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2019

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~~(S//REL)~~ (DYS)FUNCTIONAL SECRECY [REDACTED]

Laura K. Donohue*

Many theorists consider secrecy inimical to liberal democracy. Precise examination of the role that it plays in contemporary government, however, including its strengths and weaknesses, has been limited.¹ This chapter, accordingly, lays out a functional theory of secrecy, considering its role in the three branches of government in four contexts: deliberation, information security, law, and adjudicatory processes. Whether and to what extent cloaking information advances the interests of the state and society varies according to how it operates in each category.

The first area, deliberative secrecy, carries with it significant advantages. It can facilitate informed debate and honest exchange, allowing individuals to alter their views without losing face and ensuring that the final determination is made on the merits. This is the domain of advice provided to the President, closed Congressional hearings, and juror deliberations. The nature of the deliberations alter, however, as the outcome approaches implementation of the law, adoption of rules, and resolution of a legal question. Communications may become probative, if not dispositive, of the final rule, interpretation, policy, or decision. Along this spectrum, the impact of secrecy shifts from facilitating open exchange to obfuscating the final finding, law, or judgment. As it does so, the quality of the communication shielded from public scrutiny shifts from deliberative-secrecy to information-secrecy or secret law, in which capacity it may *undermine* the effective operation of a liberal, democratic state.

The second category, information secrecy, masks factual data that the government obtains or generates. It encompasses controls placed on material (e.g., classification, informal controls, and patent secrecy orders) as well as restrictions on government employees. Secrecy functions in this realm to forestall efforts by individuals wronged from seeking justice through the courts. Absent knowledge of how the executive wields its authority, neither facial nor as-applied challenges may be brought to limit government overreach. Civil litigation also may be severely constricted, resulting in the failure to rectify

a wide range of grievances ranging from breach of contract and environmental damage, to wrongful death and personal injury. The cost of cloaking how power is exercised is borne in litigation, civic engagement, and public debate. “Official” interpretations may go unchallenged even as individuals with access to information increase their power within the executive and vis-à-vis the other branches and citizens. To the extent that information-secrecy bleeds over into the other branches, attempting to bind their actions, it undermines the other branches’ ability to perform their constitutional functions.

The third category centers on efforts to hide the law. Secrecy here threatens the structure of the state itself. It has a profound impact on the rule of law even as it radically augments the power of agencies deep within the executive branch. By preventing access to law, it undermines the legality—and morality—of the rules themselves. A legal system that hides law from the public may not, even in a positivist tradition, be said to exist. Such secrecy raises question about the existence of a legal system.

The fourth category, adjudicatory secrecy, masks the administration of justice. In the courts, it may impact litigation, preventing the introduction of evidence, altering proceedings, and hindering publication of all or parts of judicial decisions. State secrets doctrine may suspend litigation altogether. As a matter of process, courts may exclude all or some portion of the spectators. Yet a defendant’s right to a public trial relies in part on public pressure to ensure that witnesses, prosecutors, judges, and juries act well. Adjudicatory secrecy affects the public’s right to participate in the judicial process and to learn from it. Judges may hold trials *in camera*, or *ex parte*, increasing the potential for poor decision-making. It may conceal judicial decisions, undermining rights central to the liberal, democratic state. Like secret law, this is a particularly pernicious form of secrecy. The reason, however, is slightly different than that offered in relation to the courts: as an executive act, it affects separation of powers and both structurally and substantively the protection of rights within the state.

In each of these categories, secrecy presents obstacles to civil and criminal litigation and to the effective operation of the legal system writ large. The question of precisely how and whether such interference is justifiable turns on the function of secrecy in each context.

1. Deliberative Secrecy

Deliberative secrecy encourages honest debate and discussion. Far from being a novel idea, the value of protecting inter-personal exchange extends to antiquity. For Michel Foucault, the Greek concept of *parrhesia* [παρρησία], or truth-telling, lay at the heart of knowledge, power, and the self.² It required that the individual believe that what he said was accurate and exhibit courage, even at the risk of damaging the relationship.³ As a matter of political interaction, *parrhesia* occurred during democratic assembly and between counsellors and the ruler. The latter carried substantial risk: princes unable to accept the truth could (and did) kill individuals for what they said.⁴ Nevertheless, for counselors to be effective, they had to have the ability and the courage to tell the truth.⁵ Contemporary respect for the deliberative process reflects this inheritance. It is animated by the idea that the governmental structure has to create space within which counselors, lawmakers, and jurors can be forthright.

The deliberative process encompasses intercourse leading to a final decision. In legal matters, we can think about the end point as the rule that is adopted, the statutory interpretation, or the final determination in a dispute. The steps along the way exist on a continuum, starting with individuals, moving to communication between and among persons and entities, advancing to formal processes, and eventually resulting in a decision.

All three branches in the United States recognize the importance of encouraging frank and open exchange by shielding a certain amount of deliberation from public scrutiny. Certain Congressional hearings and private meetings between members of Congress, executive privilege centered on consultation between the President and her immediate advisors, and juror deliberations thus enjoy privileged status. The point at which a decision is reached represents the formal construction of the rule, or the interpretation of the rule that serves as working law, to guide behavior. At that point, the function of secrecy shifts from deliberative secrecy to secret law (see discussion in Part 3, *infra*). To the extent that what we might think of as “proximate deliberation” is relevant to understanding the final determination, then it exists, in some sense, outside the deliberative process as integral to the final rule.

As with deliberative secrecy, the importance of airing proximate deliberations to deepen public understanding of the final rule is recognized by each branch. The Congressional Record publishes the deliberations of the full House and Senate. Committees, by and large, publish their hearing transcripts. The Federal Register, in turn, contains the rules, proposed rules, and notices of federal agencies. Every final rule adopted and published in the Code of Federal Regulations (CFR) includes not just a summary of the rule and the legal authority for its issuance, but also a summary of the rule's purpose and analysis of public comments received. Executive Orders and Presidential Proclamations (which, absent extraordinary circumstances, are published in the CFR) include within them the authority under which they are issued as well as the reasoning leading to the rule. Federal courts, in turn, look to sources such as James Madison's notes from the Constitutional Convention, the *Federalist Papers*, and various anti-Federalist papers to shed light on the Constitutional text, as well as the legislative history to shape statutory interpretation. Appellate courts issue opinions that include the *grounds* on which their final determinations are made. The *reasoning* supporting the holding establishes binding precedent, even as extraneous reasoning—i.e., *dicta*—may be probative, if not dispositive, in subsequent cases.⁶ Proximate deliberation in the judicial context incorporates not just the ruling on the question presented, but *how* the court comes to that conclusion.

Proximate deliberation thus operates within a broader legal context, subject to the considerations in Part 3, below. Outside of this realm, though, arguments for and against deliberative secrecy are largely consistent among the branches. This section, accordingly, considers these debates before delving into a discussion of how deliberative secrecy functions within each branch.

A. Weighing the Value of Deliberative Secrecy

There are numerous arguments for masking political and legal discussion early in the deliberative process, before the proximate decision point is reached. Each argument emphasizes the role that secrecy plays in yielding a better outcome.⁷

First, deliberative-secrecy can facilitate candor and build trust between individuals. This argument is ultimately a consequentialist one in which the goal is to get better ideas on the table. Individuals may be

more willing to consider arguments put forward by individuals with whom they have a frank and open exchange. Second, protecting deliberations may help to prevent outside parties and interest groups from exerting undue influence. Money and politics can skew decisionmaking in favor of those with more power, potentially undermining coming to a better conclusion. Third, secrecy may allow individuals to play devil's advocate, considering alternative (and potentially unpopular) views, without being concerned about negative publicity that may result from entertaining different ideas. By exploring alternative positions, decisionmakers can reach better results. Fourth, it can create space for individuals to be persuaded by arguments that are put forward and, thus, to change their positions. By not becoming publicly tied to a particular position, decisionmakers may avoid the need to find a way to save face to reverse a prior course, ultimately reaching a better final result. This argument evokes a deeply humanistic principle: it is only through full and frank discussion that one's own ideas can evolve. Fifth, as a structural and political matter, protecting the deliberative process may help to maintain the separation of powers, allowing each branch to operate without interference from the other organs of government. Adhering to structural divisions may help to ensure that individuals (or branches) ambitious to influence the course of events are not able to overreach, thereby protecting individual liberty .

Important drawbacks accompany these advantages. By preventing public knowledge of the back-and-forth that shapes the outcome, deliberative secrecy precludes outside parties from influencing the conversation. This may have deleterious consequences on the substance or legitimacy of the final rule or decision. Important expertise may be lost because others are not allowed into the conversation. Simultaneously, where the discussion involves a negotiation, it may be harder to get buy-in to the final agreement if key stakeholders are neither at the table nor allowed to contribute in a meaningful way to the design. Voters may be confronted with merely a thumbs-up or a thumbs-down option, instead of having the opportunity to shape the final product. Along the way, the less accessible decision-making is to the outside world, the more power those in the room accrue.

Another drawback stems from the danger that what is decided may exceed the purview set for the deliberative body. While this concern may be mitigated by requiring the final decision to be approved by

an external arbiter to evaluate the legitimacy of the action, at that point, it may be too late to disentangle various components of the agreement. In an effort to advance at least some of the decisions, others may thus get swept into the process, leading to unexpected outcomes.

An additional difficulty that stems from protecting the deliberative process is that once a decision is reached, it may be difficult to ascertain the intent behind the rule that is adopted. While purposive arguments may be dismissed as non-conclusive, in some circumstances, they certainly can be probative of final meaning. Legislative history does provide some kinds of insight into the meaning of laws, while judges in their opinions must explain the basis of their decision-making. No less relevant are the intentions of policymakers in the executive branch. Absent such insight, implementation and public understanding may suffer.

To chart a normative path that allows for the advantages of the deliberative process and mitigates the risks, it is helpful to look more carefully at the function of secrecy within the respective realms.

B. Legislative Privilege

The United States has a long history of protecting legislative deliberation, adopting it during the Constitutional Convention and then including in the text of the Constitution. Over the past few decades, though, legislative secrecy has significantly increased, with an attendant impact on public understanding of the law and the ability of citizens to hold the executive accountable through the courts.

In May 1787, within days of meeting for the first time, delegates to what became the Constitutional Convention agreed to protect their deliberations from the “licentious publications of their proceedings” by vowing to keep them secret, masking their decision-making from those not present—including, and particularly, the press.⁸ The rule they adopted forbade any duplication of journal entries. It also limited access to the journal only to members present, and it established “That nothing spoken in the House be printed, or otherwise published or communicated without leave.”⁹

James Madison, whose scrupulous notes of the Convention provide much food for fodder, was one of the strongest proponents of secrecy. As he explained to Thomas Jefferson, it “was thought expedient in order to secure unbiassed discussion within doors, and to prevent misconceptions &

misconstructions without, to establish some rules of caution which will for no short time restrain even a confidential communication of our proceedings.”¹⁰ Jefferson did not welcome the rule, lamenting to John Adams, “I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & ignorance of the value of public discussions.”¹¹ Others similarly objected, but the decision had strong support among delegates.¹² George Mason saw it as “a necessary precaution to prevent misrepresentations or mistakes; there being a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly mature and arranged.”¹³ George Washington noted in his diary, “Attending in Convention and nothing being suffered to transpire no minutes of the proceedings has been, or will be inserted in this diary.”¹⁴

The primary reason for the rule was to ensure that delegates were at liberty to discuss sensitive matters. Secrecy, Madison explained, would “secure the requisite freedom of discussion,” even as it would also “save both the Convention and the community from a thousand erroneous and perhaps mischievous reports.”¹⁵ Additional rationales supported a certain amount of discretion—not least, the fact that while their formal purview was to amend the Articles of Confederation, as a practical matter, the delegates created an entirely new government.¹⁶ Privileged exchange had other benefits as well. It allowed those present to propose ideas without fear of repercussion, encouraging more robust debate. It also prevented delegates from becoming tied to their initial positions, allowing them to be influenced by argument and reason. It protected the conversation from becoming unduly influenced by external groups. And it cloaked sausage-making from outside scrutiny, leaving the final product to be inspected on its own merits. Mason considered it “a necessary precaution to prevent misrepresentations or mistakes; there being a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly matured and arranged.”¹⁷ Jared Sparks, an early American historian, later related a conversation with Madison:

Opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime, the minds of

the members were changing and much was to be gained by a yielding and accommodating spirit. Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to retain their ground, whereas by secret discussion, no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to argument. Mr. Madison thinks no Constitution would ever have been adopted by the Convention if the debates had been public.¹⁸

The nascent constitution went on to recognize the importance of both democratic accountability and deliberative secrecy.¹⁹ The Journal Clause ensured public knowledge of how representatives voted (at least in regard to the preferences of a minority on certain matters). It reflected a presumption of transparency in regard to the chambers' deliberations. It afforded the Senate and House the authority to determine the timing of the release of the information. And it retained for each chamber the discretion to waive public release of information. At the same time, it fell short of creating a universal right of physical access.

A few points deserve notice. While a majority, assumedly, could block access to deliberations, the Roll Call Clause ensured that just one-fifth of the membership could require publication of how representatives voted—a constitutional minimum for accountability. This design created a presumption of openness but allowed for each house to determine, on a case-by-case basis, the extent to which deliberative secrecy would be maintained. Ultimately, the Madisonian check, in conjunction with federalist pushback from the state legislatures, would help to demarcate the appropriate boundaries.²⁰

Directly elected by the people and ceded the responsibility of raising revenue, the House quickly adopted an open-door policy.²¹ The Senate, in contrast, initially followed the precedent set by the Continental Congress and the Constitutional Convention: it met in secret and looked down on the House for the populist displays that marked the public gallery.²² It gave its first employee, the doorkeeper, strict instructions to prevent either the public or members of the House of Representatives from gaining access to the chamber while the Senate was in session.²³

Pressure steadily increased on the Senate, however, to admit the public—particularly from state legislatures, who had elected members of the chamber. In 1794, Democratic-Republicans introduced a measure to allow for more openness.²⁴ The proposed resolution cited the responsibility that representatives had to their constituents and to their states to make “all questions and debates” related to their legislative and judicial responsibilities public.²⁵ North Carolina’s Alexander Martin explained that withholding such information undermined Senators’ accountability—the importance of which increased in proportion to the greater powers afforded the chamber.²⁶ Publicity would allow for “abuse of power [and] mal-administration of office” to be “more easily detected and corrected”; it would prevent “jealousies, rising in the public mind from secret Legislation”; and it would instill greater confidence “in the National Government,” which was entrusted with securing and protecting the “lives, liberties, and properties” of the People.²⁷ Accordingly, the resolution called for “a standing rule, that the doors of the Senate Chamber remain open while the Senate shall be sitting in a Legislative and Judiciary capacity, except on such occasions as in their judgment may require secrecy.”²⁸

Although the resolution was postponed,²⁹ a dispute over whether Pennsylvania’s senator-elect (Albert Gallatin) met the constitutional citizenship requirements for office afforded Democratic-Republicans another opportunity to press for open proceedings. The Federalist majority, keen to avoid the bad press that may well follow a closed-door decision, acquiesced.³⁰ Less than a fortnight later, the Senate agreed to open all of its deliberations to the public “so long as the Senate shall be engaged in their Legislative capacity, unless in such cases as may, in the opinion of the Senate, require secrecy.”³¹

In addition to the Journal Clause, the Statement and Account Clause assumed representatives’ public accountability.³² The provision retained a similar discretion, although “all public Money” was to be included. The Constitution granted no discretion in terms of what must be accounted for, even as it preserved a liberty for Congress to determine the manner in which the information was presented and to keep its debates about how such money should be spent private.

Over time, the standard evolved for the Senate and House to hold most of their deliberations in public, with special rules for exceptional circumstances. As Professor Dakota Rudesill observes, by 1800

open sessions were the default: “Thereafter the House and Senate retained rules allowing for secret or closed sessions to consider confidential information and presidential messages, treaties, and nominations,” but starting in the nineteenth century, “non-public proceedings were generally rare.”³³ The pattern was “open full chamber sessions to debate and pass the law, with periodic full chamber closed sessions and regular closed committee work to consider non-public information.”³⁴

Reflecting this legacy, the rules of the House of Representatives provides for secret sessions, “[w]hen confidential communications are received from the President, or when the Speaker or a Member, Delegate, or Resident Commissioner informs the House that such individual has communications that such individual believes ought to be kept secret.”³⁵ Since the War of 1812, the House has only met secretly, as a whole, on half a dozen occasions.³⁶ Almost all involved matters of foreign affairs.

The Standing Rules of the Senate similarly allow for sessions to be closed for legislative matters, as well as nominations and treaties.³⁷ For the latter, sessions are presumptively closed unless a majority decides otherwise (which it frequently does). The chamber requires that impeachment trials be closed.³⁸ Because the Senate has more explicit constitutional foreign affairs authorities than the House, as well as the power of impeachment, the Senate has met secretly considerably more times than its counterpart, but almost exclusively in relation to the matters specified above.³⁹

Although a presumption of openness accompanies Congressional deliberations, the practice of closed committee hearings has increased commensurate with the growth of the national security state and the establishment of its legislative counterparts. While a certain amount of secrecy may be seen as a concomitant necessity in light of new and emerging threats, weapons, and technologies, the democratic costs associated with cloaking legislative deliberations raises significant concerns—particularly in light of overclassification. The Senate Select Committee on Intelligence (SSCI) and the House Permanent Committee on Intelligence (HPSCI) routinely close their hearings and refuse to release even redacted transcripts or summaries of the proceedings. In 2016, SSCI shuttered nearly every hearing, holding 63 secret sessions and only four open discussions.⁴⁰ SSCI barred the public from 94% of its hearings. In 2017, the number of secret hearings skyrocketed to 75, with 17 remaining open, making 82% of SSCI’s

hearings closed to the public. The following year, 83% of SSCI's meetings were closed.⁴¹ Like its Senate counterpart, the HPSCI conducts most of its hearings behind closed doors.⁴² And it is not just the intelligence committees that are closing their hearings to the public. Over the past two years, outside of nominations, the Senate Armed Services Committee has closed one out of every four hearings.⁴³

To the extent that what is at issue relates to free and open discussion removed from final determination, the decision to close hearings may result in members being able to consider measures more honestly and to ask hard questions. But in the process, public education on such matters is lost. To the extent that these hearings, moreover, function as a form of public *oversight*, and not merely discussion of how best to craft future legislation, additional complications follow. Representatives cannot be held responsible as to how diligently they perform their duties if the public cannot see what they are doing or what is happening behind closed doors. No more can the public understand how the executive is interpreting and implementing the law—or hold it responsible through the judicial system. The cost is borne further in democratic engagement and potentially, once information is finally aired, in the political legitimacy of institutions that have been operating in unexpected ways outside the public gaze. To the extent that Congressional activity involves oversight, moreover, the question of secrecy may leave the realm of deliberation and enter into other categories: namely, data secrecy and masking the law. Here, as a normative matter, the decision to block public access is based on much weaker grounds.

C. Executive Deliberation

Like the legislature, from the earliest days of the Republic, the executive has sought to protect its deliberative processes. There are limits, however, on what can be considered within this realm and implications for the conduct of civil and criminal litigation as well as the structure of the state.

One of the first questions of executive privilege in the newly-constituted government arose in the celebrated case of *Marbury v. Madison*.⁴⁴ Charles Lee, Marbury's attorney, subpoenaed Levi Lincoln, who, while acting Secretary of State, had been in the room with Thomas Jefferson when they found the undelivered commissions. Jacob Wagner, Jefferson's temporary secretary (pending Meriwether Lewis's arrival), had neglected to enter the commissions into the record book, making Lincoln's testimony critical.⁴⁵

Lincoln, however, refused to answer on grounds of executive privilege: he stated “that he was not bound, and ought not to answer, as to any facts that came officially to his knowledge while acting as secretary of state.”⁴⁶ Once the questions were written and provided to him, Lincoln offered a rationale beyond the mere provision of candid advice to the President. As reported by Cranch, “1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and 2d. He ought not to be compelled to answer any thing which might tend to criminate himself.”⁴⁷ Lee argued in response that “the duties of a secretary of state were two-fold.” On the one hand, he had a duty to act “as a public ministerial officer of the United States, totally independent of the President.”⁴⁸ In this capacity, “any facts which came officially to his knowledge . . . he was as much bound to answer as a marshal, a collector, or any other ministerial officer.”⁴⁹ In his second role, he acted as an agent of the President. Here, he was “bound to obey his orders, and accountable to him for his conduct.”⁵⁰ In this capacity, “any facts which came officially to his knowledge . . . he was not bound to answer.”⁵¹ Lincoln again objected, saying that “it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge.”⁵² While he might have a duty to the court, he also had a duty to the executive.

Chief Justice Marshall’s took the position that while deliberative secrecy was a valid exercise of executive power, and the Fifth Amendment prevented self-incrimination, nothing Lincoln had been asked to disclose could be considered confidential. To the contrary, it was “a fact which all the world have a right to know.”⁵³ Lincoln capitulated.⁵⁴

The case underscored the distinction between factual information and confidential political and legal discussions that lead to decision points. While the former fell outside of executive privilege, the latter fell well within the long-recognized principle that full and frank consideration of matters before the President required some level of private discretion. The fact that Lincoln had seen that the commissions had been signed by the President John Adams and marked with the seal of the United States did not fall within executive privilege. Nor was it beyond his purview to testify whether, to his knowledge, any of the commissions had actually been delivered.

