. Cox, *supra* note 60, at 1433.

71. *See, e.g.*, Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 198–202, 205–13 (2008).

72. Michael D. Shear, *Government Openness is Tested by Salahi Case*, WASH. POST, Dec. 4, 2009, at C7.

73. *Cf. generally, e.g.*, Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. (forthcoming 2010), ssrn draft, http://ssrn.com/abstract=1566982 (describing the shadow effect of state secrets).

74. 418 U.S. 683 (1974).

75. *Id.* at 686–90.

76. *Id.* at 705–09.

where the claim rests on a different rationale—that of national security—the presumption is even stronger, requiring extreme if not absolute judicial deference.[77] Since the *Nixon* case, the candor and national security rationales have been invoked countless times—both generally and as explicit claims of executive privilege—by executive branch officials as bases to avoid testifying to Congress or the courts or disclosing information under public access statutes. The ubiquity of such demurrals, in turn, can discourage congresspersons from pursuing inquiries in light of their possible futility or can provide a desired escape hatch for those who prefer not to probe the executive branch for partisan or other reasons.[78]

The most radical executive privilege claims are exclusivist in nature—that is, they embrace a right to circumvent statutes that impose disclosure requirements. Before considering examples of such claims, it is helpful to understand the different ways in which exclusivist objections to statutes can manifest themselves. The most obvious form of such an objection is an explicit claim to the effect that a statute is unconstitutional on its face or as applied from an exclusivist perspective. Yet exclusivity can also manifest itself through aggressive statutory interpretation. That is, through strained statutory readings that lead to the conclusion that particular presidential actions are permitted by statute. Two marks of an exclusivity-infused statutory reading are: (1) the tenuousness of the statutory interpretation and (2) the linking of the interpretation to a broad view of the President's power under Article II. The link can take one of two forms. It can take the form of an argument that a statute authorizing presidential power is most naturally read broadly given the breadth of the President's constitutional discretion to execute laws. Or it can amount to the position that the statute must be read very broadly if reasonably possible because a more constraining statute would violate the President's constitutional powers or would raise a serious question to that effect.

An important example of an exclusivity-infused statutory interpretation involving executive privilege arose in the midst of the Iran-Contra controversy. In 1986, the OLC was asked to offer an opinion on the legality of the decision previously made and implemented by President Reagan to withhold notice to the congressional intelligence committees of the decision to sell arms to Iran until roughly ten months after the deal was complete.[79] The statutory requirement at issue was Section 501 of the National Security

77. *Id.* at 710–11.

78. *See, e.g.*, EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY, 2–4, 7–13, 16–23 (2009); Lee, *supra* note 71, at 198–99, 209–13; Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 496–501 (2007).

79. President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. 159 (1986) [hereinafter "Timely Notification" Memo].

Act. For any covert actions about which the intelligence committees were not given prior notice, the Act required the President to inform them "in a timely fashion" and to provide a "statement of the reasons for not giving prior notice."[80] The OLC concluded that the word "timely" had to be interpreted to give the President "virtually unfettered" discretion to withhold notice for however long he deemed necessary. Otherwise, the act would raise serious constitutional questions.[81] Among other things, the OLC cited *U.S. v. Nixon*, explaining that while the *Nixon* Court rejected President Nixon's:

> sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities."[82]

Another indirect use of executive privilege to avoid a statutory disclosure requirement can occur when an administration warns that executive privilege concerns might be raised if statutory disclosure rights are pursued. This technique proved successful in the 2004 case of *Cheney v. U.S. District Court*.[83] The *Cheney* Court admonished lower courts that the Vice President need not invoke executive privilege in order to seek court protection from disclosing information under an openness law. Instead, the Court explained, it was enough for the Vice President to object to an entire discovery request on separation of powers grounds, including the ground that it would unduly burden him to have to claim executive privilege with respect to particular pieces of information.[84] Hence, the very possibility that executive privilege problems might be raised by aspects of a discovery order was enough to get the order struck (and ultimately, on remand, to have the case dismissed) although executive privilege was never claimed.[85]

Administrations also invoke executive privilege directly to object to proposed legislation and thus to keep macro-transparent disclosure obligations from arising in the first place. For example, the Obama Administration objected to proposed legislation to require notice to the congressional intelligence committees in cases where administrations currently may notify a smaller group known as the "Gang of Eight."[86] The

80. 50 U.S.C. § 413(b) (1988) (repealed 1991).

81. "Timely Notification" Memo, *supra* note 79, at 173–74.

82. *Id.* at 165 (emphasis omitted).

83. 542 U.S. 367 (2004).

84. *Id.* at 375, 388–90.

85. *See In re* Richard B. Cheney, 406 F.3d 723, 725, 727, 731 (D.C. Cir. 2005) (discussing separation of powers issues, ordering case dismissed on remand).

86. PRESIDENT BARACK OBAMA, STATEMENT OF ADMINISTRATION POLICY: H.R. 2701—

Administration deemed the proposal to "raise significant executive privilege concerns by purporting to require the disclosure of internal Executive branch legal advice and deliberations." It also cited "the President's responsibility to protect sensitive national security information."[87] The administration also threatened to veto an amended proposal, written in response to its initial objection, to allow Gang of Eight notice while requiring some general information—including the fact that more detailed notice was given to the Gang of Eight—to be provided to the full intelligence committees.[88]

C. STATE SECRETS PRIVILEGE

There is some uncertainty as to where executive privilege ends and the state secrets privilege begins. Indeed, Professors Robert M. Pallitto and William G. Weaver argue in their book, *Presidential Secrecy and the Law*, that commentators are mistaken to perceive a national security branch of executive privilege doctrine at all. To the contrary, they argue that national security secrecy claims are all state secrets claims. From this perspective, the *Nixon* Court's distinction between privilege claims based on the candor rationale and those based on "military or diplomatic secrets" is not a distinction between types of executive privilege claims, but between executive privilege on the one hand and state secrets on the other. Pallitto and Weaver deem this point highly consequential, perhaps most importantly because they explain that only executive privilege is constitutionally based, which limits Congress' ability to curtail it, whereas the state secrets privilege is a product of the common law that Congress may freely override.[89]

It is true that the case law leaves some uncertainty as to the overlap, if any, between executive privilege and state secrets doctrines. It is also true that there is debate over whether the state secrets privilege is solely a common law privilege or whether it is grounded partly or fully in Article II of the Constitution.[90] Relatedly, there is debate over Congress' ability to foreclose the state secrets privilege.[91] This discussion proceeds, however, on

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INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010 (July 8, 2009) [hereinafter POLICY STATEMENT ON INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010]; *see also, e.g.*, Scott Shane, *CIA Reviewing its Process for Briefing Congress*, N.Y. TIMES, July 10, 2009, at A16.

87. POLICY STATEMENT ON INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, *supra* note 86.

88. *See* Letter from Peter R. Orszag to Sen. Diane Feinstein (Mar. 15, 2010); *see also, e.g.*, Walter Pincus, *White House Threatens Veto on Intelligence Activities Bill*, WASH. POST, Mar. 16, 2010, at A4.

89. ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 98–99, 105, 117–19, 206 (2007).

90. *See, e.g.*, Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270–71, 1293–95 (2007).

91. *Id.* at 1309–10; Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80

the conventional assumption that there is some overlap between the two privileges as well as some applications unique to each privilege. This assumption entails four main points. First, national-security-based executive privilege claims made in response to congressional requests for information do not overlap with state secrets claims, as the latter appear to be treated only as evidentiary privileges in litigation disputes. Second, state secrets claims that do not involve high-level executive branch communications—such as discussions with the President—do not overlap with executive privilege claims. Third, there is some potential for overlap between state secrets and executive privilege where a national-security-based secrecy claim is made in response to a litigation-driven request for information involving presidential or other high-level executive branch communications. If the *Nixon* Court indeed was referring to a national security branch of executive privilege, this scenario presumably was what it had in mind. Fourth, any questions as to the constitutional grounding of some or all state secrets claims need not depend on the claims' nomenclature. Hence, while this Article treats state secrets doctrine as encompassing all litigation-based national security secrecy claims and as overlapping in part with executive privilege claims, these assumptions hardly resolve the claims' constitutional status.