Reflecting this legacy, the Courts and Congress have repeatedly recognized the validity and importance of executive privilege.⁵⁵ While it is not to be invoked lightly, it is considered essential to executive deliberation.⁵⁶ It is for this reason that the Freedom of Information Act (FOIA) includes an exemption for inter- or intra-agency memorandums or letters that contain attorney work-product.⁵⁷ The purpose is not to protect secrecy *per se*, but, more specifically, the deliberative process.⁵⁸ This includes a wide range of matters.⁵⁹

Nevertheless, there are limits as to what falls within the deliberative process. Assuming that protection of the liberal, democratic government is the aim of the state, the extent to which separation of powers may be undermined serves as a useful marker for how to ascertain where the line ought to be drawn. To the extent that executive privilege impairs accountability (to the public or to Congress), or the ability of the judiciary to fulfill its important constitutional functions, then a boundary is crossed.

D. Judicial Matters

There are myriad ways in which the judiciary, too, recognizes the importance of deliberative secrecy. Grand juries proceed in secret, largely to ensure the free flow of discussion. Outside of narrow circumstances, grand jurors, interpreters, court reporters, operators of recording devices, anyone transcribing recorded testimony, attorneys for the government, and any other individuals to whom disclosure is made are forbidden from disclosing any matter to come before the grand jury.⁶⁰ Grand jurors' votes can never be disclosed.⁶¹ In both criminal and civil cases, petit juries do not undertake their discussions in open court. Nor is the public allowed to observe judges' conferences at an appellate level. The Supreme Court, too, meets behind closed doors and communications in chambers are protected from public scrutiny. It is only where the decision approaches the establishment of law, in the opinions themselves, that insight into competing considerations is made available.

In contrast to proceedings in chambers, while deliberative privilege protects certain documents from discovery,⁶² although some exceptions apply (*see* CIPA discussion, *infra*), documents submitted to the court are, for the most part, open. As a matter of *deliberative* secrecy, that makes sense, as the parties in a case are not direct advisors to the judiciary. Instead, they are interested entities pursuing certain

claims. They therefore fall outside the deliberative domain. As with the legislature and the executive, to the extent that secrecy advances the interest of ensuring full discussion within the judiciary, such secrecy may well support (instead of undermining) liberal, democratic values and facilitate fundamental principles of fairness at issue in litigation. But, as addressed in Part 3, as the discussion approaches a final judgment, the function of secrecy shifts to one that yields harmful results.

2. Information Secrecy

Another way in which secrecy may act within the legal system is to prevent certain types of information from coming to light. A distinction can be drawn between factual data and what the Supreme Court terms “working law.” Although information-control systems may be applied to both, the function that secrecy plays in regard to each is essentially different.⁶³ This section thus considers the former, factual data, and describes two primary ways such information may be hidden from public view: material controls and restrictions on government employees.

A. Material Controls

The principal means by which the executive branch exercises control over information is by limiting access to data that the government generates and/or holds. The first point to make here is that the concept of masking at least some information from the public inheres in sovereignty: states will, from time to time, need to keep certain information hidden to mitigate vulnerabilities. It is with national security and foreign intelligence in mind, for instance, that Congress, from the beginning, expected and allowed for the executive to engage in expenditures outside the public eye. In July 1790, the legislature passed An Act providing the means of intercourse between the United States and foreign nations, authorizing the President to draw up to \$40,000 annually from the Treasury, “for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed.”⁶⁴ Capping the annual salaries, Congress required that the President “account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify.”⁶⁵

In 1793, the Second Congress went on to pass a law stating, “That in all cases, where any sum or sums of money have issued, or shall hereafter issue, from the treasury, for the purposes of intercourse or treaty, with foreign nations,” the President would decide whether to release the amounts assigned or to certify the total of such expenditures.⁶⁶

These statutes acknowledged a sphere of secrecy. The executive, however, did not cabin itself to expenditures. In the twentieth century, the government went on to adopt a classification regime, to institute informal controls, and to take steps to prevent certain scientific and technical knowledge from becoming public. This section considers each of these spheres and posits that, to the extent that they enable the executive to protect national security, they further the interests of the state. But to the extent that they interfere with public understanding of how the executive is wielding its constitutional and statutory authorities, or how the executive impacts the separation and balance of powers, they may impact the progress of civil and criminal litigation as well as the state structure itself.

Classified and Controlled Unclassified Information

The current classification system arose prior to World War II.⁶⁷ In 1946, it split into two realms: National Security Information (NSI) as classified by executive order, and Restricted Data (RD), as defined in the Atomic Energy Acts.

In the former category, nine primary executive orders and two subsidiary ones have been introduced since that time to control the dissemination of NSI.⁶⁸ Under Executive Order 13,256, which currently controls NSI, classification can only be applied to matters related to (a) military plans, weapons systems and operations; (b) foreign governments; (c) intelligence operations; (d) foreign relations; (e) scientific, technological, or economic matters related to national security; (f) nuclear materials or facilities; (g) critical infrastructure; or (h) weapons of mass destruction.⁶⁹ Not every member of the intelligence community (IC) has the authority in the first instance to classify materials.⁷⁰ Original classification authorities (OCAs) alone can do so. As of FY 2016, there were 2,215 OCAs (up from 2,199 in FY 2015), who made nearly 40,000 original classification decisions.⁷¹ Another 55 million

derivative classifications followed—a number that underscores a frequently-voiced concern that the IC has a tendency to overclassify information.⁷²

The Atomic Energy Act of 1946 (and later 1954) classified nuclear discoveries from birth—even if funded and carried out by private citizens.⁷³ The statute continued the comprehensive restrictions that had existed during the Manhattan project, labeling all information concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy RD.⁷⁴ Starting in 1954, Congress added a new category of Formerly Restricted Data (FRD)—i.e., classified information removed from RD designation following a Department of Energy (DOE)/Department of Defense (DOD) joint determination that it relates primarily to atomic weapons and can be safeguarded similar to NSI.⁷⁵

Outside of NSI and RD, an unclassified regime controls public access to government information. In 2010, President Obama issued an executive order establishing Controlled Unclassified Information (CUI) as a replacement for Sensitive But Unclassified (SBU) and other markings.⁷⁶ CUI serves as a catch-all for matters related to citizens' privacy, security, proprietary business information, and law enforcement investigations.⁷⁷ The specific types of information included vary widely—ranging from agency data provided to law enforcement for investigations, to military records provided to former service members to facilitate benefits claims. It may include medical data central to responding to diseases and epidemics, or demographic data helpful to researchers developing new technologies.

The impact of formal classification and CUI on civil and criminal litigation depends on the type of data at stake. Preventing the public from knowing the identities of foreign spies, the time at which a drug shipment is expected to cross the border, or the blueprints for advanced missile systems does not appear to directly harm—or even influence—the conduct of judicial processes. The fact that information has previously been classified, moreover, does not necessarily retard prosecution. The Classified Information Procedures Act (CIPA) allows for suits to move forward with special work-arounds to ensure that certain privileged information can be used at trial and that defendants will have an opportunity to respond to the charges levied against them.⁷⁸ These suits can be challenged in terms of whether they

actually provide for sufficient discovery to mount a defense. The court is placed in the position of determining whether secrecy is undermining the administration of justice.

Some ways in which classification works may prevent citizens from seeing how their rights are being impacted. If, for instance, the NSA obtains information about pending (ordinary) criminal activity through Section 702 incidental collection, and provides that information to the Drug Enforcement Agency—which then uses parallel construction to obtain the same evidence (thus masking the original use of foreign intelligence authorities)—then criminal defendants will never have an opportunity to challenge the statutory provision.⁷⁹ Even if the Department of Justice (DOJ) adopts a policy of informing defendants when information “derived from” FISA provisions is being used, if it classifies the definition of “derived from,” the cloak of secrecy is maintained. The criminal justice system relies on defendants knowing how the information has been obtained; this is the whole point of the notice requirement. It allows defendants to mount facial and as-applied claims, keeping the exercise of prosecutorial power in check. Information secrecy therefore may undermine the ability to mount such challenges.

It is not just in the criminal realm that we see the impact of classification. In 2017, New York University Professor Paul Light undertook a study of the federal government, finding that as of 2015, its true size was 9.1 million employees—a number that included civilian employees, active-duty military personnel, and contract and grant employees.⁸⁰ Individuals in the last category made up more than 40 percent of the workforce.⁸¹ Masking information about contractors’ activities via classification may have a significant impact on civil litigation across a range of areas: employment, environmental damage, intellectual property, wrongful death and personal injury, and the like.

A similar phenomenon marks contractor use of state secrets as an affirmative defense, prompting U.S. intervention and dismissal of the suit at a pleadings stage.⁸² The numbers are growing: between 2001 and 2009, the government asserted state secrets in more than one hundred cases, even as the doctrine’s shadow fell over dozens of others.⁸³ Since then, there have been more than 200 cases involving claims that the suit cannot continue without revealing sensitive information.⁸⁴ The doctrine has blocked complaints related to breach of contract, patents, trade secrets, fraud, and employment termination.⁸⁵ It

has prevented wrongful death, personal injury, and negligence suits from moving forward, as well as cases brought against telecommunications companies for acting outside the law; torture suits; environmental degradation claims; breach of contract suits; and defamation litigation.⁸⁶ The privilege has become a sort of private indemnity, excusing contractors from various forms of malfeasance. The executive also benefits from state secrets privilege, which masks how it uses its power.⁸⁷

In addition to the immediate impact on litigation, classification has a potentially broader impact on the legal system. From a separation of powers perspective, the legislature is entrusted with oversight—a function it *cannot* perform if the executive branch can simply hide information from it. The Senate and House, accordingly, retain the right to declassify material, even over Presidential objection.⁸⁸ The same is true of the committees that most often handle classified materials. SSCI, for instance, controls access to its own records.⁸⁹ Members of the committee may declassify witness names and make classified materials available to the rest of the Senate or to the public.⁹⁰ HPSCI also has its own system for safeguarding sensitive information.⁹¹ As soon as information is obtained, it becomes committee material.⁹² The committee then controls who has access to it—including whether and when to make it entirely public.⁹³

As a constitutional matter, the executive orders that govern formal and informal controls on executive branch materials cannot be used to prevent the other two branches from airing or publishing their work for the simple reason that they are separate, co-equal branches. One would think that this point does not even need to be addressed, if it were not for the Government's recent contention to FISC that the executive alone can decide when and what portions of judicial opinions can reach the light of day. This claim runs directly contrary to the concept of separation of powers. When one branch of government attempts to classify the product of another branch, moreover, the type of secrecy at play subtly shifts: information secrecy morphs into efforts to mask the law itself, which, as Part 3 addresses, is the most dangerous kind of secrecy in a liberal, democratic regime.

Patent Secrecy Orders

Patent secrecy orders also act to restrict public access to information, making it particularly difficult for inventors to recoup damages or to mount effective constitutional as-applied challenges. Like the classification regime, such restrictions date back to the mid-twentieth century. The 1951 Invention Secrecy Act empowers the Commissioner of Patents to order that an invention be kept secret, neither published nor patented, where such disclosure “might . . . be detrimental to the national security.”⁹⁴ The government does not have to have an interest in adopting the invention.⁹⁵ It merely must conclude that the invention may harm U.S. national security. Once the commissioner institutes an order, it becomes a criminal offense to tell anyone about the invention without authorization. The statute allows inventors to seek compensation, but neither the order’s existence nor speculative damage are sufficient to support compensation claims.⁹⁶ The inventor must provide concrete evidence to demonstrate actual damage.⁹⁷

The number of secrecy orders is steadily increasing. In 2012, there were 5,327 orders in place.⁹⁸ In 2015, there were 5,579.⁹⁹ This trend continued: by the end of FY 2018 (September 30, 2018), 5,792 orders were in effect—the highest number in decades.¹⁰⁰ Although many of the orders apply to inventions developed with government assistance, a significant number are placed on independent inventors, who neither work with, nor are funded by, the United States. In 2016, for instance, of the 121 new secrecy orders, 49 applied to private inventors.¹⁰¹

Despite the issues raised by these secrecy orders for First Amendment speech rights and Fifth Amendment takings prohibitions, few legal challenges have come forward to determine the constitutionality of the statute, and none have succeeded.¹⁰² It is difficult to establish damages claims when a patent has not been granted. The first time the Court addressed this question was in 1982.¹⁰³ In response to James Constant’s assertion that the secrecy order prevented him from marketing the invention, the Court stated:

These conjectural and speculative claims must be rejected *in toto*. Apart from plaintiff’s own conclusory *ipse dixit* testimony, the record is devoid of any probative evidence tending to show that the companies alleged to be potential “customers” were interested in plaintiff’s

unsolicited proposals, or that the secrecy orders interfered with plaintiff's attempts to sell his system to these various companies.¹⁰⁴

The burden was on the inventor to petition the Commissioner of Patents to modify the secrecy order and allow him to market the invention.

Constant I, as it has come to be called, is a remarkable decision not least because inventors have no access to the commissioner's rationale and hence cannot use this rationale to challenge the designation.¹⁰⁵ In a classified domain, evidence of whether the invention actually harms national security—or has been usurped by the government for its own use—is difficult to obtain.¹⁰⁶ The courts, moreover, have interpreted the statute narrowly, insofar as damages can be awarded. The claim must arise from placement of the order, or because the government uses the invention improperly (demonstration of which, in light of the potential use of classification, may be extremely difficult to obtain).¹⁰⁷ Courts exclude nonmonetary damages and, at times, interest.¹⁰⁸ Full-time USG employees may not seek damages.¹⁰⁹ In addition, courts reject efforts to recoup attorneys' fees, making even successful litigation more costly.¹¹⁰ One of the most recent cases, in 2014, was brought for failure to compensate inventors for a John/Jane Doe order placed on their invention, unjust enrichment, as well as for the constitutional failings of the statute.¹¹¹ The invention in question related to an improved countermeasure for aircraft being attacked by infrared heat-seeking missiles.¹¹² Once again, the claim failed—this time, because the order had been lifted in the interim, making the case moot.

B. Employee Controls

The second way in which the government may conceal information is by restricting government employees' ability to speak. A variety of devices can be used in this manner, such as the security clearance process, employment contracts, termination agreements, statutory provisions, and statutory exceptions. Such restrictions can prevent insight into the executive branch; ensure that there is no one to dispute official reports; result in a power imbalance vis-à-vis current and former employees, citizens, other agencies, and the legislature; erode First Amendment rights; reduce the amount and quality of

evidence presented in court; and dehumanize the bureaucracy by taking individual personalities out of the equation. Each has implications for the legal system.

In 2014, OMB reported that 5.1 million individuals (employees and contractors) held security clearances.¹¹³ As a condition, every single one was required to sign documents acknowledging that they would have access to sensitive information and accepting the consequences, such as administrative censure or the possibility of losing employment for failing to keep the information secret, and a lifetime of pre-publication review.¹¹⁴ Statutory provisions provide further control. Federal law makes it illegal to disclose classified information.¹¹⁵ Under the 1917 Espionage Act, it is illegal to gather, transmit, or lose defense information, to deliver it to aid foreign governments, or to harbor anyone who has engaged in either of the foregoing acts.¹¹⁶ The law forbids photographing, sketching, or selling pictures of defense installations.¹¹⁷ Other statutes, such as the Freedom of Information Act, provide explicit exceptions to prevent government information from reaching the public domain.

Speech control affects the legal system in numerous ways. As with the classification of materials, it can prevent critical insight into the executive branch, making it difficult to determine when the government is acting according to the law. Fewer as-applied challenges may result. And it may prevent facial challenges from ever being raised. Although efforts to offset these consequences have been established through various whistleblower processes, they often prove ineffective.

Unless employees speak out, classification may prevent even gross violations of the law from coming to light. The discussion of the enhanced interrogation techniques relied extensively on government workers coming forward.¹¹⁸ The social and legal barriers to making such information public may be substantial: individuals must decide to break ranks with their agencies—a proposition difficult enough when procedures for reporting certain behavior have been established. The decision may be compounded when classified documents have determined that the behavior in question comports with doctrine, as it did in relation to the NSA's use of section 215 to collect telephony metadata. Like secrecy in the classified materials realm, preventing employees from speaking on matters about which they are well-informed ends up harming the public democratic debate surrounding certain authorities. Even where

employees may not reveal classified data, part of the importance of letting them participate in the debate rests on their insights—wisdom developed because of their close familiarity with how the law operates.

When employees' speech is tightly controlled, there is no one to counter the "official" position put forward by policymakers. Nor is there anyone with direct knowledge of programs and operations who can question the "lessons learned" for future policy decisions. Outside the public eye, there is no public pressure on the bureaucracy to act in a certain way, nor pressure *from the bureaucracy* on those making the decisions. Consequently, the public dialogue—and strength of the law—suffers. So when Vice President Dick Cheney states that interrogation works,¹¹⁹ or senior IC officials say that torture led to actionable intelligence,¹²⁰ the public is not in a strong position to counter them in light of all potentially available evidence. It is an assertion based on experience. By preventing others *with the same experience* (or with more experience, because of their placement in the bureaucracy) from commenting, restrictions on government employees allow assertions to go unchallenged.

Further distortion that occurs when only those who agree with top policymakers are allowed to contribute to the conversation. There is evidence to suggest, for instance, that pre-publication review is only enforced against those critical of government.¹²¹ As one scholar has explained, "[D]isputes over redactions in a work favorable to an agency are almost nonexistent," with only one case on record.¹²²

Another consideration relates to power. Karl Marx, Max Weber, Michel Foucault, and others critiqued secrecy because of its intimate connection with disproportionate power. Marx argued that bureaucracy "is a magic circle from which no one can escape. Its hierarchy is the hierarchy of knowledge."¹²³ In the search for power, control of information proves paramount.¹²⁴ Weber saw the bureaucratic state as the quintessential surveillance entity wherein access to, and control of, information provides those in power with the "mechanisms of repression."¹²⁵ Secrecy, "the things one declines to say or is forbidden to name," presents less of an "absolute limit of discourse" and more of an element that functions alongside power: "There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourse."¹²⁶

By preventing employees from speaking and/or contributing (freely) to the discourse, the government is more able to control the information and thus build its power. When pre-publication review boards place conditions on authors that extend beyond merely reviewing the text that has been submitted, they abuse the employer-employee relationship.¹²⁷ It is equally inappropriate for review boards to circulate authors' drafts within classified circles, or for prosecutors unrelated to the review boards to then use the documents for their own purposes.¹²⁸ It is a further abuse of power to hold authors' publications hostage to competing agency interests, such as trying to prevent answering FOIA requests and, therefore, not allowing even unclassified information into the public domain.¹²⁹ Power considerations extend beyond the disparate power held over society or employees, as, notably, the control of information is concentrated in a small portion of the executive branch. So when Central Intelligence Agency (CIA) employees are prevented from discussing false charges brought against SSCI staff members in the midst of the committee's enquiry into torture, the agency increases its power over the legislature.¹³⁰

A further concern is that allowing the government to quell employees' speech erodes important Constitutional protections. Rights suffer. The First Amendment is not by any means unlimited.¹³¹ When the issue is critique of government action in relation to "matters of public concern," the Court weighs the employee's interests against the interests of the State.¹³² Where it is not a matter of public concern, the Courts grant wider latitude to the executive.¹³³ The problem with this balancing test is twofold: first, national security is a particularly strong government interest, making allowance of employee speech in the most highly guarded sphere of the state the least likely to pass judicial muster. Second, deference tends to reach into the deliberative privilege, confusing the distinction between the two.

In 2015, Professors Jack Goldsmith and Oona Hathaway published an op-ed in the *Washington Post*, underscoring the myriad problems with pre-publication review.¹³⁴ Not only do the criteria go beyond what is required to identify and protect classified information, but reviewers can broadly interpret their mandates, leading to a chilling effect. In the interim, the review process takes longer than indicated, leaving authors with no recourse.¹³⁵ The risk is that reviewers, by being selective about what they do or

do not allow, and how long they delay publication (e.g., until just after a Congressional vote), can shape the dialogue according to their political interests.

An additional impact on the judicial system has to do with evidence presented in Court. Pre-publication review means that not only are printed materials (from which attorneys could draw their arguments) unavailable, but live testimony and witness representation are also affected. Justice may be denied, because of the absence of corroborative or exculpatory information, even as the role of the judiciary diminished.

Courts consider pre-publication review to be constitutional. In the first case to reach the courts, *United States v. Marchetti*, an employee signed two secrecy agreements: one when he joined the CIA and another when he left it.¹³⁶ He went on to publish a novel and a number of articles, prompting the agency to seek an injunction. The District Court ruled that Marchetti had to submit anything related to his classified work at the agency at least thirty days prior to publication. In light of the 1947 National Security Act requirement that the CIA protect its sources and methods, the Fourth Circuit found that “a system of prior restraint against disclosure by employees and former employees of classified info obtained during the course of employment” was reasonable.¹³⁷ What was unreasonable was the exit contract, which prevented publication of even unclassified information.

The problem with the Court’s standard can be summed up in the legal principle of *nemo iudex in causa sua*. By classifying more information—a decision that unreviewable by any but the OCA—the CIA can expand its power to prevent almost anything from coming to light. The Court only partially addressed this concern, noting that if information was already “in the public domain,” then Marchetti could republish it. But even this theory has been roundly attacked by executive branch on the grounds that allowing such publication could confirm potentially classified material. The Court added two requirements: the CIA had an obligation to “act promptly to approve or disapprove any material” and, in the event that the author disagreed with the pre-publication decision, he could seek judicial review.¹³⁸ But such review explicitly excluded the original classification decision.

Several years after *Marchetti, Snepp v. United States* reached the Court.¹³⁹ Frank Snepp published a book based on his eight years' service with CIA. Upon leaving the agency, he, too, agreed not to publish any information (either classified or unclassified) about the agency or intelligence collection without obtaining prior approval. The Court decided that Snepp had been in a position with "an extremely high degree of trust." Therefore, it did not matter whether his book contained classified information or not. Its publication could cause irreparable harm. A scholarly debate ensued. Congress urged the executive branch to allow former employees to speak.¹⁴⁰ President Reagan did the opposite: National Security Decision Directive 84 required pre-publication review for *all* individuals with SCI clearances.¹⁴¹ Congress balked.¹⁴² Reagan did suspend the lifetime pre-publication review requirement,¹⁴³ but it had little impact, because individuals still had to sign other agreements that had the same effect, in order to gain access to SCI.¹⁴⁴ Pre-publication review became standard procedure.¹⁴⁵

A final consideration in the government's effort to stifle employee speech centers on the way in which it dehumanizes government. When all that is allowed into the public domain are policy statements and broad, sweeping generalizations from top officials, important details remain hidden. Individuals lower down the ladder can often provide more accurate information.¹⁴⁶

3. Secret Law

The most dangerous form of secrecy in a liberal, democratic state is secret law. By law, I mean rules that require obedience.¹⁴⁷ Statutes setting out the conditions under which the executive can operate or specify how citizens must act differ in important respects from turning the provisions into working law or interpreting them to determine whether an executive action comports with either the legislative framing or the dictates of the constitution. All three types of law—static, working, and interpretive law—operate in a liberal, democratic state. To the extent that secrecy prevents such decisions and rules from entering the public domain, it presents a profound challenge to the legitimacy of the legal system.

A. Static Law

Static law incorporates legislative products, amongst which classified transcripts, annexes, reports, appendices, appropriations, and supplements increasingly obfuscate the law.¹⁴⁸ Professor Rudesill's masterful treatment of Congressional processes details how these forms of secrecy present.

As Rudesill explains, since 1979, SSCI and HPSCI have overseen the annual Intelligence Authorization Act (IAA), which now governs the National Intelligence Program.¹⁴⁹ This legislation typically has a short section of Public Law text giving legal force to a detailed classified addendum, as well as brief mention of this legal maneuver in unclassified committee reports, which focus primarily on intelligence agencies' pensions and public matters.¹⁵⁰ The same year that the intelligence committees began legislating via classified addenda in the IAA, the Appropriations Committees started writing classified annexes and referencing them in the unclassified reports associated with the annual DOD Appropriations Act (DODAA).¹⁵¹ This statute provides funding for DOD activities ranging from operations related to the Global War on Terrorism and drug-interdiction and counter-drug activities, to military operation and maintenance and research and development.¹⁵² Since passing the National Defense Authorization Act (NDAA) for fiscal year 1983, the Armed Services Committees have also attached classified addenda. This legislation provides the framework for the Defense Department—including the Military Intelligence Program.¹⁵³ Starting with fiscal year 1990 the Public Law text of the NDAA began giving legal force to classified addenda, with the DODAA following suit the subsequent year.¹⁵⁴

The rationale behind using such devices was that it was the only way to regulate classified programs.¹⁵⁵ But by making them secret, Congress prevented the public from apprehending the scope of the law as applied—including the very structure of the intelligence community.

It could be argued that unclassified committee reports and the parts of the classified addenda that are similarly mere commentary or descriptive report language are not technically part of a statute. As Rudesill recognizes, they might provide an explanation for each section of an act, or summarize what the committee decided or comments of particular Members, but these reports do not come to the full House or Senate for

a vote and are not signed by the President.¹⁵⁶ The President may not even have access to the classified addenda at Presentment.

Yet Congress and the executive branch agree that the Public Law provisions referencing provisions in the classified addenda *do* give those classified provisions legal force.¹⁵⁷ In five of the seven years prior to Rudesill's analysis, the NDAAAs included explicit incorporation language.¹⁵⁸ DOD Appropriations Acts prohibit the agency from moving money among the accounts in a manner that departs from the allocations in the classified addenda.¹⁵⁹ Reports that accompany the bills for signature in the Oval Office, moreover, takes a similar stance: of 32 IAAs since 1979, most have been accompanied by unclassified last-in-time reports which emphasize that the classified Schedule should be considered part of the statutory text, or that the annex should be considered part of the authoritative document.¹⁶⁰ Courts, for their part, look to legislative history to understand the intent behind the introduction of statutes to probe the full meaning of the written text.¹⁶¹

Congress defends the practice by citing to the fact that it has passed clandestine measures on numerous occasions—apparently unaware that it is establishing its own form of *stare decisis*, wherein repetition carries with it its own legitimacy—rather underscoring the concern that Congress is creating secret law.¹⁶² In the meantime, the number of classified annexes appears to be increasing.¹⁶³

While the above examples focus on intelligence programs, they are not the only area in which Congress has introduced secret law.¹⁶⁴ To the extent that the NDAAAs and DOD Appropriations Acts incorporate the Classified Annexes into Public Law, and not just the Classified Schedule of Appropriations (or Authorizations), the realm of secret law is even broader. As Rudesill notes, these annexes establish what the government must and cannot do, with unknown and potentially broad implications for public policy and individual liberties.¹⁶⁵ The annexes bind the government. They act as law. They fund and otherwise govern classified activities—from NSA's surveillance apparatus to lethal drone programs, which plainly do, or could, implicate basic freedoms guaranteed by the Constitution.

B. Working Law

Working law refers to authoritative executive branch interpretations and understandings of their statutory and constitutional powers (as well as those of the other branches).¹⁶⁶ It differs from deliberation in that it represents a final decision point that then becomes binding. Presidential orders, regulations, opinions issued by the Office of Legal Counsel (OLC), and internal agency guidelines provide just a few examples of areas in which secret working law may present.¹⁶⁷

In 1935, Congress created the *Federal Register*. The law requires publication of all “Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof.”¹⁶⁸ Congress and the President have the authority to add additional documents to the register for publication.¹⁶⁹ Any document or order that carries a penalty is deemed to be of general applicability and legal effect.¹⁷⁰ At the close of each year, everything published in the *Federal Register* is placed in Title 3 of the *Code of Federal Regulations*. While the default is promulgation, the law provides for an exception “In the event of an attack or threatened attack upon the continental United States.”¹⁷¹ Under such conditions, if the President determines that publication “would not serve to give appropriate notice to the public of the contents or documents,” he or she may suspend any part of the requirements for publishing the documents in the *Federal Register*.¹⁷² Not all documents that the President signs and that have legal effect must be published.¹⁷³ Some are issued through the National Security Council, and many of these remain classified. There are also oral presidential directives, which are equally binding. Despite the clandestine nature of these documents, the DOJ’s Office of Legal Counsel (OLC) has “consistently advised” the President that they are controlling.¹⁷⁴ These documents govern the executive branch.

Presidents routinely distinguish between “decision directives” and “review directives,” providing each with a different abbreviation.¹⁷⁵ To date, President Donald Trump has issued just one kind of presidential directive: National Security Presidential Memoranda (NSPMs), which include, inter alia, a direction to the Secretary of Defense to come up with a plan to defeat the Islamic State of Iraq and Syria (NSPM 3) and a reinstatement of the ban on U.S. citizens travelling to Cuba (NSPM 5).¹⁷⁶ NSPM 7 establishes national security threat categories, directs the integration of information related to national

security threat actors, and makes way for algorithmic analysis of biometric, biographic, and other personally-identifiable information obtained by the intelligence community.¹⁷⁷ The exercise of such programs could have a deep impact on citizens' rights, yet they emanate not from the legislature but from the executive.

It would be difficult to find a better example of working law than the legal opinions issued by the Office of Legal Counsel (OLC). They contain independent legal analysis that is considered binding on the executive branch.¹⁷⁸ OLC's "Best Practices" documents emphasize the importance of *stare decisis*: outside of extraordinary circumstances, future opinions must conform to earlier ones, unless the prior opinion has been withdrawn.¹⁷⁹ At times, however, OLC insulates its opinions from public view, with the result that a secret jurisprudence now operates within the executive branch.¹⁸⁰

FOIA requests prove inadequate to unearth OLC opinions, despite the statute's goal of eliminating secret law.¹⁸¹ FOIA requires federal agencies to publish "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency," in the Federal Register.¹⁸² A person "may not in any manner be required to resort to, or be adversely affected by" a rule that should have been published in the Federal Register but was not.¹⁸³ The reading room provision requires that each agency "make available for public inspection" in electronic format all "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."¹⁸⁴ They also must make available "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."¹⁸⁵ Under FOIA, certain information held by the executive is not subject to disclosure. This includes "records or information compiled for law enforcement purposes," but only insofar as their production could reasonably be expected to either (a) interfere with law enforcement proceedings, or (b) constitute an unwarranted invasion of personal privacy.¹⁸⁶ The statute also excludes matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [] are in fact properly classified pursuant to such Executive order."¹⁸⁷ The burden is on the agency to demonstrate that an exemption applies.¹⁸⁸

In *NLRRLB v. Sears, Roebuck & Co.*, a unanimous Supreme Court understood FOIA to require all federal agencies to publish their “working law.”¹⁸⁹ The Court pointed to the reading room provision as representing “a strong congressional aversion to ‘secret law’” as well as “an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’”¹⁹⁰ While pre-decisional or deliberative documents may be withheld under FOIA exemption five, the final decisions must be released.¹⁹¹ The DOJ nevertheless argues that OLC can never generate working law—a claim at odds with its assertion that OLC opinions are binding.¹⁹² If they are binding, they have the force of law. In some cases, such as the Terrorism Surveillance Program or the use of enhanced interrogation, it is *only* OLC analysis that undergirds programs.

In 2016, Congress contemplated legislation that would have required the executive to release legal opinions that reflected “controlling interpretations of law.”¹⁹³ It also would have required release of any “final reports or memoranda created by an entity other than the agency” making final decisions, as well as “guidance documents.”¹⁹⁴ Congress did not pass the measure, however, opting instead to pass a FOIA reform bill.¹⁹⁵

C. Interpretive Law

Interpretive law incorporates judicial decision-making, where secrecy operates to masquerade statutory construction, constitutional analysis, and government malfeasance, raising constitutional concerns. The Foreign Intelligence Surveillance Court (FISC) provides a good example. In 1978, Congress introduced FISC, and the appellate Foreign Intelligence Surveillance Court of Review (FISCR) to consider whether the government had demonstrated probable cause that an individual was a foreign power or an agent of a foreign power, and that the individual would use the facilities to be placed under surveillance, prior to issuing an order for electronic surveillance. At no point did Congress address the possibility that the FISC would issue opinions involving complex matters of statutory construction and constitutional interpretation, which would become binding precedent. Nevertheless, there are now more than 70 declassified and redacted FISC opinions and more than 270 orders in the public domain—and potentially numerous other opinions that remain classified. These decisions deal directly with matters

that may have a profound impact on individual rights and which cry out for public discussion and debate. The Section 215 telephony metadata program provides an excellent example.¹⁹⁶

For years, the government's contention, and court's acceptance, that language in the USA PATRIOT Act could be read broadly to authorize the collection of nearly all Americans' telephony metadata, remained secret. In 2013, when the existence of the secret legal interpretation became publicly known, the outcry reverberated in all three branches. The Privacy and Civil Liberties Oversight Board (PCLOB), which had floundered since its creation, took form and issued its first report, in which it found that the government had engaged in illegal surveillance.¹⁹⁷ The body called for the immediate cessation of the program. The President appointed the Review Group on Intelligence and Communications Technologies, which issued a lengthy report sharply criticizing the statutory interpretation and calling for an end to the program.¹⁹⁸ The President went on to issue PPD-28 to try to restore domestic and international confidence in the U.S. intelligence community.¹⁹⁹ In the courts, numerous cases challenged the program. The Second Circuit called the statutory interpretation "unprecedented and unwarranted" and ruled that it violated the act.²⁰⁰ In *Klayman v. NSA*, Judge Leon granted an injunction against the NSA, calling the program "Almost Orwellian" and "almost certainly unconstitutional."²⁰¹ FOIA requests and suits suddenly exploded: in one, the Electronic Frontier Foundation requested "all decisions, orders, or opinions issued by FISC or FISCR between 1978 and June 1, 2015, that include a significant construction or interpretation of any law."²⁰² In Congress, from only three bills the prior year (addressing a clause in FISA that sunset that year), the year following the revelations saw the introduction of 42 bills containing wide-ranging proposals that included changes to the manner of appointment to the FISC/FISCR and the FISC/FISCR process, as well as requiring the release of all FISC/FISCR opinions and orders. Congress ultimately adopted a provision requiring that the Director of National Intelligence in consultation with the Attorney General publicly reveal any significant construction or interpretation of the law, including (to the extent consistent with national security), "a description of the context in which the matter arises and any significant construction or interpretation of any statute, constitutional provision, or other legal authority relied on" by the FISC/FISCR.²⁰³

Part of the reason for the outcry was that the Court’s decision in regard to telephony metadata essentially *created new law*, without any of the protections that otherwise mark statutory interpretation: adversarial debate, open court, and a published opinion. Instead, a handful of individuals deep in the executive branch, with approval from judges on a secret court, adopted a *sui generis* understanding of the statutory law.

Another way in which the structure of clandestine judicial decision-making presents issues for the legal system is through its impact on constitutional interpretation. In her 2013 memorandum opinion on bulk collection, Judge Egan, citing just one Supreme Court decision, dispatched any Fourth Amendment concerns.²⁰⁴ She relied entirely on *Smith v. Maryland*—a case directly relevant, yet inadequate in light of the changed technologies at hand.²⁰⁵ The opinion did not even mention First Amendment concerns. The Court did not provide any detailed legal reasoning based on careful legal argument. Yet it was binding on future decisions. When the court creates an entirely new exception to the Fourth Amendment—as it did in regard to the “special needs” exception—secrecy is particularly worrisome. In *In re Directives*, FISCRC looked back at its decision in *In re Sealed Case* to confirm “the existence of a foreign intelligence exception to the warrant requirement.”²⁰⁶ Although FISCRC had “avoided an express holding that a foreign intelligence exception exists by assuming *arguendo* that whether or not the warrant requirements were met, the statute could survive on reasonableness grounds,” the Court went on to find, for the first time, a foreign intelligence surveillance exception to the Fourth Amendment:

The question . . . is whether the reasoning of the special needs cases applies by analogy to justify a foreign intelligence exception to the warrant requirement for surveillance undertaken for national security purposes and directed at a foreign power or an agent of a foreign power reasonably believed to be located outside the United States. Applying principles derived from the special needs cases, we conclude that this type of foreign intelligence surveillance possesses characteristics that qualify it for such an exception.²⁰⁷

There was no party to appeal to the FISC, or from the FISC to the Supreme Court, much less any party to challenge the government's argument in the first place. Like the FISC/FISC, the DOJ considers FISC's opinions and orders to be precedent.²⁰⁸

When the Snowden documents exploded on the public scene, Congress took steps to "end secret law."²⁰⁹ The USA FREEDOM Act required the FISC to appoint at least five amici who could be asked for comment when any novel questions of law were presented. It also required that FISC opinions undergo declassification review. However, neither of these measures adequately addressed the structural concerns.

There are problems with these fixes. Amici are not adversarial parties. They are only present when requested by judges. Even when called, they have no formal right of appeal. They operate under an abbreviated timeline, compared to their government counterparts, and the resources available to them are only a fraction of what is made available to the government. Mandatory declassification review, in turn, does not mean that the opinions are necessarily declassified. The executive still controls what information is, and is not, made public. This is troublesome when the intelligence agencies are engaged in activities with a direct impact on individual rights. It is hardly a disinterested observer where its own interests are concerned. In the interim, the precedential quality of the opinions and orders persists. What were intended to be merely determinations of the sufficiency of showings of probable cause have become binding on future courts.

Yet another way in which secret law operates within the judiciary is to restrict oversight—not just of the executive, but also the legislature and the judiciary. Ordinary legal procedures provide insight into how individuals, groups, private entities and public bodies act. Briefs, motions, memoranda, oral arguments, and final opinions provide tremendous detail on how the law is being put into practice, as well as on how entities are acting. Once this information becomes public, citizens have a range of further actions they can take. Where companies are involved, citizens may take the information that has been generated and decide to boycott their goods or services. They may pressure their legislators to pass new laws to regulate certain behavior. This opportunity is lost when the information never reaches the public

domain. Where government actors are involved, citizens have yet more recourse, such as pressuring officials to fire them, encouraging elected representatives to pass new laws, or, in the Madisonian solution, voting people out of (or into) office.

Making the opinions public yields information not just about government malfeasance (although certainly that), but also about the role that legislators may be playing in enabling actions that adversely impact rights. SSCI and HPSCI perform oversight functions of the IC. When the Snowden documents were released, part of the public's strong response was directed towards the elected representatives on these committees who were responsible for performing oversight. While Senators Ron Wyden and others had been sounding the siren for some time, others were immediately seen as culpable in the widespread violation of Americans' rights. Senator Dianne Feinstein took to the road to defend the legislators' role, for the first time having to answer to her constituents for her behavior behind closed doors. For representative democracy to work, citizens need to be apprised of how their legislators are acting.

The failure to publish judicial opinions also impacts the public's ability to perform oversight of the court. This oversight is important in two respects: first, to hold the Courts responsible for the manner in which they are performing a check on the other branches; and, second, to hold the judiciary responsible for its own actions.²¹⁰

D. Beyond Litigation: The Existence and Morality of Law

What the forms of secret law in each branch have in common is their profound impact on the existence and legitimacy of the legal system. In Western jurisprudence, lack of publicity means, at some level, that the law no longer exists. Neither does it carry moral qualities that entail a duty of obedience. These ideas are far from new. They extend across natural law, the liberal democratic tradition, and legal positivism. And they are central in understanding the impact of secrecy on the legal system.

Natural Law and the Liberal, Democratic Tradition

Natural law saw legal rules as a way of shaping—by providing a basis for—action. In this tradition, law generates a moral obligation to obey which, in turn, depends upon the morality or justice of the law. As developed in the writings of Plato, Aristotle, Cicero, and St. Augustine, “*Lex iniusta lex non*

*est.*²¹¹ In addition to being consistent with divine and natural law, to be just, human-created laws have to follow certain rules related to procedure and substantive fairness. For one, they must be made publicly available.²¹² For another, they must be actively promulgated by the governing power within the governing power's authority. Such laws "bind in conscience."²¹³ In the natural law tradition, the absence of the required elements—which include promulgation—means that the law is no longer binding.²¹⁴ While there might be other reasons to obey it, such as upholding a legal system that is otherwise just, the law itself lacks the moral requisite of obedience. Law is "nothing other than a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated."²¹⁵ It must be available for it to be considered just.

Early liberal democratic theorists adapted the concept of natural law to political obedience.²¹⁶ Immanuel Kant's commitment to human freedom shaped the concept of the social contract, offering reason as a determinant of the moral qualities of law. In Kant's work, as well as that of more recent natural law theorists such as Professors John Finnis and Ronald Dworkin, secrecy is an undesirable trait.²¹⁷ It prevents transparency and therefore undermines accountability. What debate there is over secrecy boils often down to open versus closed government.²¹⁸

This approach relies heavily on a Lockean framing: that government rests on the consent of the governed. The contours are well-established and hardly bear repeating: it falls to the state to protect certain rights, from which individuals cannot divest themselves.²¹⁹ Other rights may be relinquished in a contractual relationship, in which individuals leave a state of nature and enter into society.²²⁰ When the government ceases to act according to the social contract—either in the protection of rights or the functions of government—then the people, who retain the supreme power, have not just the right, but the duty to withdraw consent. In such a political order, the people must necessarily be apprised of the actions of the state, in order to judge, consistent with their consciences, what duty of obedience remains.

Secrecy thus presents an obstacle to the fundamental precepts of liberal, democratic government and the right of rebellion. Locke goes further in his *Second Treatise*, noting that when either the executive or the legislature ceases to protect individuals in their lives, liberties, and estates; a majority is

of similar mind; and each man in his own conscience satisfied that the conditions are met, then individuals have not just the right but the *duty* to rebel. Thus, knowing the extent to which the executive or legislative powers have departed from their contract becomes paramount in ascertaining the point of departure. The right of rebellion similarly requires a duty of openness in laying out the grievances precipitating a change in government. The primary concern, insofar as secrecy presents, is in regard to political control.