The state secrets privilege enables the government to argue to a court that it would endanger national security to reveal certain evidence in open court or even in a closed setting to the court alone.[92] Given the doctrine's somewhat disputed basis and origins—with some arguing that it developed solely as a common law privilege with no constitutional content, and others treating it as a supremacist doctrine with roots in both the common law and constitutional law[93]—it is not surprising that the Supreme Court's seminal state secrets case bears elements of both low-level and high-level radicalism. The case, 1953's *United States v. Reynolds*,[94] marked the Court's first explicit recognition of the doctrine.[95]

Reynolds stemmed from lawsuits brought under the Federal Tort Claims Act ("FTCA") by the widows of three civilian observers on a B-29 aircraft that crashed during a test flight. The widows claimed that the crash was caused by Air Force negligence.[96] They sought the production of the Air Force's official accident report.[97] The Air Force sought to quash the

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TEMP. L. REV. 489, 494, 497–98 (2007).

92. *See* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–37 (2007).

93. Donohue, *supra* note 73, ssrn draft at 4–5, 5 n.15.

94. 345 U.S. 1 (1953).

95. Donohue, *supra* note 73, ssrn draft at 4.

96. United States v. Reynolds, 345 U.S. at 1–2; *see also* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY 3, 29 (2006).

97. *Reynolds*, 345 U.S. at 3.

request, claiming a constitutional privilege to protect state secrets.[98] The Air Force explained that the plane had carried "'confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to [the Air Force] and would not be in the public interest.'"[99] The widows argued that Congress had overridden any privilege by passing the FTCA and that it was within Congress' constitutional power to do so.[100] The Supreme Court concluded that it need not weigh in on either side of the constitutional issue. Instead, it read the FTCA to incorporate the state secrets privilege.[101] The Court thus explored the privilege's content but did not address whether it was constitutionally based and whether Congress could override it.

The *Reynolds* Court outlined "principles which control the application of the privilege":

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[102]

The Court added that "[t]he latter requirement is the only one which presents real difficulty."[103] With respect to that requirement, the Court cautioned the judiciary not to abdicate their judgment over evidentiary matters "to the caprice of executive officers."[104] This point was coupled with the Court's earlier warning to the executive branch not to invoke the privilege lightly. Yet the Court declined to:

> go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant

98. *Id.* at 3–4, 6; *see also* FISHER, *supra* note 96, at 96–99.

99. FISHER, *supra* note 96, at 53 (quoting statement of Secretary of the Air Force Thomas K. Finletter, filed October 10, 1950, Civil Action No. 10142 (E.D. Pa. 1950)); *see also Reynolds*, 345 U.S. at 4–5.

100. *Reynolds*, 345 U.S. at 6; *see also* FISHER, *supra* note 96, at 102.

101. *Reynolds*, 345 U.S. at 6–7.

102. *Id.* at 7–8.

103. *Id.* at 8.

104. *Id.* at 9–10.

> to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[105]

The Court also suggested that judicial assessments as to whether disclosure would create a "reasonable danger" should be weighed against the strength of the interests in disclosure. However, "even the most compelling necessity [for disclosure] cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[106]

The *Reynolds* Court deemed the widows' need for the accident report "dubious" because the widows could have, but did not, interview the surviving crew members.[107] The Court thus concluded that "a formal claim of privilege, made under the circumstances of this case, will have to prevail" based on the government's affidavits. The Court did not look beyond the affidavits to review the accident report itself. The Court remanded the case to the trial court for further proceedings consistent with its decision.[108]

On the one hand, aspects of the *Reynolds* opinion lay the foundation for a privilege low in radicalism. The Court left open the possibility that the privilege was not constitutional in nature. Of equal importance, it stated that the judiciary must independently determine whether and how the privilege applies in any given case, as "'[i]t is the judge who is in control of the trial, not the executive.'"[109] Yet in applying the privilege, the Court planted the seeds of a far more radical doctrine by refusing to require *in camera* judicial review of the evidence at issue. As one commentator explained in reflecting on *Reynolds*, "if the court does not examine the information, it must decide in the dark. Thus, the executive will almost always determine the legal question of privilege."[110]

The risk of executive abuse when judges do not independently examine evidence is sharply illuminated by the factual developments that followed *Reynolds*. As noted, the *Reynolds* Court remanded the case back to the lower courts. At that point, the widows' attorney noticed depositions of the surviving crew members. The attorney subsequently wrote to one of the widows that "'we went ahead and took the depositions'" and that the crew members stated that the secret equipment that the government claimed would be revealed in the accident report "'had absolutely nothing to do with the accident and had not even been put into operation.'"[111] According to the widows' recollections, the attorney at that point "seemed inclined to take

105. *Id.* at 10.
106. *Id.* at 11.
107. United States v. Reynolds, 345 U.S. 1, 11 (1953).
108. *Id.* at 11–12.
109. *Id.* at 8 n.21 (internal citation omitted).
110. James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 891 (1966).
111. FISHER, *supra* note 96, at 116.

the issue back to district court, using the depositions as evidence that access to the accident report was needed."[112] However, the widows decided against a further round of litigation. The advice of one widow's family lawyer might have played a role. He wrote to her of his

> 'doubts now, as we are deprived of most essential proof to make out a case.' The accident report 'was of official character and carries in it the determinable cause of the failure in the plane which precipitated the tragedy.' Statements by surviving crew members 'might and might not spell out negligence sufficient to base a judgment in your favor thereon; but inasmuch as these are all that is left to us to proceed on, [the plaintiffs' attorney] will have to make the best of them on the trial.'[113]

The widows agreed to settle with the government rather than continue to trial.[114]

Nearly fifty years later, the daughter of one of the deceased civilian observers obtained the accident report, which by then was declassified, after learning on the internet that it was available.[115] She discovered that the report contained no military secrets about experimental equipment or otherwise. "But there was incriminating evidence showing government negligence. According to the report, the crash was most likely caused by an engine fire. Contrary to Air Force directives, a protective shield designed to prevent engine overheating had not been installed."[116]

Reynolds' impact has been substantial, with the decision's high-radicalism potential increasingly realized. For one thing, many lower courts have upheld privilege claims based solely on government affidavits or declarations, without themselves reviewing the disputed materials.[117] Indeed, courts at times have upheld claims based solely on government declarations even when the disputed information had once been in the

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112. *Id.*

113. *Id.*

114. *Id.* at 117.

115. *Id.* at 167.

116. Timothy Lynch, *An Injustice Wrapped in a Pretense*, WASH. POST, June 22, 2003, at B3; *see also* FISHER, *supra* note 96, at 167–68; Warren Richey, *Security or Coverup?,* CHRISTIAN SCI. MONITOR, June 8, 2006, at USA, p. 1.

117. PALLITTO & WEAVER, *supra* note 89, at 107; Meredith Fuchs, *Judging Secrets: The Role that Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 167–68 (2006); Kinkopf, *supra* note 91, at 490; Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 107–08, 119 (2007); *Restoring the Rule of Law: Hearing Before the Constitution Subcomm. of the S. Judiciary Comm.*, 110th Cong. 14 (2008) (written testimony of Amanda Frost and Justin Florence on reforming the state secrets privilege) [hereinafter Frost and Florence testimony]; *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability: Hearing Before the S. Comm. on the Judiciary*, 110th Congress 2–3 (2008) (written testimony of Louis Fisher); CONSTITUTION PROJECT, REFORMING THE STATE SECRETS PRIVILEGE 3–7 (2007), http://www.constitutionproject.org/manage/file/52.pdf.

public domain and was retroactively classified after the plaintiff's lawsuit was filed.[118] Courts have also upheld claims based on government declarations that invoke the theoretically limitless "mosaic theory."[119] The mosaic theory encompasses "the notion that the government may withhold otherwise trivial or innocuous information because it might prove dangerous if combined with other information by a knowledgeable actor (especially a hostile intelligence agency)."[120]

More so, state secrets doctrine has been used as a basis not only to exclude certain pieces of evidence, but to dismiss entire cases because the very subject matter of the litigation is deemed a state secret or because the plaintiff is deemed unable to make their case without disclosing state secrets. Research by Professor Robert Chesney reveals that the government, as reflected in published cases, requested dismissal on state secrets grounds five times between 1971 and 1980 (with three of the five requests granted), nine times between 1981 and 1990 (with eight of the nine requests granted), thirteen times between 1991 and 2000 (with twelve of the thirteen requests granted), and sixteen times between 2001 and 2006 (with ten of the sixteen requests granted).[121]

As noted, assertions of the privilege and judicial applications of the same are often underscored by supremacist reasoning. For example, both the Bush and Obama Administrations sought the dismissal of entire cases under the privilege. Each took the position that the privilege, while developed at common law, "has a firm foundation in the constitutional authority of the President under Article II to protect national security information."[122]

Supremacist invocations of the state secrets privilege tend to conflate presidential capacity with presidential prerogative. For example, courts applying the state secrets privilege first and most ubiquitously reason that the executive branch, by virtue of the fact that it has access to so many secrets and that it often plays a predominant role in national security matters, has an expertise that courts cannot safely second-guess. As Professor Amanda Frost and attorney Justin Florence explain, "[j]udges

118. *See* Edmonds v. U.S. Dep't of Justice, 323 F.Supp. 2d 65, 76–77 (D.D.C. 2004), *aff'd*, 161 Fed.Appx. 6, 2005 WL 3696301 (D.C. Cir. 2005); *see also* David Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, 2 J. NAT'L. SEC. L. & POL'Y. 165, 167–71, 186–92 (2006) (discussing *Edmonds* case)).

119. PALLITTO & WEAVER, *supra* note 89, at 110–12.

120. Christina Wells, CIA v. Sims: *Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006); *see also* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630–31 (2005).

121. Chesney, *supra* note 90, at 1307.

122. Government Defendants' Notice of Motion and Motion to Dismiss and for Summary Judgment at 12 n.9, Jewel v. Nat'l Sec. Agency, 2010 WL 235075 (N.D. Cal. Apr. 3, 2009) (No. C:08-cv-4373-VRW) [hereinafter Jewel MTD]. *See also infra* notes 135–137and accompanying text.

repeatedly assert that they must defer to the executive because they lack the ability to make independent judgments about the executive's claimed need for the privilege, and frankly concede that they are reluctant [to] second-guess the executive's assertions that disclosure will put the nation at risk."[123] Second, the expertise rationale is sometimes explicitly intertwined with the more straightforward notion that national security secrecy decisions belong to the executive branch as a matter of constitutional right.

The opinion of the U.S. Court of Appeals for the Fourth Circuit in *El Masri v. United States* exemplifies both lines of reasoning.[124] In *El Masri*, the court dismissed a case brought by a German citizen of Lebanese descent who claimed that the CIA mistakenly identified him as a terrorist, captured him, tortured him and sent him to Afghanistan where he was jailed for four months before being released on the side of an abandoned road in Albania months after the CIA had discovered his innocence.[125] The court relied on declarations by the CIA Director to dismiss the case on state secrets grounds.[126] Describing the constitutional backdrop against which it made its decision, the Fourth Circuit, echoing similar reasoning by the District Court whose opinion it affirmed, explained that "the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs. The [Supreme] Court accordingly has indicated that the judiciary's role as a check on presidential action in foreign affairs is limited."[127] The Fourth Circuit cited, among other things, to Supreme Court precedent that prescribed a "limited judicial role in foreign policy matters, especially those involving 'information properly held secret'"[128] and that deemed the "'authority to protect [national security] information'" to belong to "the President as head of the Executive Branch and as commander-in-chief."[129]

The *El Masri* Court joined its pure constitutional rationale to analysis based on executive expertise. It invoked the mosaic theory and the President's unique vantage point to determine when disclosures will cause international embarrassment or otherwise harm foreign relations:

> [D]eference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidential classification decisions, we have

123. Frost and Florence testimony, *supra* note 117, at 14.

124. El Masri v. Tenet (*El Masri II*), 479 F.3d 296 (4th Cir. 2007).

125. El Masri v. Tenet (*El Masri I*), 437 F.Supp.2d 530, 532-34 (E.D. Va. 2006); Complaint ¶¶ 1–3, 15, 27–54, El Masri I, 437 F.Supp.2d 530 (E.D. Va. 2006) (No. 1:05cv1417).

126. *El Masri II*, 479 F.3d 296 at 301, 311.

127. *Id.* at 303.

128. *Id.* at 303–04 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

129. *Id.* at 304 (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988)).

> observed that "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." (citation omitted) The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing our foreign relations, the President's assessment of the diplomatic situation is entitled to great weight.[130]

The state secrets privilege casts a very long shadow. As Laura Donohue notes, the impact of the privilege goes far deeper than its appearance in published judicial opinions can tell us. Donohue searched court dockets to examine the use of the privilege in litigation, and thus to assess how it influences cases including those that do not result in published opinions or in which the privilege is not mentioned in those opinions. Donohue found:

> [F]rom January 2001 through January 2009 the privilege played a significant role in the Executive Branch's national security litigation strategy. In one case, the Administration asserted state secrets some 245 times. More to the point, in more than one hundred cases the government invoked state secrets. . . . And it is not just the Executive Branch that benefited from the privilege: in scores of additional cases private industry asserted state secrets with the expectation that the federal government would later step in to prevent certain documents from being subject to discovery or to stop the suit from moving forward. Beyond these, there are hundreds of cases on which the shadow of the privilege fell.[131]

Donohue finds the shadow effect to be of great practical consequence. For instance, she notes that in cases against private government contractors, "[e]ven where the government *never* becomes involved in the suit, the threat of state secrets gives the companies a tactical advantage. It shapes litigation in important and prejudicial ways, often dropping out of the picture by the time the court issues its opinion resolving the case."[132] In suits against the government, "the mere assertion that state secrets are *or*

130. *Id.* at 305.
131. Donohue, *supra* note 73, ssrn draft at 7–8.
132. *Id.* at 15.

may be at stake tips the scale toward the government."[133] The case files, she concludes, "strongly suggest that the shadow of state secrets is much longer than previously realized—indeed, that state secrets doctrine has expanded well beyond the framing of *Reynolds*, to become a powerful litigation tool for both private and public actors."[134]

Finally, exclusivist state secrets claims have been made to argue that Congress may not constitutionally limit the doctrine. In an April 2009 brief urging dismissal of a case against the National Security Agency on state secrets grounds, for instance, the Obama Administration "incorporate[d] by reference [the government's] prior detailed discussion" to the effect that the statute under which the plaintiffs brought suit should not be read to preempt the state secrets privilege.[135] The referenced prior argument was made in two Bush Administration briefs in a related case.[136] There, the government had argued, among other things, that a preemptive reading of the statute should be avoided because

> any effort by Congress to regulate an exercise of the Executive's authority to protect national security through the state secrets privilege would plainly raise serious constitutional concerns, and it is well-established that courts should construe statutory law to avoid serious constitutional problems unless such construction is 'plainly contrary to the intent of Congress.'[137]

The Bush Administration also objected, on exclusivist and other grounds, to legislation that Congress considered in 2008 to place limits on the doctrine.[138] While the Obama Administration has not, as of this writing, spoken directly to that legislation—the State Secrets Protection Act, which was introduced in 2008 and again in 2009—its exclusivist response to the claim that another statute preempts the state secrets privilege could obviously be applied to such legislation. Furthermore, while the Obama Administration announced a new policy whereby it would seek to invoke the privilege only when necessary and as narrowly as possible in each case, this policy is entirely internal to the administration. It provides no means for external accountability to check the administration's use of the policy.[139]

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133. *Id.* at 63.

134. *Id.* at 92.

135. Jewel MTD, *supra* note 122, at 24–25.

136. Jewel MTD, *supra* note 122, at 25 n. 25 (citing to briefs filed in *Al Haramain*).

137. Defendants' Notice of Motion and Second Motion to Dismiss in or, in the Alternative, for Summary Judgment at 14, Al-Haramain Islamic Found. v. Bush, 2008 WL 5552047 (N.D. Cal. Mar. 14, 2008) (No. M:06-CV-01791-VRW); *see also* Defendants' Reply in Support of Second Motion to Dismiss or, in the Alternative, for Summary Judgment, Al-Haramain Islamic Found. v. Bush, 2008 WL 1956160 (N.D. Cal. Apr. 14, 2008) (No. M:06-CV-01791-VRW).

138. *See* Letter from Michael Mukasey, U.S. Attorney General, to Patrick Leahy, U.S. Senator (Mar. 31, 2008).

139. *See, e.g.*, Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 630 (2010).

Such external accountability mechanisms would have to come from the courts or Congress. Yet the legality of such mechanisms is called into question by the exclusivist positions taken in the Bush and Obama Administrations.

D. SECRET LAW

In the Introduction, I drew a distinction between extraordinary prerogative claims and exclusivity. The former, whether conceptualized as occurring within or outside of the Constitution, are claims of an extraordinary right to circumvent existing laws on the condition that the executive make the circumvention transparent to the people or their representatives and accept whatever judgment they may render.[140] Exclusivity encompasses claims of a far broader presidential discretion to circumvent laws. It embraces what can fairly be called a "regularized prerogative." Rather than hinging on fact-specific popular judgments, exclusivist claims are tautological in that they hinge on the President's own judgment as to what national security, and in some cases the autonomy of his office, demand.[141] This is the essence of Richard Nixon's infamous statement: "when the President does it, that means it is not illegal."[142] It is also the reasoning underlying John Yoo's remark that whether the President may legally crush a child's testicles to get information from his parent "'depends on why the President thinks he needs to do that.'"[143] Exclusivity thus justifies long-term statutory circumvention, so long as the President deems it essential. Most important for our purposes, regularized prerogative, or exclusivity, does not demand transparency because public judgment, outside of that reflected at the ballot box once every four years, is not essential to it. To the contrary, regularized prerogative intrinsically leaves room for presidential judgments to the effect that statutory circumventions must remain secret.