Closely related to the principle of liberal, democratic structure is the importance of eliminating secrecy as a matter of morality. In the second appendix to *Perpetual Peace* (“Eternal Peace”), Kant puts forward his transcendental formula of public law: that “all actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity.”²²¹ This claim provides a sharp contrast to Machiavelli’s embrace of any means to the required ends. Kant’s formulation came to symbolize the Enlightenment.²²² As Professor David Luban explains, Kant’s principle rests on the necessity of ordinary citizens having knowledge of political and legal affairs and thus being able to reflect on them without receiving direction from others.²²³ As long as citizens know how the rights of others are being impacted, they will be able to scrutinize government action and to determine whether it is acting in an appropriate manner. For Kant, the publicity principle carries with it a moral quality, an expression of reason. Luban explains that it amounts to requiring governors to asking themselves, “Could I still get away with X action, if that act, and the reasons for doing it, were publicly known?”²²⁴ If not, then the action lacks moral strength.²²⁵ Kant’s publicity principle is not absolute, but it points to the importance of consent and the necessity of transparency for democratic deliberation. It carries with it both a legal and a moral quality, within which institutional design matters.²²⁶

Modern natural law theorists similarly emphasize the importance of the promulgation of the law. Professor John Finnis posits that the justness of a law depends in part upon whether the law has been made publicly available.²²⁷ While, for him, failure to publish the law does not mean that it does not exist—just that it is not “law in the fullest sense of the word”—the fact that it does not carry the necessary elements of law means that it no longer commands our reasons for acting in certain ways. There may still

be a reason to comply with such laws (e.g., to ensure that the legal system, as a whole, is not undermined), but the existence of the law itself is not one of them.²²⁸

Within the liberal, democratic tradition, promulgation of the law is central to rule of law. It is non-negotiable—the golden rule. Along with principles such as no retroactive law, it has become one of the pillars of how we think about law. Within the rule is the recognition that the law acts to constrain the governors and that democratic deliberation depends upon citizens knowing what the government is doing. The liberal democratic tradition goes so far as to recognize that when the governors act in certain ways, it is not just the right but the duty of the people to rebel. There is no room in this construct for hiding government action. The purpose of the governmental structure is to protect the rights of citizens. It therefore follows that citizens must know when their rights are being impacted by government actions. This becomes a second foundational tenet of the liberal, democratic tradition.

Legal Positivism

Legal positivism rejects the natural law tradition insofar as the internal morality of the law is concerned.²²⁹ Nevertheless, it proves equally hostile to secret law. Professors H.L.A. Hart and Joseph Raz thus considered legal rules to be social norms, whence the requirement of obedience arose.²³⁰ Hart's rule of recognition serves as the foundation for his approach.²³¹ Central to his account is the importance of citizens and officials being cognizant of what the law is and how it is being implemented. It requires officials to identify deviation. To the extent that the rule of recognition is not merely a convention, but also carries with it a duty of obedience, knowledge of its precepts becomes a necessary condition of conformity. So, too, with the primary rules, as crafted by the rule of recognition.²³² Secrecy has no place in Hart's approach, it being a necessary condition of the existence of the law that the rules be known.

In the mid-twentieth century, Professor Lon Fuller rose to prominence as he attacked legal positivism for ignoring the internal morality of the law.²³³ He posited, instead, a sort of secular natural law with eight principles of legality. He separated form from substance: whether actual measures introduced consistent with the norms were desirable, in a normative sense, could be distinguished from

the existence of the norms under which substantive law was passed. Without these essential attributes, no legal system could function.²³⁴ They defined rule of law.

Fuller's eight conditions focused on procedural norms that served to achieve social order by guiding human behavior. They included, first, that there be rules. He understood this as a requirement of generality. Consistent with a principle of fairness, issues "must [not] be decided on an ad hoc basis."²³⁵ Second, the rules had to be widely promulgated so as to ensure that society at large knew their remit and the standards to which they were being held. Third, Fuller rejected retroactive rule-making and its application to individuals, as it would be virtually impossible to regulate human behavior *a priori*, according to rules that had yet to come into being. Fourth, Fuller emphasized the importance of well-written law: it must be understandable, as well as, fifth, not contradictory. Sixth, the law had to be limited to conduct that *could* be required, consistent with the abilities of those impacted. Seventh, the laws should remain more or less constant over time, with little variability. Eighth, the law as written and the law as applied must be consistent. For Fuller, "A total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."²³⁶

Fuller did not claim that *every* system containing the eight elements ought to be considered moral. As opponents quickly pointed out (and Fuller did not deny), one could easily conceive of a society in which, despite the existence, promulgation, internal consistency, and generality of the laws, their substance might nonetheless be considered morally reprehensible. The insight that Fuller brought was that procedures themselves carry a moral importance and help to determine whether certain rules *ought* to be considered a legal system.

As Professor Matthew Kramer explains, Fuller's approach recognizes two aspects of rule of law. On the one hand, it lacks any inherent moral quality. It can be used for benign or malignant purposes. It "is indispensable for the preservation of public order and the coordination of people's activities and the security of individuals' liberties."²³⁷ Simultaneously, such form is essential for perpetrating significant harm.²³⁸ Thus, the criteria can be understood as just a "general juristic phenomenon,"—i.e., "nothing

more and nothing less than the fundamental conditions that have to be satisfied for the existence of any legal system.”²³⁹

On the other hand, when present in what Kramer considers “a benign regime,” Fuller’s criteria do more. They “become[] expressive of the very ideals which . . . [they] help[] to foster.”²⁴⁰ Kramer explains that the basic features of Fuller’s system “take on the moral estimableness of those ideals, for the sustainment of the rule of law in such circumstances is a deliberate manifestation of a society’s adherence to liberal-democratic values.”²⁴¹ His insight is that the *role* played by such features may alter and expand, depending upon the regime.

Understood in both senses, Fuller’s criteria are compelling. How could an individual be said to have a moral obligation, or a duty, to obey a legal rule that does not exist, or is kept secret? Surely this could not be the case. Similarly, how could an individual be required to follow a rule that comes into existence after an action is taken? If law is unintelligible, or contradicted by other rules, it puts the individual in an impossible position. So, too, with laws that constantly fluctuate.

It is in the importance of consistency in the law, in how it is written and applied, as well as over time, that we see the conversation in regard to secrecy advance. It would make little sense to publicize a law, but then to have the law interpreted or applied very differently by those in power, or to have one administration interpret (or apply) a law in X way, and the subsequent administration interpret (or apply) it as Y. To the extent that the interpretation or application of the law remains shielded from public view and departs from the public meaning of the law, then the seventh and eighth criteria may be implicated. The result raises questions about both the existence of law (Kramer’s first category of Fuller’s thought) and the morality of the law (Kramer’s second category). At some point, the existence of such departures mean that we no longer have a liberal, democratic state.

Fuller recognized that secrecy plays an essential role in transforming a society into an autocratic structure. He illustrated his concern by discussing the demise of the Weimar Republic.²⁴² “A situation begins to develop,” he wrote, “in which though some laws are published, others, including the most important are not.”²⁴³ He added, “For the trial of criminal cases concerned with loyalty to the regime,

special military tribunals are established.”²⁴⁴ Eventually, “the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence.”²⁴⁵

The Limits of Reason of State

To the extent that secrecy is tolerated in the liberal, democratic model, it is done so in relation to preservation of the state. National security thus trumps the citizens’ right to know to ensure that the state continues to exist. But even here, there are limits that fall short of accepting secret law.

The concept of reason of state and the need of the ruler to control information in the interests of security and stability has long been part of political discourse. Epitomized by Niccolò Machiavelli, the underlying concept is that certain actions of a ruler can be justified to the extent that they contribute to the existence, stability, and well-being of the political structures.²⁴⁶ Not all actions are acceptable, but some actions resulting in harm cannot be avoided and must be turned to productive ends.²⁴⁷

Machiavelli’s consequentialist approach excuses transgressions based on the ends that they achieve.²⁴⁸ In the sixteenth century, Giovanni Botero picked up on Machiavelli’s reasoning, defining *arcana imperii* as “knowledge of the means by which such a dominion may be founded, preserved and extended.”²⁴⁹ To sustain (and extend) power, discretion and secrecy are paramount. Like Machiavelli, Botero saw the management of information, and its limitation to a small number of individuals, to be imperative to political survival. As seventeenth-century legal scholars reimagined Magna Carta, English jurists sought to restrict what the Crown could do. Thus Sir Edward Coke, arguing in Parliament for a clause prohibiting arbitrary arrest and search authorities, explained,

[I]f [imprisonment] be *per mandatum domini regis*, or “for matter of state”; and then we are gone, and we are in a worse case than ever. If we agree to this imprisonment “for matters of state” and “a convenient time,” we shall leave Magna Carta and the other statutes and make them fruitless, and do what our ancestors would never do.²⁵⁰

Ultimately, Parliament, and then the people, became the supreme power, giving democratic institutions more authority.²⁵¹

The problem with hearkening back to the Machiavellian tradition and reason of state as sufficient to offset public access to the law is grounded in how secrecy functions. Insofar as deliberative secrecy or even certain forms of information secrecy are at stake, the public may forgo immediate knowledge. But secret *law* undermines the liberal, democratic state. It is thus a threat as great as, if not even *more* profound than, the national security threats being claimed as justification. A terrorist organization may threaten the life and property of the citizens, but the erection of secret law threatens the very structure of government. It undermines the moral qualities of the law. And it raises the question of whether and to what extent obedience is due. Ultimately, what is at stake is the rule of law.

4. Adjudicatory Secrecy

Secrecy in the fourth and final context, Article III adjudication and Article I tribunals, raises concerns related to substantive rights, such as liberty, property, privacy, and due process. It evokes separation of powers concerns, and it challenges the effective administration of justice. Like secret law, it therefore carries with it significant challenges for liberal, democratic governance.

A. Judicial Proceedings

Secrecy operates in various ways in the conduct of Article III tribunals. Deliberative secrecy, for instance, marks grand jury proceedings. Information secrecy may mark the introduction and use of classified information and efforts to prevent judicial opinions from being made public implicate secret law. In addition, adjudicatory secrecy may accompany proceedings, with a profound impact on civil and criminal litigation. Spectator exclusion and *in camera*, *ex parte* hearings provide two examples.

In the United States, as in England, criminal trials have long been presumptively open.²⁵² This approach was such a fundamental part of criminal adjudication in the United States that in 1948 the Supreme Court was “unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country.”²⁵³ “Nor have we found,” the Court continued, “any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.”²⁵⁴ The Court

attributed the guarantee of public trial to the U.S. English common law heritage, as part of the “ancient institution of jury trial.”²⁵⁵ For centuries, English tradition embraced the concept of public trials. In the sixteenth century, Sir Thomas Smith noted the occurrence of public trials in *De Republica Anglorum*.²⁵⁶ Sir Matthew Hale in his *Historia Placitorum Coronæ* discussed public attendance at trial proceedings.²⁵⁷ As William Blackstone explained,

This open examination of witnesses *viva voce* in the presence of all mankind, is much more inductive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical and all others that have borrowed their practice from the civil law.²⁵⁸

The right of those accused of crime or seeking justice to have a public trial derived from common law.²⁵⁹ It appeared in the early state constitutions, before its incorporation into the Sixth Amendment.²⁶⁰

The right to a public trial protects two types of rights: first, the right of the defendant to have the proceedings open to public scrutiny; and second, the right of the public to access.²⁶¹ Multiple considerations attach to the defendant’s right. One relates to pressure on witnesses to tell the truth in front of the community—assumedly either because the individual would be shunned, or because there might be someone else present who would object based on their knowledge of the facts.²⁶² The public also has the potential to keep the judge and jurors in check.²⁶³ There is power that comes with observation—the flip side of the Panopticon being when the public watches the watchers. Jeremy Bentham explained:

[S]uppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge—that judge will be at once indolent and arbitrary; how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.²⁶⁴

The right of the public, in turn, rests on a number of arguments. Observation is critical for the democratic process. Without insight into the application of law, voters may remain ignorant as to how officials are acting. No less important is this knowledge for participation in the political dialogue. Citizens in a similar position to the defendant also must have access to information that may be of great import to them. The public, in addition, has the right to be a witness to—and to be participant in—the legal system, to see that justice is done. This last consideration may carry an emotive quality stemming from the community's need to see that justice is done.

Despite the general rule of public access, over time, several exceptions emerged over time for limiting access to certain parts of the trial, while still being cognizant of individual and social rights. By the middle of the twentieth century, judges could exclude observers because of space limitations.²⁶⁵ If violence threatened the proceedings, the trial judge could take reasonable steps to secure the facilities.²⁶⁶ Disorderly conduct could lead to members of the public being removed in the middle of a trial.²⁶⁷ And where witnesses may be emotionally unable to testify in front of many individuals, the judge could ask members of the public to leave to ensure that the witness provided evidence.²⁶⁸

In *Richmond Newspapers v. Virginia*, the Supreme Court further underscored the First and Fourteenth Amendments as guarantor of the right of the public and press to attend criminal trials.²⁶⁹ Two years later, the Supreme Court ruled a mandatory closure rule designed to protect minors in sexual assault cases unconstitutional.²⁷⁰ The fact that criminal trials had traditionally been open to the public mattered, not least because such hearings play a significant role in the legal process.

Technically, a judicial proceeding is held *in camera* either when spectators are excluded from the court room, or when the hearing or discussion takes place with the judge in the privacy of his chambers. As the previous section deals with the former type of secrecy, I here consider the second form, with further consideration for in limine motions and ex parte hearings, all of which involved secrecy in some form or another. The first two considerations suggest that secrecy can be beneficial to the adjudicative process and to achieving a just result. It is the third type, however, that raises particular concerns in the national security arena.

In camera hearings can be either on or off the record. These rules are reflected in administrative proceedings. Confidential business documents, for instance, and testimony made to the International Trade Commission that are subject to protective orders, or orders granting *in camera* treatment, are not part of the public record and are retained in a separate *in camera* record.²⁷¹ Only those individuals identified in the protective order, and court personnel concerned with judicial review, have access to the *in camera* record.²⁷² They are used in various situations, such as in the civil context for testimony related to child custody, where a child's testimony in open court may carry with it a tremendous emotional burden, or where issues of confidentiality are of concern.²⁷³ Motions *in limine* are made outside the presence of jurors, to request that certain testimony be excluded. They generally occur before the trial begins, with the purpose of preventing certain information from prejudicing the jury against the defendant. These proceedings are secret in that neither the jurors nor the public are not informed of their details. Secrecy here plays a role in protecting the defendant from information that would unfairly bias the jury against him or her. Ex parte matters are generally temporary orders (such as a restraining order or temporary custody), pending a formal hearing or an emergency request for a continuance.²⁷⁴ The obvious point here is that in such circumstances, it is easier to mislead judges—either intentionally or by accident—when there is no one to check the assertions that are being made. In concert with secret law, the impact is felt in statutory interpretation, constitutional understanding, and the ability of society to ascertain how the government is wielding its power.

B. Quasi-Judicial Executive Functions

Article III courts are not the only entities that engage in adjudicatory processes impacting rights. A range of quasi-judicial executive functions weigh evidence of potential wrongdoing and make determinations as to guilt or culpability, with a direct impact on legal rights. The expansion of executive activities in this realm coincides with the growth of the administrative state.²⁷⁵ Over the past 70 years, as the state has become more focused on national security, secrecy within these administrative tribunals has kept pace. As a result, we now find ourselves in the position in which decisions made by officials impact life, liberty, property, privacy, and free speech, with little or no recourse provided for those affected to

seek justice in a regular court of law. An examination of how secrecy functions in these contexts yields insight into how secrecy interacts with Constitutional procedural rights. It also illuminates distinctions between citizens and non-citizens and highlights conflicts of interest. Of no less importance are the implications for separation of powers that result from rapidly-expanding executive power.

Like the concerns that accompany secret law, this category is of concern. What is at stake is the usurpation of the judicial functions of government and thus both separation of powers and substantive rights related to life, liberty, property, privacy, and due process of law.

Targeting

The number of civilians estimated to have been killed by U.S. drone strikes over the past decade is, by some non-governmental accounts, in the thousands.²⁷⁶ Government figures are substantially lower, owing perhaps to the assumption that, absent clear evidence to the contrary, all military-age males in a strike zone are considered combatants.²⁷⁷ The military and CIA maintain top secret lists of high-value targets eligible for kill or capture.²⁷⁸ Some of the factors considered in populating the lists are the strength of intelligence indicating enemy status, whether the individual poses an imminent threat, and how significant they are in the enemy forces, as well as whether capture is feasible.²⁷⁹

Decisions to kill or capture enemies are part and parcel of wartime. But three elements make administrative expansion into this realm and the role that secrecy plays different: (a) the indefinite nature of the 2001 AUMF as a formal declaration of war (and ambiguity regarding the populations to whom it applies); (b) the rapidly-expanding concept of “battlefield”; and (c) the use of kill powers against U.S. citizens.

The 2001 AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the 9/11 attacks.²⁸⁰ Although not a formal declaration of war, Congress couched the Joint Resolution as specific statutory authorization within the meaning of the 1973 War Powers Resolution.²⁸¹ The language of the resolution has been interpreted broadly, to include not only individuals and organizations who are not part of al Qaeda, the Taliban, or associated forces, but also some who are actively hostile to these groups.²⁸²

Between 2001 and 2016, the President cited his authorities under the AUMF in support of 37 military operations in 14 different countries—refusing to specify which groups the statute covered.²⁸³ Scholars are divided on the legitimacy of the rapidly expanding battlefield.²⁸⁴ Some argue the need take the fight to the enemy (wherever the enemy may be located) and respond to human rights concerns by suggesting that in a global battlefield, the distinction between war and peace becomes meaningless. In one of the strongest articles on this topic, Professor Jennifer Daskal proposes a set of binding standards to limit (and legitimize) the use of targeted killing outside “hot battlefields.”²⁸⁵

In prosecuting its global war, the government maintains that it can place U.S. citizens on the kill or capture list.²⁸⁶ In 2011, for instance, the Central Intelligence Agency killed Anwar al-Awlaki.²⁸⁷ The placement of al-Awlaki, a U.S. citizen, on the top secret targeting list only came to light after a 2014 Freedom of Information Act lawsuit brought by the *New York Times* and the ACLU against the DOJ.²⁸⁸ Until that point, the records pertaining to the process via which U.S. persons could be designated for killing—including who had the authorization to make such determinations and what evidence was required to support the designation—was concealed from public view, as were all records pertaining to the legal basis of this process in domestic, foreign, and international law.²⁸⁹

When information regarding al-Awlaki’s placement on the kill list was made public, the justification offered was one of public authority: a well-recognized principle that the government may engage in activity that is otherwise forbidden to private citizens.²⁹⁰ What exempted the CIA and DOD from the federal murder statute was their use of such force during “the lawful conduct of war.”²⁹¹ The OLC heavily relied on “[h]igh-level government officials” which had concluded, “on the basis of al-Awlaqi’s activities in Yemen, that al-Awlaqi is a leader of AQAP whose activities in Yemen pose a ‘continued and imminent threat’ of violence to United States persons and interests.”²⁹² His citizenship did not make him immune from the use of force outside U.S. borders.²⁹³ The fact that he was located in Yemen, and not anywhere near “the most active theater of combat” between the United States and al-Qaida, also did not matter, as AQAP was, if not part of al-Qaida, a co-belligerent with a strong presence in Yemen.²⁹⁴ Because the threat was continued and imminent, and an operation to capture al-Awlaqi

infeasible, neither the Fourth Amendment right against seizure nor Fifth Amendment due process rights prohibited killing him.²⁹⁵

The rapidly-expanding concept of war and the battlefield, undergirded by broad Executive Branch interpretation of the AUMF, means that targeting, based on secret information only available to the executive, becomes the avenue for responding, instead of the state turning to criminal law. In the process, the government sidesteps important protections otherwise meant to restrict governmental exercise of lethal power. It is not that in criminal law the execution of citizens never occurs. Capital punishment has long been a feature of the U.S. legal system. But, notably, to the extent that the ability to take individuals' lives exists outside of war, it is subject to lengthy judicial procedures to ensure that those who lose their lives are justly tried. Even then, estimates of the number of wrongful convictions are distressingly high.²⁹⁶ Since 1973, there have been 159 people exonerated while on death row—despite the procedural protections on capital cases.²⁹⁷ Further rules prevent execution based on age or mental capability and limit pain and suffering. None of these apply to extra-judicial targeting. Added to these concerns is the nature of the information on which extra-judicial killings are based and how the fog of war obscures what is actually known. War is notorious for the uncertainty it generates—a situation referred to in military terms as volatile, uncertain, complex, and ambiguous (VUCA). As Clausewitz observed, “war is the realm of uncertainty; three quarters of the factors on which action is based are wrapped in a fog of greater or lesser uncertainty.”²⁹⁸

The kill list does include specific individuals. But in 2008, a *New York Times* article revealed further use of signature strikes against unnamed individuals, using location and patterns in behavior as evidence of involvement in al Qaeda or the Taliban.²⁹⁹ Also known as Terrorist Attack Disruption Strikes (TADS), signature strikes amount to decisions to kill unidentified individuals.³⁰⁰ That includes (potentially) U.S. citizens. In November 2002, for example, human intelligence and signals intelligence intercepts suggested that Abu Ali al-Harithi, believed to be involved in the 2002 *USS Cole* bombing, was living in the Marib region of Yemen, near the Saudi Arabia border.³⁰¹ U.S. forces on the ground were monitoring him when they saw two SUVs leave the compound.³⁰² The NSA picked up a call from one of

the cars.³⁰³ The analyst listening, who had listened numerous times to tapes of al-Harithi, was convinced that the person on the phone was not him.³⁰⁴ Overhearing someone in the back seat of the car, he immediately identified the background speaker as al-Harithi.³⁰⁵ He called a second analyst over for another opinion.³⁰⁶ The phone call lasted all of six seconds, at which point the command was given to fire a Hellfire missile at the car, killing all six occupants.³⁰⁷ One of them, Ahmed Hijazi (a.k.a. Kemal Derwish), was an American citizen.³⁰⁸ It is unclear whether the CIA knew the identities of the people in the car.³⁰⁹

The incident is instructive in terms of how the secret killing of al-Harithi was carried out. Some of the evidence that al-Harithi was involved in al-Qaida came from Abd al Rahim al-Nashiri—one of three detainees the CIA had waterboarded.³¹⁰ The manner in which the information was obtained raises question about its accuracy. The decision to kill al-Harithi, moreover, depended upon an analyst overhearing someone in the background on the phone—a rather attenuated confirmation. It is not clear whether the government knew the identities of the other people it condemned to die in the same attack—one of whom was an American. The level of assuredness, while perhaps typical of a battlefield, took place hundreds of miles from any active hostilities. The effect of the secret operation was to cleave the judiciary out of the determination of guilt and those Americans killed from any of the procedural protections and substantive rights otherwise available to them as a Constitutional matter.

Liberty Restrictions: Courts martial, military commissions, and immigration

Another way in which secrecy presents in Article I adjudication relates to restrictions on the freedom of movement. Military tribunals provide a good example.³¹¹ Their use is hardly an invention of the twenty-first century: the Second Continental Congress recognized a role for military courts in relation to certain offenses linked to military order.³¹² In 1776, the American Articles of War provided for courts-martial over “[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline.”³¹³ In considering the role of secrecy in the conduct of litigation, two forms of military tribunals are of particular import: (i) courts-martial and (ii)

military commissions. In addition, a less formal type of adjudication has existed in regard to (iii) detention. Secrecy plays a unique role in each type of adjudication.

The modern version of military courts-martial stems from the enactment in 1950 of the Uniform Code of Military Justice (UCMJ), which establishes three types of proceedings. The most serious offences are tried by general courts-martial, in which a military judge presides, with not less than five members (in cases where the penalty is not capital punishment), or twelve members (in capital cases), serving as jurors.³¹⁴ For cases in which the maximum punishment does not exceed twelve months imprisonment, a special court martial is constituted of a military judge (or convening authority if a military judge cannot be detailed) and three or more members.³¹⁵ Under certain conditions, and with defense agreement, general and special courts martial can be held by a single judge.³¹⁶ A summary court-martial deals with the lowest-level offenses and may not be employed if the person on trial objects to being tried in such a court.³¹⁷

The power of courts-martial is steadily expanding. Consistent with their traditional position, courts-martial have the authority to try current (or former) members of the constituent service for more than four dozen offenses laid out in the UCMJ.³¹⁸ Until the 1987 case of *Solorio v. United States*, the Court required that the offenses be “service-connected,” and not ordinary crimes.³¹⁹ But in *Solorio*, the Court held that individuals could be tried for any crime incorporated by Congress into the UCMJ—regardless of whether there was a direct connection to service in the military.³²⁰ In the Court’s view, Congress had “primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military,” which required deference in all situations—including those implicating service members’ constitutional rights.³²¹ In 2006, Congress amended the UCMJ to extend courts-martial jurisdiction beyond service members and reservists, and individuals subject to the law of war, to include “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”³²² In 2012, as Professor Vladeck notes, a lower court controversially held that this language applied to noncitizen civilian contractors outside the United States, even though Supreme Court doctrine otherwise rejects the application of military law to civilians.³²³

The result, and the associated role that secrecy plays in courts martial, carries implications for: (a) which charges are brought (affecting defendant and victim rights);³²⁴ (b) the speed of the trial (implicating the Eighth Amendment speedy trial provision); (c) the defendant's ability to mount a defense (encroaching on client-attorney privilege as well as the ability of the accused to see, present, or counter evidence and witnesses);³²⁵ (d) the defendant's procedural protections (e.g., public access and trial by jury);³²⁶ and (e) rights of appeal.³²⁷

In November 2001, President Bush announced that military commissions would be established to try "certain non-citizens" suspected of involvement in terrorism.³²⁸ The military order gave commissions jurisdiction over individuals alleged to have committed *any* offense. It incorporated a wide range of secret information into the trial proceedings, including:

(i) information classified or classifiable pursuant to [Executive Order 12958]; (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests.³²⁹

That definition extended beyond classified documents to include anything considered a threat to U.S. national security. The order authorized the presiding officer (a military judge advocate officer) to take steps necessary to protect U.S. interests in regard to state secrets and protected information—including deleting information from documents provided to the accused or to defense counsel.³³⁰ The presiding officer could direct that a summary be provided in lieu of the information or substitute the data with a statement of the relevant facts that the sensitive material would tend to establish.³³¹ Further, the presiding officer could close any portion of the legal proceedings to prevent sensitive information from being disclosed.³³² The rules and procedures differed in important other ways from courts-martial or even ordinary judicial processes. Instead of five or twelve members of the U.S. armed forces, panels required three military officers. They also allowed for: the use of evidence against an accused without providing

access to the information; the potential admission of hearsay; the use of unsworn testimony and evidence obtained through coercive interrogation; and limited rights of appellate review.³³³

The first judicial correction to the overreach came following the February 2004 prosecution of Salim Hamdan, a Yemeni national held in Guantánamo Bay, of conspiracy “to commit . . . offenses triable by military commission.”³³⁴ Hamdan contended that conspiracy was not a violation of the law of war and that the procedures instituted for the commissions violated the basic tenets of military and international law, “including the principle that a defendant must be permitted to see and hear the evidence against him.”³³⁵ The Supreme Court ruled in Hamdan’s case that the military commissions could not proceed because the structure and procedure violated Article 36 of the UCMJ (which requires uniformity of rules with courts-martial, unless uniformity is impracticable) and Article 3 of the Geneva Conventions (which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”)³³⁶ Because the military commission violated Article 36 of the UCMJ, they were not “regularly constituted.”³³⁷ Four of the justices further concluded that the offense of conspiracy was not an “offens[e] that by . . . the law of war may be tried by military commissions.”³³⁸

Congress responded by passing the 2006 Military Commissions Act, which created a category of alien unlawful enemy combatants engaged in hostilities against the U.S. and provided for them to be tried by military commission for violations of the law of war, as well as other offences.³³⁹ The statute established the right of the defendant to see evidence arrayed against him, to be tried before a qualified military judge and a panel of members of the U.S. services, to obtain evidence, to cross-examine witnesses who testify against him, and to bring witnesses in his or her defense.³⁴⁰ It allowed the defendant to seek review of the decision.³⁴¹ At the same time, it limited the right of habeas corpus.³⁴² It narrowed the right to counsel.³⁴³ It shifted the burden for hearsay onto the opponent,³⁴⁴ and, while it prohibited the use of statements obtained through torture, it did not prohibit the use of statements obtained through coercive interrogation.³⁴⁵ Members of the panel cast secret ballots to determine guilt or innocence, with only two of the three votes necessary for conviction.

In this context, secrecy functioned to allow information to be obtained under conditions that significantly departed from judicial norms, undermining not just public perceptions of the tribunals, but, as a substantive matter, detainees' rights.³⁴⁶ The commissions also helped to hide rendition and detention from public view, preventing challenge in civilian courts.³⁴⁷ The conversation between the three branches continued.

In 2008, the Supreme Court ruled that the 2006 Military Commissions Act unconstitutionally suspended detainees' right to habeas corpus.³⁴⁸ That same year, Hamdan was tried and convicted by a six-member military commission and sentenced to 5 ½ years' confinement for providing material support to terrorism.³⁴⁹ Four years later, the U.S. Court of Appeals for the District of Columbia threw out the conviction, in a 3-0 decision, on the grounds that material support did not count as an international war crime until the 2006 MCA, at which point Hamdan was in U.S. custody. Judge Brett Kavanaugh noted, "[T]he Executive branch acknowledges that the international law of war did not—and still does not—identify material support for terrorism as a war crime."³⁵⁰ He explained, "If the government wanted to charge Hamdan with aiding and abetting terrorism or some other war crime that was sufficiently rooted in the international law of war at the time of Hamdan's conduct, it should have done so."³⁵¹ The principle at issue was a simple one: can an individual be held liable for conduct that is not criminal at the time it occurs? For centuries, legal jurists have responded to this question with a resounding "no!" Yet secret processes, cloaked from public view, and a hearing hidden from public access, came to a rather different answer. Just three months after the D.C. court's decision, a panel of the D.C. Circuit came to a similar conclusion in regard to charges of conspiracy and solicitation brought against Ali Hamza Ahmad al Bahlul. Remarkably, in October 2016, the en banc court overturned the panel's decision, upholding his conviction on numerous grounds.³⁵²

Congress went on to introduce the 2009 Military Commissions Act, vesting the military commissions with jurisdiction over "alien unprivileged enemy belligerents" for violations of the law of war, Articles 104 or 106 of the UCMJ, or any of 32 substantive offences laid out in the MCA.³⁵³ It prohibited the use of evidence obtained through torture or cruel and unusual punishment, and limiting the

conditions under which hearsay evidence can be used.³⁵⁴ The law strengthened the accused's rights to counsel, so that he or she could request a specific counsel from the pool of attorneys and, in capital cases, obtain a lawyer with previous experience in the area. The statute also shifted the burden for the use of hearsay evidence to the party intending to use it.³⁵⁵

The creation of a separate, secret adjudicatory system further raises the risk that in a world in which success is determined based on the number of convictions, the executive branch will engage in a form of forum shopping, preferencing the systems with greater secrecy and fewer protections for defendants, creating a reinforcing mechanism. In November 2009, for instance, Attorney General Holder explained that many of the Guantanamo Bay cases “could be prosecuted in either federal courts or military commissions.”³⁵⁶ As counsel for al-Nashiri explained, “the military commission system in Guantánamo has become a permanent, civilian-administered adjunct to the judicial system that openly competes for the district courts’ jurisdiction over high profile crimes.”³⁵⁷

The risks posed by secrecy in Article I tribunals extends beyond the military realm. For decades, INS regulations required that deportation proceedings be presumptively open to the public.³⁵⁸ In the event that there was not enough space at the facility, the regulations directed that the judge give the media priority, to ensure that the proceedings be accessible more broadly.³⁵⁹ Under certain circumstances (to protect witnesses, parties, or the public interest) the judge could “limit attendance or hold a closed hearing.”³⁶⁰ The regulations required that the proceedings be closed to the public in cases involving abuse of an alien spouse and child (unless, in the former case, the spouse agreed to have the proceedings in open record).³⁶¹ The presumption of openness reflected the right to public trial in the criminal realm.³⁶²

Immediately following the attacks of 9/11, the Department of Justice departed from this long-established practice. At the direction of Attorney General John Ashcroft, Chief Immigration Judge Michael Creppy informed all immigration judges that DOJ had implemented “additional security procedures” for cases of “special interest” to the government.³⁶³ These hearings would henceforward be closed to all members of the public—including family, friends, and the media.³⁶⁴ The Attorney General further directed that information regarding the cases neither be posted on the court calendars outside the

hearing rooms nor provided in the courts' telephone services. Those working at the courthouse were not to discuss the cases of special interest with anyone—including indicating whether or not the case had been scheduled for a hearing.³⁶⁵ The Record of Proceeding (the official file with documents related to non-citizens' immigration cases) could only be provided to the detainee's attorney, and then only if it did not contain any classified information.³⁶⁶

The decision to close the *existence* of the hearings, as well as the hearings themselves, to the public was made behind closed doors, without any opportunity for discussion. The DOJ refused to release the criteria for what constituted a case of special interest, and those whose cases fell into this category had no opportunity to contest the designation. Within six months, 611 people were subject to secret hearings, approximately two-thirds of whom had been subject to multiple ones.³⁶⁷ Several lawsuits challenged the hearings on due process and First Amendment grounds. In *Haddad v. Ashcroft*, the Eastern District of Michigan considered a case in which an immigration judge had been forced to close proceedings to the public, including the family and friends of the individual in custody as well as the media.³⁶⁸ The court ruled that the government's closure violated the due process clause of the Fifth Amendment—a constitutional protection that extends to “all ‘persons’ within the United States, including aliens, whether their presence here is unlawful, temporary, or permanent.”³⁶⁹ The court noted the many cases in which open hearings have been considered fundamental to concepts of fairness, recognizing that the rights at stake in immigration proceedings are at least as serious as those at issue in criminal or civil actions, if not more so.³⁷⁰ In light of the recent attack, it was especially important to ensure open access to adjudicative processes: “Few could disagree that the events of September 11 altered the way we view our world and the safety of our nation . . . we regard our own neighbors with suspicion and go about our day-to-day affairs wary of our own security.”³⁷¹ The Court continued, “Traditionally, in such a climate, individuals (including some in government) are more willing to abridge the constitutional rights of people who are perceived to share something in common with the ‘enemy,’ either because of their race, ethnicity, or beliefs.”³⁷² At such times, it was particularly important to maintain the country's commitment to due process to ensure that the legal system did not arbitrarily invade the rights of individuals.

Other Courts similarly picked up on the importance of open hearings for the rights of the defendant. In *North Jersey Media Group v. Ashcroft*, the Third Circuit noted the importance of having the public involved to serve “as a check on corrupt practices by exposing the judicial process to public scrutiny.”³⁷³ The Court also highlighted the importance of spectators to discourage perjury, as well as to enhance “the performance of all involved.”³⁷⁴ No less important were open immigration hearings to the rights of the public. In the same case (*North Jersey Media Group*), the Court emphasized the importance of promoting an “informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system.”³⁷⁵ It underscored the importance of promoting “the public perception of fairness which can be achieved only by permitting full public view of the proceedings,” as well as “providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion.”³⁷⁶

In May 2002, the DOJ issued an interim rule, allowing immigration judges to decide which hearings to close on a case-by-case basis.³⁷⁷ The order expanded the regulations to allow judges to issue protective orders and to accept documents under seal, to “ensure that sensitive law enforcement or national security information can be protected against general disclosure, while still affording full use of the information.”³⁷⁸ Some of the reasons given for needing the provision were strong, such as the concern that revealing the identity of witnesses might allow terrorists to threaten the witnesses or their families, with the result that witnesses would not, in the future, be willing to come forward. But other arguments, such as the need to protect the rules governing law enforcement investigations were particularly concerning, considering their spill over affect on the criminal justice system.

Property rights

Other quasi-judicial processes carried out by the executive, such as rules concerning asset freezing and forfeiture, deprive targets of their property. Like targeting and liberty restrictions, secrecy permeates the structures, giving rise to similar concerns about the invasion of substantive rights.

Consider, for instance, Executive Order 13224, under which the President can place sanctions on individuals. This power originated from legislation issued by Congress to give the President the

flexibility to respond to foreign state threats. During the First World War, President Woodrow Wilson established an Office of Alien Property Custodian under the 1917 Trading with the Enemy Act.³⁷⁹ The statute authorizes the President to appoint an individual as Alien Property Custodian (APC) to “receive . . . hold . . . administer . . . and account for” “all money and property in the United States due or belonging to an enemy, or ally of enemy.”³⁸⁰ That office had the authority to seize, to administer, and (under certain conditions) to sell property held by anyone deemed to be a threat to the war effort. Wilson appointed A. Mitchell Palmer to head the office. Within a year, the office had amassed hundreds of millions of dollars in private property.³⁸¹ During World War II, President Franklin D. Roosevelt re-constituted the office, conferring powers from TWEA, as well as the First War Powers Act, 1941, on the APC.³⁸² “Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct.”³⁸³

Following abuses of the power by the Nixon Administration, Congress withdrew TWEA and replaced it with the International Emergency Economic Powers Act.³⁸⁴ This law focused on threats outside the country. Once a national emergency is declared, the President can designate entities considered a threat to national security, freezing their assets and blocking any trade between them and U.S. persons.³⁸⁵ The President informs Treasury’s Office of Foreign Assets Control (OFAC), which informs banks. The statute includes a criminal penalty for those who refuse to comply. At first, successive administrations only applied IEEPA to states. But in the 1990s, President Clinton extended it to include nonstate actors: specifically, Palestinian organizations and the Cali drug cartel. In January 1995, for the first time, he extended it to individuals (those threatening to disrupt the Middle East peace processes), and he forbade transferring any funds, goods, or services to them.³⁸⁶ The annex to the order included a “Specially Designated Terrorist” list, on which a dozen organizations and eighteen individuals had been placed.³⁸⁷ In 1998, following the attacks on the U.S. Embassies in Nairobi and Dar es Salaam, Osama bin Laden and a number of his key aides joined them on the SDT list.³⁸⁸

Following 9/11, President Bush issued a new executive order under the IEEPA, establishing a new “Specially Designated Global Terrorist” (SDGT) list.³⁸⁹ The order blocked “all property and

interests in property” of individuals listed, as well as all persons determined “to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex.”³⁹⁰ As a practical matter, this means that entities who continue to do business with individuals listed in the order can have their assets frozen.

The process of listing individuals is highly secretive and takes place entirely within the executive branch. Efforts to challenge such designations have been met with refusal by the Courts to get involved. What makes these procedures remarkable is that they end up directly impacting the same rights that are normally addressed through ordinary judicial procedures. The effect is felt both in terms of rights and in diminishing the role of the judiciary. Even when cases end up in Court, the willingness of the judiciary to look too deeply into why individuals have had their assets frozen turns out to be extremely limited. This is true even in regard to material support provisions, where criminal penalties are applied.³⁹¹ The executive exercises secretive adjudicatory powers that directly impact property rights in numerous other areas, with a similar potential impact on substantive and procedural rights.³⁹²

Conclusion

It is not enough to ask how secrecy presents obstacles to civil and criminal litigation. First, one must ask how secrecy *functions* and then determine whether it is beneficial or harmful to the liberal, democratic state. Accordingly, this chapter has focused on four areas: deliberation, information, law, and adjudication. The first of these, deliberative secrecy, may result in better policies and laws and fairer administration of justice. Far from having a deleterious effect, it may be a necessary condition of reaching the optimal outcome. The central question is at what point the deliberation approaches a final decision. To the extent that the deliberative process as it approaches this point is probative of the *meaning* of the law, rule, or policy adopted, then the information is important to have in the public domain. The real question is the point at which the type of secrecy at issue alters to information secrecy or to secret law, at which point different considerations come into play. The second area, information secrecy, carries with it the benefit of protecting against vulnerabilities. But taken too far, it may prevent

individuals wronged from being able to seek justice in either the civil or the criminal realm. Further damage may be done to the ability of the public to know what officials are doing and therefore to hold them accountable for their acts. Of the four types of secrecy discussed in this chapter, the third, secret law, gives rise to the greatest concern. Static law generated by Congress, working law introduced by the executive, and interpretive law offered by the courts all come within this domain. For the latter, secret opinions raise significant concerns related to statutory construction, constitutional interpretation, and accountability. For all three categories, the issues are even more profound: secrecy challenges the morality of the law, casting further doubt on whether law properly could be said to exist at all. It undermines the legitimacy of the government. Claims of reason of state are insufficient in that the “state” which is being claimed no longer reflects the most basic principles of liberal democracy.

To the extent that secrecy acts within adjudicatory processes, the greatest impact is felt in the administration of justice. In the judicial realm, cases may be prevented from proceeding. Public exclusion may relieve pressure on the prosecution to mount a strong case and undermine the defendant’s—as well as the public’s—right to an open trial. Secretive adjudication in the executive branch undermines both individual rights and separation of powers. Along with secret law, adjudicatory secrecy raises some of the most profound challenges to the liberal, democratic state. Both types of secrecy reach into the legitimacy of the law and erode its morality in ways that have profound consequences for the structure of the state.

* Professor of Law, Georgetown Law. Special thanks to Professors Bobby Chesney and Steve Vladeck for the invitation to join the colloquium and to the colloquium participants for an invigorating discussion of the material addressed in this chapter. I am indebted to the faculty at the University of Maryland School of Law for their thoughtful comments on the chapter. Professors Jen Daskal and Dakota Rudesill, and Judge Mike Mosman, kindly provided further critique. Mr. Jeremy McCabe provided invaluable assistance in obtaining many of the materials used in the exposition.

¹ Professor Kim Scheppele, discussing secret-keepers and targets, distinguishes between levels of awareness, noting that the point at which the line is drawn raises questions about both knowledge and responsibility. KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 12-16 (1988). Professors Amy Gutmann and Dennis Thompson consider deep (as opposed to shallow) secrets as particularly insidious owing to the impact on transparency in a democratic state. AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 121-23 (1996). Professor Heidi Kitrosser makes the further, important point that the matter is not just one of democratic, but of constitutional design, asserting that the Founders sought to disfavor the same executive privilege operative in secrecy, as against Congressional power. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007). Professor David Pozen builds on this work,

defining “deep” versus “shallow” secrets by virtue of (a) the number of people aware of the secret, (b) who has such knowledge, (c) the extent of their knowledge, and (d) at what point they have access to the information. David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 267-73 (2010). For him, the point of departure is whether the information can be accessed. None of these theorists consider the specific function of secrecy in relation to *what* is being masked from public view.