At the apex of the supremacy / secrecy mix, then, is secret law. Secret law occurs when the executive deems it necessary to the national interest not only to circumvent a statute, but to do so in secret. One means through

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140. *See supra* at Introduction.

141. *See, e.g.*, Paulsen testimony, *supra* note 40 at 4 (referring to broad areas of military and foreign affairs in which the President's judgment is constitutionally exclusive); Eastman, *supra* note 37, at 55 ("Congress cannot by mere statute restrict powers that the President holds directly from the Constitution itself," including his ability to make decisions as commander-in-chief or chief executive); *cf.* Nat Hentoff, *Architect of Torture*, VILLAGE VOICE, July 3, 2007 (recounting statement by John Yoo to the effect that whether the President may legally crush a child's testicles to get information from his parent "depends on why the President thinks he needs to do that.").

142. *See* SCHWARZ & HUQ, *supra* note 45, at 155–56 (quoting Richard Nixon and linking this sentiment to modern exclusivity claims). Nixon similarly told a congressional committee in 1976 that "any action a president might authorize in the interest of national security," including setting aside statutes, "would be lawful." *Id.* at 155.

143. Nat Hentoff, *Architect of Torture*, VILLAGE VOICE, July 3, 2007 (quoting Yoo).

which this can occur became apparent in the years after 9/11. That is, the issuing of secret opinions by the OLC.[144] The OLC has been called "the attorney general's lawyer."[145] It advises the President on the legality of government actions.[146] Its role gives it tremendous influence, particularly over matters relating to national security. As Jack Goldsmith, who headed the OLC from 2003 to 2004 explains, "most legal issues of executive branch conduct related to war and intelligence never reach a court, or do so only years after the executive has acted. In these situations, the executive branch [i.e., the OLC] determines for itself what the law requires, and whether its actions are legal."[147] Furthermore, an opinion from the OLC deeming an action legal is understood, in practice, to immunize the President and others from prosecution if they later take that action.[148] As Goldsmith puts it, the OLC possesses "one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards."[149]

In the wake of 9/11, drafting of and access to controversial OLC opinions reportedly were restricted to a small group that called itself "the War Council." It consisted of vice presidential counsel David Addington, OLC Deputy Assistant Attorney General John Yoo, White House Counsel (later Attorney General) Alberto Gonzales, Timothy Flanigan of the White House Counsel's Office, and Pentagon general counsel Jim Haynes.[150] The War Council's most important players were Addington and Yoo.[151] Addington's influence stemmed from his ability to speak for the Vice President (who, in turn, was largely responsible for intelligence matters in the administration), his intimidating personality, his tendency toward political retribution, and his relative expertise in constitutional and national security law.[152] Yoo, meanwhile, was "crucial" to the war council's plans as its only member who "was an OLC deputy with authority to issue legal

144. *See, e.g.*, Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 579–80, 588–94 (2009).

145. JACK GOLDSMITH, THE TERROR PRESIDENCY 18–19 (2007) (citing DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT (1992)).

146. *Id.* at 32; *see also* Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1576–77 (2007).

147. GOLDSMITH, *supra* note 145, at 32.

148. *Id.* at 96.

149. *Id.* at 97.

150. JANE MAYER, THE DARK SIDE 66 (2008); GOLDSMITH, *supra* note 145, at 22–23, 98.

151. *See* MAYER, *supra* note 150, at 66 (quoting colleague of Addington and Yoo who said, "It's incredible, but John Yoo and David Addington were running the war on terror almost on their own."); *see also* MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 147 (Jan. 13, 2009) [hereinafter "STAFF REPORT"] (citing "extraordinary line of communication . . . between Mr. Yoo and Mr. Addington").

152. *See* GOLDSMITH, *supra* note 145, at 27, 76–79, 170; MAYER, *supra* note 150, at 63–64.

opinions that were binding throughout the executive branch."[153] According to Goldsmith, Yoo, "[i]n close coordination with the War Council . . . pumped out [OLC] opinions on all manner of terrorism-related topics."[154] Meanwhile, the War Council shielded their work from prying eyes by classifying opinions and bypassing ordinary review and access channels within the executive branch.[155]

The War Council thus was able to craft what amounted to secret amendments to existing statutes—in other words, secret law. It did so by issuing very closely held opinions that authorized the executive branch to secretly contravene statutory restrictions, including limits on torture and warrantless wiretapping. For example, a 2003 OLC opinion asserted that certain federal criminal laws should not be construed to apply to military interrogations and that they are unconstitutional if they do so apply. The justification was exclusivist: "In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy."[156] This Memorandum not only was classified, it was so closely held that it was kept from even "the top lawyers for each branch of the military."[157] It was declassified on April 1, 2008, in response to a Freedom of Information Act lawsuit by the ACLU.[158]

In written testimony for a hearing of the Senate Judiciary Committee, Subcommittee on the Constitution held on April 30, 2008 (in which I participated as a witness), former Information Security Oversight Office director J. William Leonard expressed dismay that the interrogation memorandum had been classified in the first place. He wrote:

> [T]his memorandum represents one of the worst abuses of the classification process that I had seen during my career, including the past five years when I had the authority to access more classified information than almost any other person in the Executive branch. This memorandum is purely a legal analysis—it is not operational in nature. Its author was quoted as describing it as "near boilerplate." To learn that such a document was classified had the same effect on me as waking up one morning and learning that after all these years, there is a "secret" Article to the Constitution that the American people do not even know about.[159]

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153. GOLDSMITH, *supra* note 145, at 23.

154. *Id.* at 98.

155. *Id.* at 166–67, 205–06.

156. Memorandum from John Yoo, Deputy Assistant Attorney General, Office Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, General Counsel of the Dep't of Def. 5 (Mar. 14, 2003); *see also id.* at 1, 11–13, 18–19.

157. Setty, *supra* note 144, at 592.

158. *Id.*

159. *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 2 (2008) (written

Leonard stressed the dangers of secret presidential assertions of power to circumvent law. He also cautioned that multiple such assertions can compound one another's effects. He wrote:

> The combination of these two powers of the President—that is, when the President lays claim to [powers to circumvent statutes], but does so in secret—can equate to the very open-ended, non-circumscribed, executive authority that the Constitution's Framers sought to avoid in constructing a system of checks and balances. Added to this is the reality that the President is not irrevocably bound by his own Executive Orders, and this administration claims the President can depart from the terms of an Executive Order without public notice. Thus, at least in theory, the President could authorize the classification of the OLC memo, even though to do so would violate the standards of his own governing Executive Order [on classification policy]. Equally possible, the President could change his Executive Order governing secrecy, and do so in secret, all unbeknownst to the Congress and the courts. It is as if Lewis Carroll, George Orwell, and Franz Kafka jointly conspired to come up with the ultimate recipe for unchecked executive power.[160]

Partly as a result of testimony by Bradford Berenson and Dawn Johnson at the same hearing at which Leonard appeared, Senators Feingold and Feinstein introduced legislation—the details of which had first been suggested in an article by Trevor Morrison[161]—addressing the use of OLC opinions as conduits for secret law.[162] The bill would have required the Attorney General to disclose to Congress any "authoritative interpretation" of a statute by the Justice Department that deems a law unconstitutional on Article II grounds or purports to interpret a statute in such a way as to avoid a constitutional difficulty under Article II.[163] The bill sought, in other words, to prevent the Department of Justice from secretly and authoritatively advising the executive branch that it need not obey a statute or that it may follow a strained interpretation of a statute on exclusivist grounds.

Yet from an exclusivist perspective, such a bill is unconstitutional because it could conflict with the President's judgment that the opinions must be kept secret for purposes of national security or to preserve candor in executive branch discussions. This was the view taken by Attorney

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testimony of J. William Leonard, Former Director, Information Security Oversight Office) (internal citation omitted).

160. *Id.* at 8.

161. Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, COLUM. L. REV. SIDEBAR, Feb. 15, 2007, http://www.columbialawreview.org/articles/executive-branch-avoidance-and-the-need-for-congressional-notification.

162. *See generally* CONG. REC. S8858-S8862 (daily ed. Sept. 16, 2008).

163. *Id.*

General Mukasey. He explained that "to the extent [OLC opinions] are generated or used to assist in presidential decision-making," they are subject to executive privilege.[164] He argued, for example, that the bill "could chill the Department's ability or willingness to provide full and candid legal assessments of statutes or government actions."[165] He concluded that the bill "violates constitutional limits and undermines the public interest protecting the confidentiality of legal advice vital to the integrity and legality of government decision-making."[166]

E. DISCRETION TO PUNISH CLASSIFIED SPEECH

The final example involves executive defenses against First Amendment claims for punishing "classified speech." Classified speech defenses rest on the notion that executive classification decisions are decisive as to the harmful nature of the information classified. By this logic, the decisions preclude much if any independent judicial role in assessing the same. Under ordinary First Amendment doctrine, a speaker cannot be punished for speech that could harm national security unless the speaker intended to, and was likely to, incite imminent illegal action through the speech.[167] And while the government has more leeway to punish its employees' speech under First Amendment doctrine, that leeway pertains mainly to employment-related repercussions rather than to criminal or civil punishments.[168] Even with respect to job-related repercussions, First Amendment doctrine grants employees some limited protection.[169] From a supremacist perspective, however, such protections do not apply where the speech at issue is classified. Rather, classification effectively transforms speech into something akin to government property. Alternatively, if still speech, it is transformed into speech that *ipse dixit* can be deemed to cause sufficient national security harm to be unprotected.

To place the issue in context, it is useful to start with some background on the classification system itself. Beyond the fact that the system is largely a product of executive order,[170] two points are of particular importance.

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164. Letter from Michael Mukasey, U.S. Attorney General., on the Constitutionality of the OLC Reporting Act of 2008, 2008 WL 5533799 (O.L.C.) at 3.

165. *Id.* at 5.

166. *Id.*

167. Brandenberg v. Ohio, 395 U.S. 444, 447 (1969). Alternatively, if *Brandenberg* were deemed only to apply to advocacy rather than information disclosure, the default test for classified speech restrictions would be that applied to content-based regulations of speech, or strict scrutiny. Under strict scrutiny, speech is punishable for its content only if the law at issue is the least restrictive means to achieve a compelling government interest. *See, e.g.,* United States. v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

168. Garcetti v. Ceballos, 547 U.S. 410, 418–20 (2006).

169. *Id.*

170. *See, e.g.*, DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at XXXVIII, 5, 11–13 (1997);

First, the classification system exemplifies the fact that claims of presidential power are frequently made to defend decisions made not by the President but by others in the executive branch. Given the millions of documents classified yearly, the President obviously does not make most classification decisions himself. Rather, several million people have some form of classification authority in the United States. Of that number, 2,557 had "original classification" authority as of the end of fiscal year (FY) 2009.[171] This marks a decrease from previous years, reportedly caused by agency anticipation of Obama Administration efforts to get the classification system under tighter control. The average number of original classifiers between FY 1980 and FY 2008 was 5,400.[172] Original classifiers are "authorized to determine what information, if disclosed without authorization, could reasonably be expected to cause damage to national security."[173] Additionally, original classifiers create classification guides. Such guides are instructions for "derivative classifiers." A guide "is a set of instructions issued . . . which identifies elements of information regarding a specific subject that might be classified and establishes the level and duration of classification for each such element."[174] The remaining several million persons with classification authority are derivative classifiers.[175] In theory, derivative classifiers lack policy discretion because their decisions are derived from original classification decisions.[176] In actuality, of course, determining what is derivative of already classified information—short of exact replicas of the latter—itself entails discretion. This is particularly so where the basis for derivative classification is the following of classification guides. Concerns have long been raised about lack of proper—and sometimes any—training for derivative classifiers and agency failures to update classification guides. The Obama Administration's Executive Order on classification, EO 13526, acknowledges and does attempt to address some of these longstanding problems. Specifically, it imposes training and guidebook review requirements and mandates that derivative classification

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HAROLD C. RELYEA, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS AND EMERGING MANAGEMENT ISSUES 2–5 (2007); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 338–41 (1973). A few discrete categories of information are classified by statute. *See, e.g.*, NATHAN BROOKS, CONG. RESEARCH SERV. REP., THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 2 n.7 (2004), available at http://www.firstamendmentcenter.org/pdf/CRS.security4.pdf; S. DOC. NO. 105-2, at 5, 15, 23–24.

171. INFO. SEC. OVERSIGHT OFFICE, 2009 REPORT TO THE PRESIDENT 4 (2010) [hereinafter ISOO 2009 REPORT].

172. *Id.*

173. *Id.*

174. *Id.* at 7.

175. Precise numbers of derivative classifiers are not recorded given the fluid means by which they are designated. A 1997 Report of the Commission on Protecting and Reducing Government Secrecy estimated that "three million government and industry employees . . . have the ability to mark information as classified." MOYNIHAN, *supra* note 170, at 31.

176. ISOO 2009 REPORT, *supra* note 171, at 7.

markings identify their author.[177]

The second important point about the current system is that there long has been widespread concern across the political spectrum about rampant overclassification. J. William Leonard, the former director of the Information Security Oversight Office, acknowledges a problem of "excessive classification." Leonard says that he has "seen information classified that [he's] also seen published in third-grade textbooks."[178] Former New Jersey governor and 9/11 Commission Chairman Thomas Keane has said that "three-quarters of the classified material he reviewed for the [9/11] Commission should not have been classified in the first place."[179] "The Moynihan Commission," a committee led by Senator Patrick Moynihan in the 1990s to study government secrecy, observed in their 1997 report that "[t]he classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters."[180] And Erwin N. Griswold, former Solicitor General under Richard Nixon, deemed it "apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[181] Statistics give an additional sense of the classification system's reach.As noted above, there presently are several million persons with some form of classification authority. The number of new classification decisions—including combined original and derivative decisions to classify—averaged 16.1 million per year from FY 1996 through FY 2009.[182]

While prosecutions for classified speech have been very rare, we can gain some insight into the supremacist reasoning underlying them by reviewing the legal arguments that the government made in their pursuit. In the 2005 case of *United States v. Rosen & Weissman*,[183] the Bush Administration initiated the first criminal prosecution in U.S. history against non-government employees for disseminating classified information. Both Rosen and Weissman were lobbyists for the American Israel Public Affairs Committee ("AIPAC"). According to the District Court in the case, "AIPAC is a pro-Israel organization that lobbies the United States executive and legislative branches on issues of interest to

177. EO 13526, §§ 1.9, 2.1(b)(1), (d).

178. Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at A1.

179. 108 CONG. REC. S9714 (2004) (statement of Sen. Wyden).

180. S. DOC. NO. 105-2, at xxi.

181. Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

182. ISOO 2009 REPORT, *supra* note 171, at 9.

183. *See* 445 F.Supp.2d 602 (E.D.Va. 2006) (order denying motion to dismiss).

Israel, especially U.S. foreign policy with respect to the Middle East."[184] The District Court summarized the indictment against Rosen and Weissman as follows:

> In general, the . . . indictment [against Rosen and Weissman] alleges that in furtherance of their lobbying activities, defendants (i) cultivated relationships with government officials with access to sensitive U.S. government information . . . (ii) obtained the information from these officials, and (iii) transmitted the information to persons not otherwise entitled to receive it, including members of the media, foreign policy analysts, and officials of a foreign government.[185]

The Government's core argument in the case was that Rosen and Weissman engaged in punishable conduct, not protected speech. Specifically, they "conspire[d] to steal national defense information" and to "pass on this stolen property to someone not entitled by its owner to have it."[186]

The government also noted that the Espionage Act, under which Rosen and Weissman were prosecuted, does not punish conveyance of all classified information. Rather, it punishes conveyance of classified information that relates to the national defense to those not entitled to receive it. Furthermore, in the case of oral communications such as those engaged in by Rosen and Weissman, the statute requires the possessor to have "reason to believe [that the information] could be used to the injury of the United States or the advantage of any foreign nation."[187]

While the government was wise to give the court an alternative basis to find in their favor—specifically, that the Espionage Act covers just a subset of classified information—it nonetheless made clear its positions that (1) the defendants engaged in thievery with no First Amendment implications because the information's classified status made it government property and (2) alternatively, if the court finds the defendants to have engaged in speech, it is speech that deserves no First Amendment protection because it is classified and it relates to the national defense. With respect to the latter point, the government cites a line of cases from 1919 in which the Supreme Court articulated the famous "clear and present danger test."[188] Yet the Court in those cases—and more so in later cases that substantially narrowed the test, protecting speech unless the speaker intends, and the speech is likely, to imminently incite illegal activity—made clear that the

184. *Id.* at 607–08.

185. *Id.* at 608.