² MICHEL FOUCAULT, *THE COURAGE OF TRUTH: THE GOVERNMENT OF SELF AND OTHERS, LECTURES AT THE COLLÈGE DE FRANCE 1983-84 4-5* (Frédéric Gros ed., Graham Burchell trans.) (2012). See also Michel Foucault, *The Meaning and Evolution of the Word Parrhesia*, in DISCOURSE AND TRUTH: THE PROBLEMATIZATION OF PARRHESIA (1999), <https://foucault.info/doc/documents/parrhesia/foucault-dt1-wordparrhesia-en.html>.

³ MICHEL FOUCAULT, *THE COURAGE OF TRUTH: THE GOVERNMENT OF SELF AND OTHERS, LECTURES AT THE COLLÈGE DE FRANCE 1983-84 11* (Frédéric Gros ed., Graham Burchell trans.) (2012).

⁴ *Id.*, at 57-58. See also Stéphane Lefebvre, *A Brief Genealogy of State Secrecy*, 31 WINDSOR Y.B. ACCESS JUST. 95, 97-98 (2013).

⁵ *Id.*

⁶ See, e.g., *Carpenter*, referring back to the shadow majority in *Jones* as though it were the holding.

⁷ See also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (discussing “secrecy in the service of deliberation”).

⁸ James Madison, Notes of the Constitutional Convention, Monday, May 28, 1787 (“Mr Butler moved that the house provide . . . against licentious publications of their proceedings . . . Whereupon it was ordered that [the motion] be referred to the consideration of the Committee appointed to draw up the standing rules and that the Committee make report thereon.”). See also James Madison, Notes of the Constitutional Convention, Tuesday, May 29, 1787.

⁹ James Madison, Notes of the Constitutional Convention, Tuesday, May 29, 1787 (noting the additional rules: “That no copy be taken of any entry on the journal during the sitting of the House without leave of the House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published or communicated without leave.”). Also note that on July 25, 1787, the Convention approved a resolution to allow the Committee of Detail access to copies of the proceedings so that they could carry out their responsibilities. On the same day, a 6-5 vote went against allowing members of the Convention access to resolutions. JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787* 693 (2005).

¹⁰ James Madison to Thomas Jefferson, June 6, 1787.

¹¹ Thomas Jefferson to John Adams, Aug. 30, 1787.

¹² See, e.g., Luther Martin to the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia, in 1787, Jan. 27, 1788 (“By another [rule], the doors were to be shut, and the whole proceedings were to be kept secret; and so far did this rule extend that we were thoroughly prevented from corresponding with gentlemen in the different states upon the subjects under our discussion – a circumstance, sir, which I confess I greatly regretted. I had no idea that all the wisdom, integrity and virtue of this State or of others, were centred in the Convention. I wished to have corresponded freely and confidentially with eminent characters in my own and other states – not implicitly to be dictated by them, but to give their sentiments due weight and consideration. So extremely solicitous were they that their proceedings should not transpire, that the members were prohibited even from taking copies of resolutions on which the Convention were deliberating, or extracts of any kind from the Journals, without formally moving for and obtain permission, by a vote of the Convention for that purpose.”).

¹³ George Mason to George Mason Jr., 1 June 1787, in RFC, 3:32-33.

¹⁴ 1 June 1787, in DGW, 5:164. But see George Washington to George Augustine Washington, 3 June 1787 in PGWCon, 5:219 (providing a broad overview of the discussions to his brother). See JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787* 694 (“George Washington filled his diaries during his time with records of the weather and where he dined, but he included no substantive facts about the Convention. Delegates frequently cited the secrecy rule in corresponding with their friends. James Madison, the individual who kept the most extensive and accurate notes of Convention proceedings, was the last delegate who attended the Convention to die, and he specified that his notes would not be published until after his death.”); TONY WILLIAMS & STEPHEN F. KNOTT, *WASHINGTON AND HAMILTON: THE ALLIANCE THAT FORGED AMERICA* 104-127 (2016); RICHARD BEEMAN, *PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 83-84 (2009).

¹⁵ James Madison to James Monroe, June 10, 1787 (“One of the earliest rules established by the Convention restrained the members from any disclosure whatever of its proceedings, a restraint which will not probably be removed for some time. I think the rule was a prudent one not only as it will effectually secure the requisite freedom of discussion, but as it will effectually secure the requisite freedom of discussion, but as it will save both the Convention and the Community from a thousand erroneous and perhaps mischievous reports.”).

¹⁶ Articles of Confederation, Article XII (“Nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

¹⁷ George Mason to George Mason, Jr., June 1, 1787.

¹⁸ Farrand III, 479.

¹⁹ U.S. CONST., Art. I, §5 “(Each house shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

²⁰ It was not until 1913 that the Seventeenth Amendment required the direct election of senators. Prior to that, state legislatures played a central role.

²¹ U.S. CONST., Art. I(7). See also JAMES MADISON, THE FEDERALIST 58 (extolling the House as holding “power over the purse”); THE FEDERALIST 52 (noting their shorter election and the House of Representatives’ “duty to the people”).

²² U.S. Senate, *The Senate Opens its Doors*, Dec. 9, 1795,

https://www.senate.gov/artandhistory/history/minute/The_Senate_Opens_Its_Doors.htm.

²³ *Id.*

²⁴ Clive Parry, *Legislatures and Secrecy*, 67 HARV. L. REV. 737, 743 (1954).

²⁵ Annals of Congress, Senate, 3rd Cong., 1st Sess, p. 33 (Jan. 16, 1794).

²⁶ *Id.* at 33-34.

²⁷ *Id.* at 34.

²⁸ *Id.*

²⁹ See also Annals of Congress, Jan. 17, 1794 at 34 (extending consideration of the Resolution until the following Wednesday); Annals of Congress, Jan. 22, 1794 at 37 (extending consideration of the Resolution for a fortnight); Annals of Congress, Feb. 5, 1794 at 40 (extending consideration of the Resolution for a fortnight); Annals of Congress, Feb. 19, 1794 at 45-46 (voting to take up the main question in the next session of Congress).

³⁰ Annals of Congress, Feb. 11, 1794 at 42-43 (Resolving “That the doors of the Senate be opened, and continue open during the discussion upon the contested election of Albert Gallatin.”).

³¹ Annals of Congress, Feb. 20, 1794, at 47. The resolution, which passed 19-8, went into effect after the end of the First Session “and so soon as suitable galleries shall be provided for the Senate Chamber.” *Id.*

³² U.S. CONST., Art. I, §9 (“[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

³³ Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SECURITY J. 241, 254 (2015).

³⁴ *Id.*, at 255.

³⁵ House of Representatives, Rule XVII (9).

³⁶ See, e.g., Dec. 27, 1825 (relations with Indian tribes); May 27, 1830 (trade with Great Britain); June 20, 1979 (the Panama Canal); Feb. 25, 1980 (Cuban foreign relations); July 19, 1983 (U.S. relations with paramilitaries in Nicaragua); and March 13, 2008 (FISA).

³⁷ Standing Senate Rules XXI, XXIX, and XXXI.

³⁸ Senate Rules for Impeachment Trials, Rules XX and XXIV.

³⁹ See, e.g., impeachment proceedings (May 24, 1933; Apr. 15-16 1936; Oct. 7-9 1986; Mar. 16, 1989; Oct. 19, 1989; Nov. 2, 1989; Jan. 25-26 1999; and Dec. 7, 2010); foreign affairs matters include Jun. 7, 1971 (U.S.

involvement in Laos); Feb. 21-22, 1978 (Panama Canal); Apr. 26, 1983 (U.S. support for Contras); Feb. 1, 1984 (U.S.S.R. arms control compliance); Feb. 25, 1992 (MFN extension to China); Apr. 24, 1997 (Chemical Weapons Convention); Dec. 20, 2010 (New Start Treaty).

⁴⁰ Number ascertained from SSCI website. Note that for SSCI, the closed hearings include briefings by members of the Administration.

⁴¹ U.S. Senate Select Committee on Intelligence, <https://www.intelligence.senate.gov/>.

⁴² In 2016, HPSCI held more than twice as many closed hearings as open ones (with nine hearings closed and four open). U.S. House of Representatives Permanent Select Committee on Intelligence, <https://intelligence.house.gov/calendar/default.aspx?EventTypeID=215&Page=2>. In 2017, it again held nine closed hearings with just six hearings open to the public. *Id.*

⁴³ In 2017, outside of the nominations process, the committee held nine closed sessions and 30 open ones; in 2018, there were seven closed hearings and 17 open ones. U.S. Senate Committee on Armed Services, https://www.armed-services.senate.gov/hearings?PageNum_rs=1&c=115&type=full.

⁴⁴ *Marbury v. Madison*, 5 U.S. 1 Cranch 137 (1803).

⁴⁵ It appears that Wagner informed Jefferson about the commissions, prompting the President to remove acting Secretary of State John Marshall and appoint Levi Lincoln in his place.

⁴⁶ 5 U.S. 1 Cranch 143 (1803) (“Mr. Lincoln, attorney general, having been summoned and now called, objected to answering. . . . On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.”).

⁴⁷ 5 U.S. 1 Cranch, 144 (1803).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* He was not required to answer anything that might incriminate himself, as protected by the Fifth Amendment.

⁵² *Id.*

⁵³ 5 U.S. 1 Cranch, 144-145 (1803) (“If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know.”)

⁵⁴ 5 U.S. 1 Cranch 145 (1803).

⁵⁵ *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (recognizing the President’s generalized interest in confidentiality); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (stating as the ultimate purpose of executive privilege ensuring the highest-quality agency decisions); *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁵⁶ *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367 (2004).

⁵⁷ *See* 5 U.S.C.A. §552(b)(5); *Dep’t of Interior v. Klamath Water Users*, 532 U.S. 1 (2001); *F.T.C. v. Grolier Inc.*, 462 U.S. 19 (1983); *NRB v. Sears Roebuck & Co.*, 421 U.S. 132, 154 (1975); H.R. Rep. No. 1497, p. 10; S. Rep. No. 813, p. 2.

⁵⁸ 532 U.S. 1.

⁵⁹ *See, e.g.*, *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

⁶⁰ Fed. R. Crim. Pro. Rule 6(e)(2)(B). Exceptions are laid out in Rule 6(e)(3)(A)-(G).

⁶¹ Rule 6(e)(3)(A).

⁶² *See, e.g.*, 5 U.S.C.A. 706(2)(A); 16 U.S.C.A. 1855(f); Fed. R. Civ. P. 26(b)(1); *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. Apr. 2019).

⁶³ *See* discussion, *infra*, Part 3.

⁶⁴ Act of July 1, 1790, ch. 22 Stat. 128, vol. 1, at 128.

⁶⁵ Act of July 1, 1790, ch. 22 Stat. 128, vol. 1, at 128, §1.

⁶⁶ Act of Feb. 9, 1793, ch. 4, 1 Stat. 299, vol. 2, at 299, 2 An Act to continue in force for a limited time, and to amend the act intituled, “An act providing the means of intercourse between the United States and foreign nations.” The Third Congress made an additional \$1 million available to the President “to defray any expenses which may be incurred, in relation to the intercourse between the United States and foreign nations.” Act of Mar. 20, 1794, ch. 7, 1 Stat. 345, An act making further provisions for the expenses attending the intercourse of the United States with foreign nations; and further to continue in force the act entitled “An act providing the means of intercourse between the United States and foreign nations.”, p. 345, §1. The law required that an account of the expenditures be laid before Congress.

⁶⁷ Exec. Order 8381, Mar. 22, 1940.

⁶⁸ Exec. Order 8381 (Mar. 22, 1940) (Roosevelt); Exec. Order 10104 (Feb. 1, 1950) (Truman); Exec. Order 10290 (Sept. 24, 1951) (Truman); Exec. Order 10501 (Dec. 15, 1953) (Eisenhower); Exec. Order 10964 (1961) (Kennedy)(amending Exec. Order 10501); Exec. Order 11652 (Mar. 8, 1972) (Nixon); Exec. Order 12065 (June 28, 1978) (Carter); Exec. Order 12356 (Apr. 2, 1982) (Reagan); Exec. Order 12958 (Apr. 17, 1995) (Clinton); Exec. Order 13292 (Bush) (Amending Exec. Order 12958); Exec. Order 13526 (Dec. 29, 2009) (Obama). Note that various other orders play a subsidiary role. *See, e.g.*, Exec. Order 12829, as amended (National Industrial Security Program); Exec. Order 13549 (Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities); Exec. Order 13556 (Nov. 4, 2010) (Controlled Unclassified Information); Exec. Order 13587 (Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information).

⁶⁹ Exec. Order 13256, §1.4.

⁷⁰ The IC includes two independent agencies (the Office of the Director of National Intelligence and the Central Intelligence Agency), eight Department of Defense elements (the Defense Intelligence Agency, the NSA, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and each of the services' intelligence components—the Army, Navy, Air force, and Marine Corps), and seven additional departments and agencies (the Department of Energy's Office of Intelligence and Counter-Intelligence, the Department of Homeland Security's Office of Intelligence and Analysis and U.S. Coast Guard Intelligence; the Department of Justice's Federal Bureau of Investigation and the Drug Enforcement Agency's Office of National Security Intelligence; the Department of State's Bureau of Intelligence and Research; and the Department of the Treasury's Office of Intelligence and Analysis). Office of the Director of National Intelligence, *Members of the IC*, <https://www.dni.gov/index.php/what-we-do/members-of-the-ic>.

⁷¹ **ISOO 2016 Report, p. 1**, <https://www.archives.gov/files/isoo/reports/2016-annual-report.pdf>.

⁷² See, e.g., Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>; Scott Shane, *No Morsel Too Miniscule for All-consuming N.S.A.*, N.Y. TIMES (Nov. 2, 2013); etc. But note that part of the reason for this broad use of classification relates to the expansion in the types of activities conducted by the intelligence agencies since 9/11 and the correspondingly large number of employees and extensive resources being made available. Simultaneously, the proliferation of new technologies allows for the rapid replication and derivative classification of data.

⁷³ Atomic Energy Act of 1946, Pub. L. 79-585, codified as amended at 60 Stat. 755, Aug. 1, 1946; Atomic Energy Act of 1954, Pub. L. 83-703, codified as amended at 68 Stat. 919, Aug. 30, 1954.

⁷⁴ AEA 1954, §11(y). See also Exec. Order 13526, §6.2(a) (acknowledging RD).

⁷⁵ The alteration gave DOD a role in FRD declassification and allowed military personnel to access nuclear information with DOD clearances. It also made it possible for industry to develop nuclear power.

⁷⁶ Exec. Order 13,556, Nov. 4, 2010 (Controlled Unclassified Information). See also 32 CFR part 2002. SBU incorporated designations such as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), and Critical Infrastructure Information (CII), which proliferated following the 9/11 attacks.

⁷⁷ CUI applies to certain, approved categories and subcategories of information established by ISOO. The executive branch provides general descriptions for each category, a basis for controls, special markings, and guidance on training and handling procedures. See, e.g., *Assessing Security Requirements for Controlled Unclassified Information*, NIST Special Publication 800-171A, June 2018; Information Security Oversight Office, *Controlled Unclassified Information: Implementation & Recommendations*, Oct. 2017, at 4.

⁷⁸ Classified Information Procedures Act, Pub. L. 96-456, 94 Stat. 2025, codified at 18 U.S.C. Appendix §§1-16.

⁷⁹ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, §702.

⁸⁰ Paul C. Light, *The True Size of Government*, Issue Paper, THE VOLCKER ALLIANCE, 2017, https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf.

⁸¹ *Id.*

⁸² See, e.g., *Fitzgerald v. United States*, 776 F.2d 1236 (4th Cir. 1985) (Dismissal of a libel action brought following publication of an article in *Penthouse Magazine* on the Pentagon and CIA's use of animals for military and intelligence purposes. The U.S. Navy moved to intervene on the grounds that the case risked exposing classified information.); *Bareford v. General Dynamics Corporation*, 973 F.2d 1138 (1992) (dismissing a case brought against a contractor claiming a manufacturing and design defect in relation to the Phalanx weapons system); *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260 (Fed. Cir. 2005) (government intervening and invoking the state secrets privilege over 26,000 documents); *United States ex. Rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388 (C.D. Cal. 2002) (suit over wrongful termination dismissed after the government intervened to assert state secrets).

⁸³ Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77-216 (2010).

⁸⁴ See Georgetown Law State Secrets Archive, maintained by Laura K. Donohue and the Georgetown Law Center on National Security and the Law, <http://apps.law.georgetown.edu/state-secrets-archive/> (visited May 22, 2019).

⁸⁵ Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77-216 (2010). In the criminal context as well, Executive branch claims of secrecy have prevailed. *Id.*

⁸⁶ *Id.*

⁸⁷ In *Restis v. United Against Nuclear Iran*, for instance, a Greek citizen, Victor Restis, who owns and manages Enterprises Shipping and Trading, complained that United Against Nuclear Iran (UANI) and its CEO Mark Wallace (a former representative of the U.S Mission to the United Nations) had engaged in defamation and various other torts. *Victor Restis v. American Coalition against Nuclear Iran*, Case No. 13-cv-5032 (2013), Amended Complaint for Defamation and other Tort Claims, ¶1, ¶3; ¶103 ff (defamation), ¶112 ff (tortious interference with prospective

economic advantage); ¶119 ff (tortious interference with contract); ¶125 ff (intentional infliction of emotional distress); ¶132 ff (negligent interference with prospective economic advantage); ¶138 ff (prima facie tort against all defendants). He accused them of using press releases, letters to government officials, advertisements, Facebook postings, and Tweets to prevent private entities from providing support to Iran. *Victor Restis v. American Coalition against Nuclear Iran*, Case No. 13-cv-5032 (2013), Amended Complaint for Defamation and other Tort Claims, ¶4; ¶6. It did not specify the nature of the information at stake, contending that neither could any information related to the suit safely be made public, nor could Plaintiffs' counsel be given access (e.g., through a CIPA-like clearance procedure). Govt. Opp. Mem. L. 2. In March 2015, the court dismissed the suit, with the result that the government never had to account for the accusations against it. *Restis v. United Against Nuclear Iran*, 1:13-cv-05032 (Mar. 23, 2015) (2d Cir.).

⁸⁸ S. Res. 400, 94th Cong. § 8(a), (b)(1)-(5) (1976); Rules of House of Representatives, 115th Cong., Rule X(g)(1) (2017).

⁸⁹ S. Res. 400 §10.

⁹⁰ SSCI R.P., 115th Cong., Rules 8.10, 9.5, 9.7; S. Res. 400, § 8(a).

⁹¹ HPSCI R.P., 115th Cong., Rules 12(a)-(b), 14.

⁹² *Id.* at Rule 13 (labelling it "executive session material").

⁹³ *Id.* at Rule 14(d), (f), (g), (i), (l); House Rule X(11)(g).

⁹⁴ Invention Secrecy Act of 1951, Pub. L. 82-256, 66 Stat. 3, Feb. 1, 1952, 35 U.S.C. §181.

⁹⁵ *Hornback v. United States*, 36 Fed. Cl. 552, 554 (1996).

⁹⁶ *Weiss v. United States*, 146 F.Supp.3d 113, 127 (D. Mass. 2001), *aff'd*, 37 F.App'x. 518 (Fed. Cir. 2002).

⁹⁷ *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980); *Lear Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 665 (1980).

⁹⁸ Invention Secrecy Activity as reported by the Patent & Trademark Office, Federation of American Scientists, at <https://fas.org/sgp/othergov/invention/stats.html>.

⁹⁹ *Id.* The intervening years saw an increase to 5,445 in 2013 and 5,520 in 2014. *Id.*

¹⁰⁰ Invention Secrecy Activity as Reported by the Patent & Trademark Office FY 05-FY18,

<https://fas.org/blogs/secrecy/2018/10/invention-secrecy-2018/>.

¹⁰¹ Steven Aftergood, *Secrecy News: Invention Secrecy Increased in 2016*, Federation of American Scientists (Oct. 31, 2016), <https://fas.org/blogs/secrecy/2016/10/invention-secrecy-2016/>.

¹⁰² *But see* *Hornback v. United States*, 36 Fed. Cl. 552, 554 (1996); *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980) [hereinafter "Constant I"]; *Lear Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 665 (1980); *Damnjanovic et al. v. U.S. Department of the Air Force, EDMI*, civ No 14-11920 (2015); *Constant v. United States*, 617 F.2d 239, 244 (Ct. Cl. 1980); *Hornback v. United States*, 16 F.3d 422 (Fed. Cir. 1993); *Hornback v. United States*, 62 Fed. Cl. 1, 3 (2004) *aff'd*, 405 F.3d 999 (Fed. Cir. 2005); *Lear Sigler, Inc. v. United States*, 225 Ct. Cl. 663 (1980).

¹⁰³ *Constant I*, 223 Ct. Cl. 148; *Constant v. United States*, 1 Cl. Ct. 600 (1982) [hereinafter "Constant II"]. *See also* *Linick v. United States*, citing to *Constant I* and II.

¹⁰⁴ *Constant I*.

¹⁰⁵ *See, e.g.,* *Lear Siegler, Inc. v. United States*, 225 Ct. Cl. 663 (1980); *Weiss*, 146 F. Supp. 2d at 126-127; *Linick*

¹⁰⁶ *See, e.g.,* *Weiss v. U.S.*, 37 Fed. Appx. 518 (Fed. Cir. 2002) (insufficient evidence for damages because of failure to file patent applications in foreign countries); *Haynes v. U.S.*, 178 F.3d 1307 (Fed. Cir. 1998) (insufficient evidence for damages because of failure to demonstrate potential or existing market); *Linick v. U.S.*, 104 Fed. Cl. 319, 79 A.L.R. Fed. 2d 709 (2012), summarily *aff'd*, 2013 WL 2991418 (Fed. Cir. 2013) (trajectory correctible munitions patent holder failed to show technology was of real interest to any customer, despite the government having imposed secrecy orders on three patent applications); *Constant v. U.S.*, 1 Cl. Ct. 600, 216 U.S.P.Q. 505 (1982), judgment summarily *aff'd*, 714 F.2d 162 (Fed. Cir. 1983) (insufficient evidence of actual damages when patent application placed under an order for 15 months and patentee prohibited from discussing the invention with certain classes of people); *Lear Siegler, Inc., Electronic Instrumentation Division*, 225 Ct. Cl. 663, 214 U.S.P.Q. 239, 1980 WL 13202 (1980) (insufficient proof of injury and damages). *But see* *Damnjanovic v. United States Department of Air Force*, 135 F.Supp. 3d 601 (E.D. Mich. 2015) (successful claim that inventors were unable to sell or market their invention, that they lost profits and were prohibited from foreign filing rights, and that the government failed to provide compensation).

¹⁰⁷ *Farrand Optical Co. v. U.S.*, 325 F.2d 328, 139 U.S.P.Q. 249 (2d Cir. 1963) (stating damages only as flow directly from secrecy order); *McDonnell Douglas Corp. v. U.S.*, 229 Ct. Cl. 323, 670 F.2d 156, 214 U.S.P.Q. 857, 29 Cont. Cas. Fed (CCH) ¶82178 (1982) (holding two alternatives for damages: improper use, and damage caused by secrecy order).

¹⁰⁸ *Farrand Optical Co. v. U.S.*, 325 F.2d 328, 139 U.S.P.Q. 249 (2d Cir. 1963); *Haynes v. U.S.*, 178 F.3d 1307 (Fed. Cir. 1998).

¹⁰⁹ *Heinemann v. U.S.*, 223 Ct. Cl. 479, 620 F.2d 874, 206 U.S.P.Q. 418, 27 Cont. Cas. Fed. (CCH) ¶80357 (1980).

¹¹⁰ *See, e.g., E.I. Dupont De Nemours & Co. v. Berkley & Co., Inc.*, 204 U.S.P.Q. 594, 1979 WL 25067 (N.D. Iowa (1979), *aff'd in part, vacated in part*, 620 F.2d 1247, 205 U.S. P.Q. 1, 1980-1 Trade Cas. (CCH) ¶63214, 65 A.L.R. Fed. 369 (8th Cir. 1980); *Constant v. U.S.*, 1 Cl. Ct. 600, 216 U.S.P.Q. 505 (1982).

¹¹¹ *Damnajanovic et al. v. U.S. Department of the Air Force, EDMI*, civ No 14-11920 (2014) (regarding secrecy order placed on U.S. Patent Application No. 11/881,492).

¹¹² *Countermeasure Technique Using an Appropriate Fluid Spray Against Infrared Heat Seeking Missile, US 8925438 B1* (filed Jan. 6, 2007, granted Jan. 6, 2015).

¹¹³ *Suitability and Security Processes Review, Report to the President, Feb. 2014*, <https://fas.org/sgp/othergov/omb/suitsec-2014.pdf>. The National Industrial Security Program controls the conditions under which contractors obtain security clearances for more than two dozen federal agencies. Exec. Order 12829; Jan. 6, 1993 (National Industrial Security Program).

¹¹⁴ The argument for the latter is that without an agreement in place, each agency would need to seek to enjoin publication. *See Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (CA4), *cert. denied*, 421 U.S. 992 (1975); *United States v. Marchetti*, 466 F.2d 1309 (CA4), *cert. denied*, 409 U.S. 1063 (1972).

¹¹⁵ 18 U.S.C. §798.

¹¹⁶ 18 U.S.C. §793-4.

¹¹⁷ 18 U.S.C. §§795-7.

¹¹⁸ *See, e.g., The Constitution Project, The Report of the Constitution Project's Task Force on Detainee Treatment* (2013) (drew on IC employee accounts of detainee mistreatment).

¹¹⁹ *See, e.g., Chris McGreal, Dick Cheney Defends Use of Torture on Al-Qaida Leaders*, THE GUARDIAN, Sept. 9, 2011.

¹²⁰ *See, e.g., Mark Mansfield, Reflections on Service: A Conversation with Former CIA Director Michael Hayden*, Stud. Intelligence, June 2010, at 63, 65-66 (“[W]hatever you may think of this, it worked and we did indeed get life-saving intelligence out of it.”); John Rizzo, CIA’s Enhanced Interrogation “Necessary and Effective,” Frontline (Sept. 13, 2011) (“necessary and effective”).

¹²¹ Kevin Casey, *Note, Till Death do us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417, 445-449 (2015) (“The experiences of authors undergoing prepublication review suggest that review decisions may depend on whether the author is critical or supportive of the agency.”).

¹²² *Id.*

¹²³ Karl Marx, *The Critique of Hegel's Doctrine of the State*, in EARLY WRITINGS 107 (1974).

¹²⁴ MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181 (1976).

¹²⁵ *Id.*

¹²⁶ MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, Vol. 1.

¹²⁷ Yet this appears to be what the government did in relation to Professor Jack Goldsmith’s book, *The Terror Presidency*. *See, e.g., Jack Goldsmith & Oona Hathaway, More Problems with Prepublication*, LAWFARE, Dec. 28, 2015, <https://www.lawfareblog.com/more-problems-prepublication-review> (reporting that they had been required to append a statement to an op-ed in which no classified information appeared that the publication did not reflect official DOD policy).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Add cites: Diane Feinstein statement to Congress; IG Report later noting false choices.

¹³¹ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc v. Sullivan*, 372 U.S. 58, 70 (1963))).

¹³² *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹³³ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

¹³⁴ Jack Goldsmith & Oona Hathaway, *The Government's Prepublication Review Process is Broken*, WASH. POST, Dec. 25, 2015, https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story.html?utm_term=.f7e247f74701. The scholars both served as special counsel to the General Counsel at the Department of Defense. Goldsmith also served as the Director of the Office of Legal Counsel at the Department of Justice.

¹³⁵ *Id.* *See also* Jack Goldsmith & Oona Hathaway, *More Problems with Prepublication*, LAWFARE, Dec. 28, 2015, <https://www.lawfareblog.com/more-problems-prepublication-review>.

¹³⁶ *United States v. Marchetti* 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Snepp v. United States*, 444 U.S. 507 (1980).

¹⁴⁰ *See, e.g.*, Thomas M. Franck & James J. Eisen, *Balancing National Security and Free Speech*, 14 N.Y.U. J. INT'L L. & POL. 339 (1982); Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982); Diane F. Orentlicher, *Comment, Snepp v. United States; The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662 (1981).

¹⁴¹ National Security Directive No. 84 (Mar. 11, 1983) (“(a) All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access. (b) All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a nondisclosure agreement as a condition of access to SCI and other classified information. All such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information.”).

¹⁴² *See* Louis Fisher, *Congressional-Executive Struggles over Information: Secrecy Pledges*, 42 ADMIN. L. REV. 89 (1990) [NB: check Congressional hearings held by Senate Committee on Governmental Affairs over constitutionality of directive].

¹⁴³ U.S. Gov’t Accountability Office, No. GAO/NSIAD-91-106FS, *Information Security: Federal Agency Use of Nondisclosure Agreements* 10 (Jan. 1991), <http://www.gao.gov/assets/90/89057.pdf>.

¹⁴⁴ U.S. Gov’t Accountability Office, No. GAO/T-NSIAD-88-44, *Classified Information Nondisclosure Agreements: Statement of Louis J. Rodrigues, Associate Director, National Security and International Affairs Division, Before the Subcommittee on Legislation and International Security, Committee on Government Operations, U.S. House of Representatives* 3 (1988).

¹⁴⁵ Kevin Casey, *Note, Till Death do us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417, 429-430 (2015).

¹⁴⁶ Dina Temple-Raston, In ‘the Black Banners,’ Ali Soufan Takes Readers Inside the Interrogation Room, *Wash. Post*, Oct. 28, 2011 (noting different perspective); Jessie Stern.

¹⁴⁷ Professor Rudesill defines secret law as follows: “legal authorities that require compliance that are classified or otherwise withheld from the public.” Dakota Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SEC. J. 241, 249 (2015). Although he includes within his definition executive and judicial interpretations that serve as precedent or are in other respects binding legal constructions, I distinguish among the phenomena by function. Other scholars have defined the term in different ways. *See, e.g.*, HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, ACCOUNTABILITY, AND THE U.S. CONSTITUTION*, 85-87 (defining secret law as “when the executive deems it necessary to the national interest not only to circumvent a statute, but to do so in secret”).

¹⁴⁸ Three different types of committee, three separate annual bills, and multiple kinds of legislative materials are involved. Congressional practice, moreover, peregrinates. The bottom line is that as of fiscal year 1979, the IAA had both public law provisions and classified addenda; since the same year, the DODAAs have had just classified addenda; and from fiscal year 1983 the NDAAAs had classified addenda. Starting in 1990-91, both the DODAA and NDAAAs started incorporating Public Law provisions giving the addenda legal force.

¹⁴⁹ Rudesill, at 261.

¹⁵⁰ *Id. See, e.g.*, Intelligence Authorization Act of 2016, Sec. 102, Classified Schedule of Authorizations.

¹⁵¹ *Id.*

¹⁵² *See* S. 3159 (115th): Department of Defense Appropriations Act (2019). *See also* CRS Report, FY 2019 Defense Appropriations Act (Apr. 12, 2019).

¹⁵³ *Id.*, at 262.

¹⁵⁴ *Id.*, at 373-74.

¹⁵⁵ *Id.*

¹⁵⁶ Further reports, such as joint explanatory statements, may be appended to a bill, prior to the President’s signature. Nevertheless, the President signs the bill—not the additional documents, which may not be available to the President at presentment. *Id.*, at 263-64.

¹⁵⁷ *Id.*, at 267-68 (Citing to statements in 2015 by the General Counsel of the Office of the Director of National Intelligence that the classified schedules to the IAA 102 provisions are considered by the intelligence community to be law).

¹⁵⁸ *Id.*, at 276.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, at 273-274.

¹⁶¹ But note that Rudesill argues that if statutory text means not what particular committees think it means, but rather what the common understanding is, then the classified documents cannot have interpretive relevance. *Id.*, at 264.

¹⁶² Some effort has been made within the Executive branch to halt the practice of using classified annexes. The Office of Management and Budget objected to “the continuing Congressional practice of enacting secret law.” *Id.*, citing Letter from Peter R. Orszag, Director, Executive Office of the President, Office of Management and Budget, Exec Office of the President, to Dianne Feinstein, Chairwoman, U.S. Senate Select Committee on Intelligence, Regarding S. 1494 And H.R. 2701, The Intelligence Acts For Fiscal Year 2010 (March 15, 2010), at 6, <https://fas.org/irp/news/2010/03/omb031610.pdf>; Statement of Administration Policy on H.R. 2586, National Defense Authorization Act for Fiscal Year 2002, Executive Office of the President, Office of Management and Budget (Sept. 24, 2001), <http://www.presidency.ucsb.edu/ws/index.php?pid=25591>.

¹⁶³ *Id.*, at 277. For updates to the 2015 study see Dakota S. Rudesill, *Tracking Congress’s Library of Secret Law: Legislative Update for the 114th and 115th Congresses*, LAWFARE, June 29, 2017, <https://www.lawfareblog.com/tracking-congresss-library-secret-law-legislative-update-114th-and-115th-congresses> (noting the continued high rate of enactment of Public Law provisions giving legal force to classified addenda).

¹⁶⁴ Appropriations for electronic warfare, missile defense, and military operations in Iraq also fall within classified annexes. *Id.*, at 277-278.

¹⁶⁵ *Id.*, at 279, citing H.R. Rep. No. 101-367, at 20 (1989).

¹⁶⁶ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (referring to “working law”).

¹⁶⁷ Some other examples include agency opinions, administrative adjudications, targeting and minimization guidelines, DOD directives, etc.

¹⁶⁸ 44 U.S.C. §1505a(1).

¹⁶⁹ 44 U.S.C. §1505a(2)-(3).

¹⁷⁰ 44 U.S.C. §1505a.

¹⁷¹ 44 U.S.C. §1505c.

¹⁷² 44 U.S.C. §1505c.

¹⁷³ For a good discussion of Presidential Directives, see Harold C. Relyea, *Presidential Directives: Background and Overview*, CRS Report for Congress, Nov. 26, 2008, <https://fas.org/sgp/crs/misc/98-611.pdf>.

¹⁷⁴ Memorandum from Randolph D. Moss, Acting Assistant Attorney General, to the Counsel to the President, *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, Jan. 29, 2000, <https://fas.org/irp/offdocs/predirective.html> (“A presidential directive has the same substantive legal effect as an executive order. It is the substance of the presidential action that is determinative, not the form of the document conveying that action. Both an executive order and a presidential directive remain effective upon a change in administration, unless otherwise specified in the document, and both continue to be effective until subsequent presidential action is taken.”).

¹⁷⁵ President Obama, for instance, used Presidential Policy Directives (PPDs) as decision directives and Presidential Study Directives (PSDs) for reviews. President George H. W. Bush, in contrast, used National Security Directives (NSDs) for the former and National Security Reviews (NSRs) for the latter.

¹⁷⁶ For a full list of presidential memoranda see *Presidential Directives and Executive Orders*, Federation of American Scientists, <https://fas.org/irp/offdocs/direct.htm>.

¹⁷⁷ NSPD 7, Oct. 4, 2017, <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-7/>.

¹⁷⁸ See Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUMBIA L. REV. 1448 (2010). Numerous individuals who have served in OLC have noted that OLC opinions are binding. See, e.g., Marty Lederman; Jack Goldsmith; Karl Thompson, etc.

¹⁷⁹ See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 n.* (Jul. 16, 2010). See also Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, 109th Cong. 766 (2005) (written responses of Steven Bradbury, nominee to the position of Assistant Attorney General for OLC, to questions from Senator Leahy) (“The [Guidelines] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations.”), quoted and cited in Morrison, *supra* note 178, at n. 13-15.

¹⁸⁰ See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. § 2340–2340A (Aug. 1, 2002), <http://washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf>; superseded by,

Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. § 2340–2340A (Dec. 30, 2004), <http://usdoj.gov/olc/18usc23402340a2.htm>; Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to the Attorney General (Nov. 2, 2001), <http://www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoomemo-for-ag.pdf>; Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002), Memorandum from John C. Yoo & Robert J. Delahunty, Office of Legal Counsel, U.S. Dep't of Justice, for Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Department of Defense, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001). See also Dawn E. Johnsen et al., *Guidelines for the President's Legal Advisors*, 81 IND. L. J. 1345 (2006). Often, deliberative process protections are claimed to prevent the memos from being provided. Yet some of the memos that have come to light raise disturbing questions in regard to torture, the use of coercive interrogation methods, military detention of U.S. citizens, broad intelligence collection, and the targeting of U.S. citizens—all outside legislative or judicial eyesight.

¹⁸¹ *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J.). See also Jaffer & Kaufman.

¹⁸² 5 U.S.C. §552(a)(1)(D).

¹⁸³ 5 U.S.C. §552(a)(1)(E).

¹⁸⁴ 5 U.S.C. §552(a)(2)(A).

¹⁸⁵ 5 U.S.C. §552(a)(2)(B).

¹⁸⁶ 5 U.S.C. §552(b)(7)(C).

¹⁸⁷ 5 U.S.C. §552(b)(1)(A).

¹⁸⁸ *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 755 (1989); *Elec. Frontier Found. V. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir.2014); *Citizens for Responsibility and Ethics in Washington*, No. 12-5223, Apr. 1, 2014. See also Jaffer & Kaufman.

¹⁸⁹ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). For an excellent discussion of the working law provision and efforts to erode it in regard to OLC opinions, see Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, YALE L. J. FORUM. Nov. 21, 2016.

¹⁹⁰ *Sears*, 421 U.S. at 153. See also Jaffer & Kaufman.

¹⁹¹ Lower courts have followed suit. See, e.g., *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 860 (D.C. Cir. 1980); *Taxation with Representation Fund v. Internal Revenue Service*, the court considered legal and policy memoranda a matter of public record. *Taxation with Representation Fund v. Internal Revenue Service*, 646 F.2d 666 (D.C. Cir. 1981); *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607 (D.C. Cir. 1997); *National Council of LaRaza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005) (cited and quoted in Jaffer and Kaufman, pp. 243-5). See also *Electronic Frontier Foundation v. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014), cert. denied, 135 S.Ct. 356 (2014) (upholding government claim that the OLC opinion being sought was covered by the deliberative process privilege); *New York Times Co. v. Department of Justice*, 806 F.3d 682 (2d Cir. 2015). (rejected efforts to obtain the legal memoranda that undergirded the government's targeted-killing program—despite, just a year earlier, granting access to a heavily redacted version of a memo authorizing the targeted killing of a U.S. citizen).

¹⁹² Brief for Defendants-Appellees-Cross-Appellants at 51, *Am. Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 15-2956, 15-3122 (XAP) (2d Cir. June 6, 2016), ECF No. 105, cited and quoted in Jaffer and Kaufman, p. 147, n. 39; Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Attorneys of the Office of legal Counsel (July 16, 2010), cited and quoted in Jaffer & Kaufman, p. 247, n. 35.

¹⁹³ H.R. 653, 114th Cong. §2(b)(1)(2016); Jaffer & Kaufman, at 250.

¹⁹⁴ *Id.*

¹⁹⁵ FOIA Improvement Act of 2016, Pub. L. No. 114-0185, 130 Stat. 538 (2016); Jaffer & Kaufman, at 250.

¹⁹⁶ The law required that the government have “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment).” USA PATRIOT Improvement and Reauthorization Act of 2005, §106, 120 Stat. at 196 (codified as amended at 50 U.S.C. §1861 (2006)). DOJ (and the court) took the position that all U.S. persons' telephony metadata was potentially relevant to terrorism investigations and therefore fell within the statutory remit. See Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J. L. & PUB. POL'Y 757 (2014). This reading collapsed the statutory distinction between “relevant” and “irrelevant” records, obviating the NSA's obligation to discriminate between the two. It rendered the qualifying phrases (e.g., “reasonable grounds”) meaningless. And the understanding of “relevant” contravened Congressional intent. *Id.*, at 838-843. It misread “an authorized investigation” (decidedly

singular and present), as all potential investigations (multiple and future). It allowed for the collection of information that would otherwise mark a threat assessment—thus contradicting one of the statutory conditions. *Id.*, at 843, 847-850. And it violated the statutory provision that the information must be otherwise obtainable via subpoena duces tecum. *Id.*, at 843-847. There is no way that any prosecutor in the United States would be allowed to collect all Americans’ telephony metadata for nearly a decade, on the off chance that it would be helpful in an investigation. 50 U.S.C. §1861(c)(2)(D)(2006). Indeed, FISC itself recognized that the information could not be collected via any other legal instrument. In re Production of Tangible Things from [REDACTED], Order, BR 08-13, at 2 (FISA Ct. Mar.2, 2009) (Walton, J.) (stating “Because the collection would result in NSA collecting call detail records pertaining to [REDACTED] of telephone communications, including call detail records pertaining to communications of United States (U.S.) persons located within the U.S. who are not the subject of any FBI investigation and whose metadata could not otherwise be legally captured in bulk, the government proposed stringent minimization procedures that strictly controlled the acquisition, accessing, dissemination, and retention of these records by the NSA and FBI.”). Beyond this, the collection of telephony metadata under Section 215 bypassed the pen-trap provisions that controlled such collection. *Id.*, at 858-860.

¹⁹⁷ PCLOB.

¹⁹⁸ Review Group Report.

¹⁹⁹ PPD-68.

²⁰⁰ *ACLU v. Clapper*, 785 F.3d 787, 805 (2d Cir. 2015).

²⁰¹ *Klayman v. NSA*, 280 F.Supp.Ed. 39 (D.D.C. 2017).

²⁰² *Elec. Frontier Found. v. DOJ*, N No. 16-cv-02041-HSG, 2019 WL 1369922 (N.D. Cal. Mar. 26, 2019).

²⁰³ USA FREEDOM Act, section 602, codified at 50 USC 1872.

²⁰⁴ In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-109, at 6 (FISA Ct. Aug. 29, 2013).

²⁰⁵ See Donohue, *Bulk Metadata Collection*, [supra note](#), at 863-892.

²⁰⁶ In re Directives [REDACTED] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).

²⁰⁷ *Id.*, at 1011.