186. Government's Supplemental Response to Defendants' Motion to Dismiss the Superseding Indictment at 22, 29–30, United States v. Rosen, 445 F.Supp.2d 602 (E.D. Va. Mar. 31, 2006) (No. 1:05 cr225) [hereinafter Government's Supplemental Response].

187. *Id.* at 34 (citing 18 U.S.C. § 793(e)).

188. *Id.* at 23–24.

determination of harm is for courts to make.[189] Nonetheless, the government cites the cases to suggest that the speech at issue is categorically unprotected.[190] In short, the government's central argument is that the classification label is determinative because it transforms information into government property.[191] The government's alternative argument is that the classification label is determinative because it equates—at least for information that relates to the national defense—to a judicial finding of "clear and present danger."[192]

With respect to government employee leaks, there was only one successful prosecution prior to the George W. Bush Administration for leaking outside of a classic espionage or spying context, such as leaking to the press.[193] The case, *United States v. Morison*,[194] was brought against Samuel Morison. Morison was an employee of the Naval Intelligence Support Center ("NISC"). As an employee, he had signed a nondisclosure agreement regarding classified and other sensitive information. While still employed by NISC, he leaked satellite photographs of a Soviet air carrier to Jane's Fighting Ships (Jane's), an annual British publication about international naval operations. Morison had had an ongoing relationship with Jane's and at the time of the leak was seeking permanent employment from Jane's. He was convicted under the Espionage Act for leaking classified national defense information.[195] It seems a fair assumption that the Fourth Circuit and District Court opinions in the case—both of which took strong supremacist positions—reflect arguments pressed by the government. Extrapolating from the opinions, the government arguments seemed to largely parallel those made years later in *Rosen*. First, the government apparently argued that Morison had not engaged in speech at all and that his prosecution thus raised no First Amendment problems. Instead, Morrison had engaged in theft and had violated employment terms.[196] The Morison opinions also reflected a secondary argument that, even if First Amendment concerns were at issue, the statute is sufficiently narrow to alleviate them because it covers only speech that is closely held by the government, that the speaker intentionally provides to one not

189. *See* Brandenberg v. Ohio, 395 U.S. 444 (1969); Schenck v. United States, 249 US 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

190. Government's Supplemental Response, *supra* note 186, at 23–24.

191. *See supra* note 186 and accompanying text.

192. *See supra* notes 188, 190 and accompanying text.

193. Technically, there was one other prosecution—that of former Defense Department employee Daniel Ellsberg for leaking the papers that sparked the *Pentagon Papers* case. The Ellsberg prosecution was dismissed on non-merits grounds at the district court level, however, due to ethical improprieties by the government. SANFORD J. UNGAR, THE PAPERS AND THE PAPERS 4, 6–9 (1972) (Morningside ed., Columbia Univ. Press., 1989).

194. 844 F.2d 1057 (4th Cir. 1988).

195. *Id.* at 1062–63.

196. *Id.* at 1068–70; U.S. v. Morison, 604 F.Supp. 655, 664 (D.Md. 1985).

entitled to see it and that, if disclosed, could "potentially" damage the United States or "might" be useful to an enemy of the United States.[197] Drawing from the *Morison* opinions, then, the government appears to have taken the position, as it did years later in *Rosen*, that classified information is government property and its transmission thus amounts to theft rather than protected speech. Alternatively, the government appears to have argued that classification status—or at least, as reflected in the Fourth Circuit's opinion, classification status plus a judicial finding that the disclosure could "potentially" damage the U.S. or "might" be useful to an enemy of the nation—replaces the substantially more searching judicial review that would otherwise apply to a speech prosecution.

In addition to shedding light on the government's positions in the case, the appeals court opinion in *U.S. v. Morison* marks the only federal judicial holding to date (apart from the District Court opinion that it affirmed) on the First Amendment status of classified information leaks by government employees. As noted above, the majority opinion took the view that classification turns information into government property and thus removes it from the purview of the First Amendment when the information is transmitted by a government employee to one not entitled to receive it. One of the judges on the three-judge panel joined that opinion but also concurred separately to suggest the slightly less radical view that the case implicates First Amendment rights, but that the court should defer very heavily to the political branches (both to executive judgment as evidenced through classification and that of Congress in passing the Espionage Act) rather than conduct an independent analysis of the facts.[198] The third judge in the case wrote a separate opinion that largely echoed the latter position, though expressed a bit more reticence about extreme judicial deference.[199]

The *Rosen* case also offers an example of judicial reasoning on classified speech, in that case as disseminated by private citizens. The picture from *Rosen* is somewhat mixed. On the one hand, in a 2006 opinion—issued in response to the defendants' motion to dismiss the indictment on First Amendment grounds—the court sounded fairly supremacist notes, suggesting that classification might effectively be decisive in making speech punishable.[200] Yet a subsequent opinion softened the earlier one's radical potential. Among other things, that opinion, issued in February 2009, clarified that the jury must independently determine if the Espionage Act's criteria for illegal communications were met. It explained that:

197. Morison, 844 F.2d at 1071–76; Morison, 604 F.Supp. at 660–61, 664.

198. Morison, 844 F.2d at 1084 (Wilkinson, J., concurring).

199. *Id.* at 1085–86 (Phillips, J., concurring).

200. Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 902–03.

> evidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point. . . . Further, the government's classification decision is *inadmissible hearsay* on the second prong of the [statutory definition of "national defense information"], namely whether unauthorized disclosure might potentially damage the United States or an enemy of the United States.[201]

The judicial record on classified speech, in short, is both sparse and mixed. Adding to the uncertainty is the famous Supreme Court case of *New York Times v. United States*.[202] The case did not directly involve a prosecution for classified speech. In it, the Nixon Administration sought a prior restraint against the New York Times to prevent it from publishing excerpts from a leaked classified historical study on Vietnam policy known as the Pentagon Papers.[203] As such, the Court's short *per curiam* opinion denying the government's request focused solely on the high First Amendment threshold to obtain a prior restraint.[204] Yet in concurrences and dissents, several Justices evinced supremacist leanings, suggesting that statutes or even executive regulations authorizing post-publication prosecutions might be constitutional.[205] All in all, then, there remain many open questions as to how far courts will go in embracing supremacist reasoning in the context of classified speech. Naturally, this creates uncertainty for government and speaker alike. It does, however, leave the government with supremacist reasoning to which it can point, particularly from *Morison* and the separate opinions in *New York Times*, in pursuing or threatening prosecutions.

Prosecutions and threatened prosecutions indeed are on an upswing, in keeping with supremacy's trajectory generally. As noted, the Bush Administration indicted Rosen and Weissman in the first Espionage Act case in history brought against private citizens for exchanging information outside of a classic espionage or spying context. The Bush Administration also pursued prosecutions of government employee leaks to the press and lobbyists with vigor. Most notably, the Administration opened a criminal investigation on Thomas Tamm, a former Department of Justice official who leaked the news of the TSP to the New York Times, culminating in a Pulitzer Prize winning expose of the program.[206] The Administration also

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201. U.S. v. Rosen, 599 F.Supp.2d 690, 695 (E.D.Va. 2009) (emphasis added).

202. N.Y. Times, 403 U.S. 713 (1971) (per curiam).

203. *Id.* at 714 (per curiam); *see also* United States v. N.Y. Times Co., 328 F. Supp. 324, 325–26 (S.D.N.Y.), *remanded and stay continued*, 444 F.2d 544 (2d Cir.), *rev'd*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

204. N.Y. Times, 403 U.S. 714 (per curiam).

205. *See* Kitrosser, *supra* note 200, at 897–99.

206. *See* Joe Conason, *A Whistle-Blower Who Needs Obama and Holder's Protection*, SALON,

opened a grand jury investigation and issued subpoenas to reporters and others in an effort find sources for the TSP and other stories.[207] To place these events in a larger context, "[a] 2007 study by the Reporters Committee for the Freedom of the Press found a five-fold increase since 2001 in subpoenas seeking information on a media outlet's confidential sources."[208] The Administration also indicted Lawrence Franklin, a former State Department official who passed to AIPAC lobbyists Rosen and Weisman the information that they were accused of disclosing further. Franklin pled guilty in 2005 and agreed to cooperate in the prosecution of Rosen and Weisman.[209]

While many commentators expected the Obama Administration to take a less aggressive posture toward leaks to the press, these expectations have been upended. As journalist Scott Shane observed in June of 2010, "[i]n 17 months in office, President Obama has already outdone every previous president in pursuing leak prosecutions."[210] Within that time period the Obama Administration had indicted two former government officials for leaks to the press—Thomas Drake, a former National Security Agency official who passed classified information regarding alleged agency mismanagement to a Baltimore Sun reporter,[211] and Shamai Leibowitz, a former FBI linguist who pled guilty to passing classified information to a

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Apr. 17, 2009, *available at* http://www.salon.com/news/opinion/joe_conason/2009/04/17/whistleblower; Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 13, 2008, *available at* http://www.newsweek.com/2008/12/12/the-fed-who-blew-the-whistle.html; *see also* Letter from Steven A. Tyrell, Chief of Fraud Section, Criminal Div., U.S. Dep't of Justice to Paul F. Kemp, Esq. (Dec. 31, 2008).

207. Laura Rozen, *Hung Out to Dry*, COLUMBIA JOURNALISM REV., January/February 2009, 33, 33–34; Philip Shenon, *Leak Inquiry Said to Focus on Calls with Times*, N.Y. TIMES, Apr. 12, 2008, http://www.nytimes.com/2008/04/12/washington/12leak.html; Dan Eggen, *Grand Jury Probes News Leaks at NSA*, WASH. POST, July 29, 2006, A2, http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072801606.html; Scott Shane, *Leak of Classified Information Prompts Inquiry*, N.Y. TIMES, July 29, 2006, A10, http://query.nytimes.com/gst/fullpage.html?res=9903EED7123FF93AA15754C0A9609C8B63&sec=&spon=&pagewanted=all.

208. Rozen, *supra* note 207, at 34.

209. Plea Agreement, United States v. Franklin, Nos. 1:05CR225 & 1:05CR421 (E.D.Va., Oct. 5, 2005); *see also* Josh Gerstein, *Leniency for AIPAC Leaker,* POLITICO, June 11, 2009, http://www.politico.com/news/stories/0609/23671.html; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, WASH. POST, Oct. 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100501608.html.

210. Scott Shane, *Administration Takes a Hard Line Against Leaks to the Press,* N.Y. TIMES, June 11, 2010, http://www.nytimes.com/2010/06/12/us/politics/12leak.html; *see also, e.g.,* Michael Isikoff, *The Obama Administration's Next Leaker Prosecution?*, NEWSWEEK, May 28, 2010, *available at* http://www.newsweek.com/blogs/declassified/2010/05/28/the-obama-administration-s-next-leaker-prosecution-.html.

211. Isikoff, *supra* note 210; Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO, May 25, 2010, *available at* http://www.politico.com/news/stories/0510/37721.html; Jesselyn Radack, *When Whistle-Blowers Suffer,* L.A. TIMES, Apr. 27, 2010, at A13, http://articles.latimes.com/2010/apr/27/opinion/la-oe-radack-20100427.

blogger.[212] As one commentator noted after Leibowitz pled guilty, "'If Thomas Drake is convicted and sent to jail, this will be the first president to send two leakers to prison in his term in office.'"[213] The Obama Administration also renewed a Bush era grand jury investigation and subpoena of New York Times reporter James Risen regarding Risen's 2006 book, *State of War: The Secret History of the CIA and the Bush Administration*.[214] And while the Obama Administration voluntarily dismissed the prosecution of AIPAC lobbyists Rosen and Weissman in May of 2009, it signaled that it did so for pragmatic, not ideological reasons. In its motion to dismiss the Administration cited its "disagreement with some of the legal rulings in this case," presumably referring to the court's February 2009 order. It observed that "[t]he landscape of [the] case has changed significantly since it was first brought."[215]

The Obama Administration had also, as of Fall 2010, kept open the criminal investigation against Thomas Tamm that was initiated on December 30, 2005.[216] As Michael Isikoff wrote in 2008:

> The FBI has pursued [Tamm] relentlessly for the past two and a half years. Agents have raided his house, hauled away personal possessions and grilled his wife, a teenage daughter and a grown son. More recently, they've been questioning Tamm's friends and associates about nearly every aspect of his life. Tamm has resisted pressure to plead to a felony for divulging classified information. But he is living under a pall, never sure if or when federal agents might arrest him.[217]

So long as the case remains in the investigation stage, rather than being tried or even brought to indictment, the government's evidence is not subject to external checks. Many consider this troubling, arguing that Tamm's disclosures benefited the nation and did no harm to national security.[218] Regardless of whether these critics are wrong or right, the fact is that the exclusivist equating of classification with illegality gives the government a basis to keep an investigation open for years, regardless of whether it could prevail at trial or even obtain an indictment.

Similarly, when defendants plead guilty to leaking classified information, factual questions as to whether any harms meet statutory or constitutional standards are never put to the test. In the case of Lawrence Franklin, for example, who pled guilty to leaking information to AIPAC

212. Gerstein, *supra* note 211.
213. *Id.* (quoting Gabriel Schoenfeld).
214. Isikoff, *supra* note 210; Gerstein, *supra* note 211.
215. Motion to Dismiss Superseding Indictment at 1, United States v. Rosen, 557 F.3d 192 (4th Cir. May 1, 2009) (No. 08-4358).
216. *See* Radack, *supra* note 211; Conason, *supra* note 206.
217. Isikoff, *supra* note 210.
218. *See, e.g., id.*

lobbyists Rosen and Weissman, the judge in the case deemed it "'very disputable' whether some of the information at the heart of the case was actually the kind of 'national defense information' it is illegal to relay outside the government."[219] In the case of FBI linguist Shamai Leibowitz, who also pled guilty to leaking classified information the U.S. District Court Judge who handled the case acknowledged that he did not know what information was disclosed or whether the disclosures were damaging. As Josh Gerstein reports:

> [Judge] Williams [said] that while he assumed that the disclosures had a serious impact on national security, he really didn't know because he wasn't privy to what information was disclosed and what impact it had.
>
> "The court is in the dark," the judge said. "I'm not a part and parcel of the intricacies of that . . . I don't know what was divulged, other than some documents."[220]

The recent uptick in classified speech prosecutions and investigations lengthens the shadow of exclusivist approaches to classified speech. To understand this shadow effect and its importance, it helps to recognize that information leaking is a way of life in U.S. government and journalism. As one observer put it, "the leaking of classified information is routine in Washington, where such data is traded as a kind of currency."[221] Furthermore, it is well known and long acknowledged that much leaking comes from the White House itself and this practice dates back at least to the administration of Theodore Roosevelt.[222] Indeed, it is a well-worn joke that "the ship of state is the only vessel that leaks from the top."[223] Administrations have long selectively leaked classified information that puts them in a favorable light while guarding less favorable information.[224]

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219. Gerstein, *supra* note 209.

220. Gerstein, *supra* note 211.

221. Eli J. Lake, *Trouble for Journalists: Low Clearance*, NEW REPUBLIC, Oct. 10, 2005, at 16, *available at* http://www.tnr.com/article/politics/low-clearance.

222. Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 236, 250–51 (2008); *see also* William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1468–69 (2008) (noting that presidents often condemn leaks, even though they and other high-ranking officials frequently divulge classified information to journalists).

223. This quote has been attributed to journalist James Reston. *See* David E. Rosenbaum, *First a Leak, Then a Predictable Pattern*, N.Y. TIMES, Oct. 3, 2003, http://www.nytimes.com/2003/10/03/world/debating-a-leak-political-memo-first-a-leak-then-a-predictable-pattern.html?ref=david_e_rosenbaum.

224. *See, e.g.*, Papandrea, *supra* note 222, at 249–55; Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 910–14 (1990).

Among the most important shadow effects of classified speech supremacy is the selective chilling effect that it can have on journalists and government leakers. Those who leak information that paints an administration in a bad light—revealing illegal, unethical, or incompetent behavior, for example—have much to fear in an environment in which prosecutions occur and are threatened regularly. Long-time investigative journalist Seymour Hersh explains how this fear impacts federal employees and media institutions alike:

> Bureaucrats who in the past would have resisted leak-investigation demands from the administration, Hersh says, are today "more compliant." Hersh says that back in the 1970s, when he broke a story about the government spying on Americans, a top Justice Department official (Gerald Ford's attorney general Edward Levi) told those in the White House (including Ford's chief of staff Dick Cheney) who were seeking to pursue a leak investigation against Hersh, "Are you kidding? Get the hell out of here." Not any more. And that sense of fear and intimidation has seeped into the DNA of media institutions as well.[225]

The chilling effect is compounded by recent legislative changes—themselves enacted partly in response to supremacist arguments—that give administrations more leeway to conduct electronic surveillance. These changes, say reporters, make sources reluctant to talk for fear that their conversations will be overheard by the government.[226]

Finally, a few words are in order regarding WikiLeaks, the website which in the past several months (as of this writing) has generated great controversy for disseminating large troves of classified documents on its website and to selected newspapers. As of early December 2010 (when final edits on this article were made), WikiLeaks and its founder Julian Assange faced a storm of criticism from members of the media and from Republican and Democratic politicians alike, stemming most directly from WikiLeaks' November and December 2010 disclosures of international diplomatic cables. To provide a small sampling of these remarks: U.S. Senate Republican Leader Mitch McConnell deemed Assange a terrorist who must be prosecuted.[227] Representative Pete King similarly urged the Justice Department to classify WikiLeaks as a "foreign terrorist organization" and to prosecute Assange for espionage.[228] Former Alaska

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225. Rozen, *supra* note 207, at 35.

226. *See* Samantha Fredrickson, *Tapping into the Reporter's Notebook*, THE NEWS MEDIA & THE L., Fall 2008, at 10, 10–11.

227. Associated Press, *Senate GOP Leader: WikiLeaks Head a "Terrorist,"* Dec. 5, 2010, *available at* http://www.salon.com/news/feature/2010/12/05/us_us_wikileaks_mcconnell.

228. Helen Kennedy, *WikiLeaks Should Be Designated a "Foreign Terrorist Organization," Rep. Pete King Fumes*, DAILY NEWS, Nov. 28, 2010, http://www.nydailynews.com/news/world/2010/11/28/2010-11-28_media_unveils_classified_documents_via_wikileaks_website_in_

Governor Sarah Palin accused Assange of "treason" and lamented that Assange has not been "'pursued with the same urgency we pursue Al Qaeda and Taliban leaders.'"[229] Former Speaker of the House Newt Gingrich said that "Julian Assange is engaged in terrorism. He should be treated as an enemy combatant. WikiLeaks should be closed down permanently and decisively."[230] A column in the Wall Street Journal also suggested that Assange could be deemed an enemy combatant and that those who provide classified documents to WikiLeaks should be subject to the death penalty.[231] And former Arkansas Governor Mike Huckabee "called for the execution of Bradley Manning, the 23-year-old US army intelligence analyst who is in custody at a military base in Virginia, facing trial for downloading the files while on duty in Iraq."[232]

Beyond its ongoing prosecution of Manning, the U.S. Justice Department recently opened a criminal investigation into WikiLeaks for possible Espionage Act violations.[233] And U.S. Senator Joe Lieberman, who chairs the U.S. Senate Homeland Security Committee, urged private internet service providers to cease all assistance to WikiLeaks, and several providers have done just that.[234] In a statement released after internet giant Amazon.com announced that its servers would no longer host WikiLeaks, Lieberman said: "'[Amazon's] decision to cut off WikiLeaks now is the right decision and should set the standard for other companies WikiLeaks is using to distribute its illegally seized material. I call on any other company or organisation that is hosting WikiLeaks to immediately terminate its relationship with them.'"[235]

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explosive_release_of.html.

229. Glenn Greenwald, *WikiLeaks Reveal More Than Just Government Secrets*, SALON.COM, Nov. 30, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/11/30/wikileaks/index.html.

230. James Hohmann, *Gingrich Faults Obama Administration Over WikiLeaks*, politico.com, Dec. 5, 2010, http://www.politico.com/blogs/politicolive/1210/Gingrich_faults_Obama_administration_for_WikiLeaks_handling.html?showall.

231. *Attack by WikiLeaks: Assange is an Enemy of the U.S., But the U.S. Keeps Too Many Secrets*, WALL STREET J., Dec. 1, 2010, at 13.

232. Robert Booth & Haroon Siddique, *How WikiLeaks Altered the Way We See the World in Just a Week*, THE GUARDIAN, Dec. 4, 2010, http://www.guardian.co.uk/media/2010/dec/04/wikileaks-world-week-cables.

233. *Id.*

234. *See* Mark Townsend, *Paypal Joins Internet Backlash Against WikiLeaks*, Mark Townsend, THE GUARDIAN, Dec. 4, 2010, http://www.guardian.co.uk/media/2010/dec/04/paypal-internet-backlash-wikileaks; Dan Gillmor, *Online, the Censors Are Scoring Big Wins*, SALON.COM, Dec. 3, 2010, http://www.salon.com/technology/dan_gillmor/2010/12/03/the_net_s_soft_underbelly/index.html; Charles Arthur, *WikiLeaks Cables Visualization Pulled After Pressure from Joe Lieberman*, Dec. 3, 2010, *available at* http://www.guardian.co.uk/world/blog/2010/dec/03/wikileaks-tableau-visualisation-joe-lieberman; Glenn Greenwald, *More Joe Lieberman-Caused Internet Censorship*, SALON.COM, Dec. 2, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/12/02/censorship/index.html.

235. Arthur, *supra* note 234.

While the saga continues to unfold as of this writing, three general observations seem warranted at this point. First, the government's legal arguments in any ongoing or future prosecutions will almost certainly echo the supremacist positions that have been invoked in the past with respect to prosecutions for leaking or disseminating classified information. That is, while the government will likely deem the disclosures at issue particularly dangerous, it will suggest that its burden is only to show that the disclosures were classified and relate to national security. In the alternative, the government will likely suggest that if it must show some harm from the disclosures, the threshold for the demonstration is dramatically lower than it would be were non-classified speech at issue. Second, amendments to strengthen the Espionage Act to make it easier to prosecute Assange have already been proposed as of this writing.[236] It seems likely that supporters of such legislation will deem any First Amendment concerns *de minimis* in light of supremacist reasoning. Third, supremacy's shadow effect has already played an important role in the public debate over WikiLeaks. As illustrated above, a number of prominent U.S. commentators and politicians appear to take as a given the illegality of the disclosures made to and disseminated by WikiLeaks. Presumably, this assumption stems from the twin premises that leaking and disseminating classified information is categorically illegal and that such illegality, given supremacist reasoning, is constitutional. Indeed, such widespread, casual assumptions of criminality are particularly striking when juxtaposed with a recent statement by Defense Secretary Robert Gates:

> But let me—let me just offer some perspective as somebody who's been at this a long time. Every other government in the world knows the United States government leaks like a sieve, and it has for a long time. And I dragged this up the other day when I was looking at some of these prospective releases. And this is a quote from John Adams: "How can a government go on, publishing all of their negotiations with foreign nations, I know not. To me, it appears as dangerous and pernicious as it is novel." . . .
>
> Now, I've heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer, and so on. I think—I think those descriptions are fairly significantly overwrought. The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets.

236. *See, e.g.*, Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED.COM, Dec. 2, 2010, http://www.wired.com/threatlevel/2010/12/shield.

> Many governments—some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation. So other nations will continue to deal with us. They will continue to work with us. We will continue to share sensitive information with one another. Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.[237]

CONCLUSION

Supremacist approaches to presidential power are increasingly influential. This fact has important normative implications. As I make clear in the Introduction and in other work, my own view is that supremacy misreads the Constitution. It conflates the President's structural capacities with a legal right to exercise the same in the face of inter-branch checks. As such, it blocks mechanisms by which presidential misdeeds can be discovered by the other branches or the people. Overall, it undermines those aspects of the constitutional design that assume and provide for presidential accountability.

Yet while this Article is a step in a larger normative project,[238] the Article itself is meant to be largely descriptive. Specifically, it describes supremacy, its justifications, its various manifestations, and the impact of those manifestations upon transparency. Regardless of what one ultimately thinks of supremacy, it is important to understand it and its implications, given its growing influence.

Perhaps the Article's most foundational descriptive mission is simply to identify supremacy as a distinct school of thought in the first place. Exclusivity, state secrets privilege, executive privilege, and classified speech have each received their fair share of scholarly, judicial, and political branch attention. Yet little attention has been paid to the common constitutional underpinnings of these seemingly distinct areas of thought. This Article seeks to identify common interpretive threads that run through them. Furthermore, it seeks to point out a common historical trajectory whereby supremacist arguments have, for the most part, grown increasingly radical over time. Indeed, some modern supremacist claims rely partly on ancestral claims that were not themselves supremacist, like the executive

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237. Jack Goldsmith, *Realism 101 on WikiLeaks*, Dec. 1, 2010, *available at* http://www.lawfareblog.com/2010/12/realism-101-on-wikileaks/.

238. Indeed, much of this Article will form a chapter in a forthcoming book project, and subsequent chapters will elaborate on the argument that supremacy is inconsistent with the Constitution due partly to supremacy's impact on transparency and accountability.

privilege claims of the Washington Administration.

Finally, this Article seeks to describe the relationship between supremacy and transparency. As outlined in the Introduction, accountability is central to the constitutional design of the presidency. Accountability, in turn—both logically and as evidenced by history—assumes that the other branches and the people have meaningful access to information. Regardless of one's ultimate legal or policy judgments about supremacy, its impact on government transparency—both that of specific claim types, and of supremacist claims combined—should be considered and addressed.