²⁰⁸ In *ACLU v. Clapper*, for instance, the government responded to arguments that it had exceeded its authority by arguing, “[S]ince May 2006, fourteen separate judges of the FISC have concluded on thirty-four occasions that the FBI satisfied this requirement, finding “reasonable grounds to believe” that the telephony metadata sought by the Government “are relevant to authorized investigations . . . being conducted by the FBI . . . to protect against international terrorism.” Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 16, *Clapper*, 959 F. Supp. 2d 724. The government further cited to Judge Eagan’s August 2013 memorandum opinion in support of its interpretations of “relevance.” *Id.*

²⁰⁹ Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM) Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, 402, 602(a), codified at 50 U.S.C. §1872.

²¹⁰ By way of example, because FISC opinions were classified, it was not until the unauthorized leaks that the public found out that the Court had been allowing NSA officials to make their own determination as to whether there was “reasonable, articulable suspicion” (RAS) that a seed identifier proposed for a query of the Section 215 database was associated with a particular terrorist organization. Donohue, *Bulk Metadata Collection*, [supra note](#), at 807. For nearly three years, the NSA failed to follow the Court’s direction, despite the fact that numerous NSA officials knew about the violation. When the Court’s order reached the public domain, it was the first time that the public became aware of the government’s failure to report noncompliance and the Court’s response. Judge Reggie Walton expressed concern “about what appears to be a flagrant violation” of the court’s order. In re Prod. of Tangible Things From [REDACTED], Order Regarding Preliminary Notice of Compliance Incident Dated Jan. 15, 2009, No. BR 08-13, at 4 (FISA Ct. Jan 28, 2009). He also immediately ordered a comprehensive review of the system, which revealed that as of January 15, 2009, fewer than 2,000 of nearly 18,000 identifiers on the alert list were actually supported by RAS. Memorandum of the United States in Response to the Court’s Order Dated Jan. 28, 2009 at 11, In re Prod. of Tangible Things From [REDACTED], No. BR 08- 13 (FISA Ct. Feb. 17, 2009). Hundreds of reports had been issued based on these illegal queries. Although Judge Walton expressed credulity about the government’s claim that the error had been inadvertent, following the government’s final report on the incidents, the FISC allowed the NSA to retain the information generated and to again oversee dissemination of the material. Further documents showed that this was far from the only noncompliance incident. See generally Donohue, *Bulk Metadata Collection*, [supra note](#), at 814-817.

²¹¹ Aquinas, [ST I-II](#), q. 96, a.4, c. See also R.E. ASHER & J.M.Y. SIMPSON, THE ENCYCLOPEDIA OF LANGUAGE AND LINGUISTICS, [Vol. 4 \(1994\)](#), p. 2058; Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas’ Court*

of *Conscience*, 33 AM. J. JURIS. 99 (1988). (“Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Hence, in order for a law to obtain the power of obligating, which is proper to law, it must be applied to those who are directed by it. This application takes place by being made known to them by promulgation. Therefore promulgation is necessary for law to have its binding force.”)

²¹² Aquinas, ST I-II, q. 96, a.4.

²¹³ *Id.*

²¹⁴ Aquinas, ST.

²¹⁵ Aquinas, ST, q. 90, a. 4.

²¹⁶ See generally, LLOYD WEINREB, NATURAL LAW AND JUSTICE (1989).

²¹⁷ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

²¹⁸ David Luban, *The Publicity Principle*, in THE THEORY OF INSTITUTIONAL DESIGN 154 (Robert E. Goodin ed., 1996).

²¹⁹ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§230 - 287 (1690).

²²⁰ *Id.*; JEAN JACQUES-ROUSSEAU, THE SOCIAL CONTRACT (DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE) (1762).

²²¹ Immanuel Kant, *Eternal Peace*, in THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS 470 (Carl J. Friedrich ed. & trans., 1949) (1795).

²²² David Luban, *The Publicity Principle*, in THE THEORY OF INSTITUTIONAL DESIGN 155 (Robert E. Goodin ed., 1996).

²²³ *Id.*, at 154.

²²⁴ *Id.*, at 156.

²²⁵ Professor John Rawls considers this “publicity condition” a formal constraint, incorporating it into his approach in *A Theory of Justice*. *Id.*, quoting and citing JOHN RAWLS, A THEORY OF JUSTICE 130, 133.

²²⁶ In (ultimately) defending the publicity principle, Professor Luban turns to a series of arguments made about whether candor is a quality to be desired in the judicial realm. Luban notes that four Yale law professors have argued against judges being candid about their reasons for deciding cases. *Id.*, at 157 (discussing the “Yale argument”). Each of the professors’ arguments, however, address issues of *political* expediency, not legal import. Professor Guido Calabresi considers whether judges ought to ignore or bypass anachronistic laws. Calabresi 1982, pp. 174-175. Professor Charles Black suggests that whilst judges may adopt a rule against torture, they should nonetheless be willing to accept it in the true “ticking bomb” scenario. Black, 1961, discussed in Calabresi 1982, pp. 173-175. Professor Alexander Bickel proposes as a “passive virtue” that judges balance decisions on either side of the political spectrum. Bickel, 1962. By appealing to technical doctrines and avoiding the merits of a case, judges will be able to ensure stability. *Id.* And Professor Paul Gewirtz advocates decision-making with an eye towards the potential fallout—without any parallel recognition of this consideration in the judicial decision itself. Gewirts 1983, pp. 665-74. While, ultimately, Calabresi and Gwirtz reject their arguments, as Professor Luban points out, they do so only on instrumental grounds—not based on any inherent legal or moral claim.

²²⁷ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, ch. 12 (1980).

²²⁸ JOHN FINNIS, AQUINAS 272-74 (1998).

²²⁹ As John Austin postulated, “[T]he existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” John Austin, 1832, p. 157. Austin’s formulation does not mean that the morality of the law is of no consequence. It merely suggests that whether or not a law is desirable, or just, says nothing about whether it actually exists.

²³⁰ Hart writes, “According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g., legislation, judicial decisions and social customs) without reference to morality.” HART, THE CONCEPT OF LAW 103 (2d ed. 1994).

²³¹ Hart postulates that within society, there are primary and secondary rules that bind individuals. The primary ones focus on how they should act. The secondary rules are procedural: namely, they are the rules that determine how the primary rules are created, identified, and altered. A rule of recognition is of the latter type. *Id.* It governs when a particular announcement or principle can be considered a rule of obligation: “[T]o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.” *Id.*, at 117. Hart suggests that a rule of recognition lays at the heart of every “fully developed” legal system, making it a necessary condition for law. It does not depend on other rules for its existence. For a legal system to be considered legitimate, two conditions apply: first, citizens (generally) follow the rule of recognition (making their actions themselves the determinant); second, officials consider the rule to be a “common standard[] of official behavior and appraise critically their own and each other’s deviations as lapses.” *Id.*

²³² But note here there may be two opportunities to challenge promulgation. First, the rule of recognition may include within it acknowledgement of secret law; second, the component requiring that officials analyze lapses in the rule does not speak to whether the officials, in turn, need to communicate their findings with the population more generally. At most, it could be argued, this places a requirement that all officials (again, raising the question of qualifications of which ones ought to be included) be allowed access to information.

²³³ In 1832, John Austin attacked natural law theory, articulating the basic precepts of what became legal positivism: “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.” Austin 1832, Lecture V, p. 157.

²³⁴ KRAMER, *supra* note , at 101.

²³⁵ LON FULLER, THE MORALITY OF LAW 39, 47.

²³⁶ *Id.*

²³⁷ Kramer, at 102. *See also* Kramer 1999a. Other scholars have emphasized a similar approach. *See* Craig 1997, Summers 1993, Tamamnah 2004, 91-113.

²³⁸ Kramer, at 102.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Lon Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 648-57 (1958).

²⁴³ LON FULLER, THE MORALITY OF LAW 40.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ NICCOLÒ MACHIAVELLI, THE PRINCE (1515).

²⁴⁷ *Id.*

²⁴⁸ *See, e.g., id.*, c. 15 (“[I]t is necessary for a prince wishing to hold his own to know how to do wrong, and to make use of it or not according to necessity.” “[I]t would be most praiseworthy in a prince to exhibit all the above qualities that are considered good; but because they can neither be entirely possessed nor observed, for human conditions do not permit it, it is necessary for him to be sufficiently prudent that he may know how to avoid the reproach of those vices which would lose him his state”; “[H]e need not make himself uneasy at incurring a reproach for those vices without which the state can only be saved with difficulty”).

²⁴⁹ GIOVANNI BOTERO, THE REASON OF STATE, bk. 1, Trans. by P.J. & D.P. Waley 3 (1956) (defining *arcana imperii* as “Notitia mediorum & rationum, quibus fundatur, firmatur & augentur status.”). Note that Botero was the writer who revived Tacitus’s formulation of *arcana imperii*. (*See* discussion, *infra*).

²⁵⁰ Coke to Parliament, Committee of the Whole House, Proceedings and Debates, f. 99, in CD, III, 94–96 (Apr. 26, 1628), in Sheppard, ed, 3 The Selected Writings of Edward Coke 1266, 1268 (Liberty 2003).

²⁵¹ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), §§134-141.

²⁵² 448 U.S. 569.

²⁵³ *In re Oliver* 333 U.S. 266 (1948).

²⁵⁴ 333 U.S. 266.

²⁵⁵ 333 U.S. 266.

²⁵⁶ THOMAS SMITH, DE REPUBLICA ANGLORUM, (1583), c. 6 (Triall or Judgment by Parliament; c. 8 (Triall by Assise or SIJ. Men and First of the Three Parties which Be Necessary in Judgment); c. 10 (Of the Chiefe Tribunals, Benches or Courttes of Englande); c. 12 (Of Judges in the Common Lawe of England, and the Manner of Triall and Pleading There).

²⁵⁷ MATTHEW HALE, HISTORIA PLACITORUM CORONÆ (History of the Pleas of the Crown) (1736).

²⁵⁸ BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

²⁵⁹ Note absence of discussion of the right to a public trial in Magna Carta, the Bill of Rights of 1621, and the Bill of Rights of 1689. For good discussions of the right to a public trial see Harold Shapiro, *Right to a Public Trial*, 41 J. CRIM. L. & CRIMINOLOGY 782 (1951); Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932); Thomas S. Schattenfield, *The Right to a Public Trial*, 7 CASE WESTERN RESERVE L. REV. 78 (1955).

²⁶⁰ Pennsylvania Constitution, Declaration of Rights IX (1776); North Carolina Constitution, Declaration of Rights IX (1776); U.S. CONST., 6th Amend.

²⁶¹ Shapiro also recognizes these two rights, but he offers different arguments in support of them.

²⁶² *See* Hale, The History of the Common Law of England, 290, 291 (1792); 6 Wigmore, Evidence §. 1834 (3rd Ed. 1940); 2 Bentham, Rationale on Judicial Evidence 355 (1827), cited in Shapiro, at 784, n. 15-16.

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- ²⁶³ Shapiro, at 784.
- ²⁶⁴ JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).
- ²⁶⁵ See, e.g., Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935); State v. Saale, 308 Mo. 573, 274 S.W 393 (1925); Commonwealth v. Trinkle, 279 Pa. 564 Atl. 191 (1924); Bishop v. State, 19 Ala. App. 326, 97 So. 169 (1923); Davis v. United States, 247 Fed. 394 (8th Cir. 1917); Wendling v. Commonwealth, 143 KY. 587, 137 S.W. 205 (1911); Kugadt v. State, 38 Tex. Crim. Rep. 681, 44 S.W 989 (1898).
- ²⁶⁶ See, e.g., Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264 (1934); Makley v. State, 49 Ohio App. 359, 197 N.E. 339 (1934); Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53 (1918); United States v. Buck, 24 Fed. Cas. 1289, No. 14,680 (D. Pa. 1860).
- ²⁶⁷ See, e.g., State v. Scrugs, 165 La. 842, 116 So 206 (1928); Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508 (1917).
- ²⁶⁸ See, e.g., Hogan v. State, 191 Ark. 437, 86 S.W.2d (1935); Gren v. State, 135 Fla. 17, 184 So. 504 (1938); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).
- ²⁶⁹ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).
- ²⁷⁰ Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
- ²⁷¹ 19 C.F.R. §210.39(a).
- ²⁷² 19 C.F.R. §210.39(b).
- ²⁷³ See generally Lauren A. D’Ambra, *The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, 19 ROGER WILLIAMS UNIV. L. REV. 323 (2014).
- ²⁷⁴ Legal Dictionary, *Ex Parte*.
- ²⁷⁵ See, e.g., D. WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (2006); D. ROSENBLUM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE 1946-1999 (2002); R. HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1989); C.R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, COLUMBIA L. REV. ## (1989); G. Lawson, *The Rise and Rise of the Administrative State*, HARV. L. REV. ## (1994).
- ²⁷⁶ See, e.g., *Drone Wars: The Full Data*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>; Conor Friedersdorf, *The Obama Administration’s Drone-Strike Dissembling*, THE ATLANTIC (Mar. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-obama-administrations-drone-strike-dissembling/473541/>.
- ²⁷⁷ Jo Becker & Schott Shane, *Secret “Kill List” Proves a Test of Obama’s Principle and Will*, N. Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.
- ²⁷⁸ *Id.*
- ²⁷⁹ Mark Mazzetti and Eric Schmitt, *Terrorism Case Renews Debate over Drone Hits*, N.Y. TIMES (Apr. 12, 2015), <https://www.nytimes.com/2015/04/13/us/terrorism-case-renews-debate-over-drone-hits.html>. Despite claims that the government’s first preference is to capture individuals on the lists, numerous commentators argued that, as a matter of practice, it appeared to be the opposite. See, e.g., John Brennan, *Strengthening our Security by Adhering to our Values and Laws*, HARV. LAW SCHOOL (Sept. 16, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.
- ²⁸⁰ Authorization for Use of Military Force, Pub. L. 107-40 (Sept. 14, 2001), §2.
- ²⁸¹ War Powers Resolution (1973), §5(b), codified at 50 U.S.C. §§1541-1548.
- ²⁸² For the past six years, the executive has claimed that the AUMF provides legal support for its fight against the Islamic State in Iraq and Syria—a claim disputed by scholars. For the past six years, the executive has claimed that the AUMF provides legal support for its fight against the Islamic State in Iraq and Syria—a claim disputed by scholars. See, e.g., Robert Chesney, *What Is the Domestic Law Basis for U.S. Airstrikes Supporting AMISOM in Somalia?*, LAWFARE (July 31, 2015), <https://lawfareblog.com/what-domestic-law-basis-us-airstrikes-supporting-amisom-somalia>; [NB: See also Louis Fisher, Matt Waxman, Jonathan Turley, etc.]
- ²⁸³ Memorandum from Matthew Weed, Subject: Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress, Congressional Research Service, May 11, 2006, <https://fas.org/sgp/crs/natsec/pres-aumf.pdf>.
- ²⁸⁴ Compare, e.g., Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013) (arguing against an expansive battlefield and for an expansive application of international humanitarian law); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009) (arguing against the expanding concept); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantánamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335

(2007); with Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L. J. 293, 312-313 (2012) (arguing that international humanitarian law would create sanctuaries for violent actors if the concept could not expand); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (arguing that the AUMF does not limit the battlefield).

²⁸⁵ Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 UNIV. OF PENN. L. REV. 1165 (2013).

²⁸⁶ The military's Joint Special Operations Command has confirmed that several Americans are on the target list. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST (Jan. 27, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html.

²⁸⁷ Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N. Y. TIMES (June 23, 2014), <https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html>.

²⁸⁸ *New York Times, et. al. v. U.S. Department of Justice*, Docket Nos. 13-422(L), 13-445 (Con), June 23, 2014.

²⁸⁹ *Id.*, p. 13.

²⁹⁰ See al-Awlaki OLC memo, at 16, <https://www.nytimes.com/interactive/2014/06/23/us/23awlaki-memo.html>.

²⁹¹ Model Penal Code §3.03(2)(b), at 22, OLC memo at 16, 20.

²⁹² OLC memo at 21.

²⁹³ *Id.*, at 23.

²⁹⁴ *Id.*, at 24.

²⁹⁵ *Id.*, at 39-41.

²⁹⁶ According to the National Registry of Exonerations, since 1989 there have been 2,075 exonerations, with some 18,062 years lost to false imprisonment. National Registry of Exonerations, *Exonerations by State*, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>. The numbers work out to between 23 and 168 people per year. *Id.*

²⁹⁷ Death Penalty Information Center, *Innocence and the Death Penalty*, <https://deathpenaltyinfo.org/innocence-and-death-penalty>.

²⁹⁸ CARL VON CLAUSEWITZ, ON WAR 120 (Michael E. Howard & Peter Paret eds., 1976).

²⁹⁹ Eric Schmitt & David E. Sanger, *Pakistan Shift Could Curtail Drone Strikes*, N. Y. TIMES (Feb. 22, 2008), <http://www.nytimes.com/2008/02/22/washington/22policy.html>.

³⁰⁰ *David Sanger and Daniel Klaidman on National Security*, FOREIGN AFFAIRS, June 22, 2012, <https://www.foreignaffairs.com/videos/2012-06-22/david-sanger-and-daniel-klaidman-national-security>.

³⁰¹ Micah Zenko, *Targeted Killings and Signature Strikes*, COUNCIL ON FOREIGN RELATIONS (July 16, 2012), <https://www.cfr.org/blog/targeted-killings-and-signature-strikes>; Doyle McManus, *U.S. License to Kill*, LOS ANGELES TIMES (Jan. 18, 2003), <http://articles.latimes.com/2003/jan/11/world/fg-predator11>.

³⁰² *Id.*

³⁰³ James Bamford, *"He's in the Backseat!"*, THE ATLANTIC (Apr. 2006), <https://www.theatlantic.com/magazine/archive/2006/04/-hes-in-the-backseat/304712/>.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Although officials initially denied it, the *Washington Post* later reported that the Agency targeted the car, knowing that Hijazi was present. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST (Jan. 27, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html. See also Greg Miller, *U.S. citizen in CIA's Cross Hairs*, LOS ANGELES TIMES (Jan. 31, 2010), <https://www.latimes.com/archives/la-xpm-2010-jan-31-la-fg-cia-awlaki31-2010jan31-story.html>.

³¹⁰ Randall Mikkelsen, *CIA Says Used Waterboarding on Three Suspects*, REUTERS (Feb. 5, 2008), <http://www.reuters.com/article/us-security-usa-waterboarding/cia-says-used-waterboarding-on-three-suspects-idUSN0517815120080205> (discussing Michael Hayden's testimony to SSCI, Feb. 5, 2008).

³¹¹ For a thoughtful treatment of the issues that plague military adjudication of courts martial, military commissions, and courts incident to military rule (e.g., martial law or belligerent occupation), see Steven I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933 (2015). Other examples of Article I liberty restrictions include immigration proceeding, watch listing, and travel restrictions.

³¹² Vladeck, 939, n. 24, citing 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 378 (Worthington Chauncey Ford ed., 1905) (entry for Nov. 28, 1775) (creating rules for the “Regulation of the Navy”); 2 *id.* at 111–12 (entry for June 30, 1775) (creating articles of war for the Army). After ratification of the Constitution, Congress formally readopted the Articles of War in 1789. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96; *see also* Act of July 1, 1797, ch. 7, § 8, 1 Stat. 523, 525 (applying the 1775 Articles of War to sailors and marines).

³¹³ American Articles of War of 1776, §XVII, Art. 5, reprinted in 2 Winthrop 1503.

³¹⁴ 10 U.S.C. §§816 (1), 818(a)-(c).

³¹⁵ 10 U.S.C. §§816(2), 819.

³¹⁶ 10 U.S.C. §§816 (1), (2).

³¹⁷ 10 U.S.C. §§816(3), 820 (Note that summary courts-martial are not available in capital cases, dismissal, dishonorable or bad-conduct discharge, confinement for more than a month, hard labor without confinement for more than 34 days, restrictions for more than two months, or forfeiture of more than 2/3 of one month’s pay).

³¹⁸ 10 U.S.C. §§817, 877-933.

³¹⁹ O’Callahan v. Parker, 395 U.S. 258 (1969) (holding that military tribunals may not try individuals charged with crime lacking a “service connection”); Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971) (laying out the factors to be weighed in deciding whether an offense is service-related).

³²⁰ Solorio v. United States, 483 U.S. 435, 440-441 (1987) (“On reexamination of O’Callahan, we have decided that the service-connection test announced in that decision should be abandoned.”). In that case, a general court martial tried a sexual abuse charge against an individual serving in the Coast Guard. Citing Alexander Hamilton in *Federalist No. 23*, the Court considered Congress’s powers to regulate the Armed Forces in Art. I(8)(14) to include making laws regarding service members actions, regardless of whether those actions took place within the confines of military installations. 483 U.S. 441 (quoting Hamilton, “These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”).

³²¹ 483 U.S. 447-48, citing, *inter alia*, Goldman v. Weinberger 475 U.S. 509-510 (free exercise of religion); Chappell v. Wallace, 462 U.S. 296, 462 U.S. 300-305 (1983) (racial discrimination); Brown v. Glines, 444 U.S. 348, 444 U.S. 357, 360 (1980) (free expression); Middendorf v. Henry, 425 U.S. 25, 425 U.S. 43 (1976) (right to counsel in summary court-martial proceedings); Parker v. Levy, 417 U.S. 733, 417 U.S. 756 (1974) (due process rights and freedom of expression).

³²² 10 U.S.C. §802(a)(10) (emphasis added). Congress included the italicized language to address any potential ambiguity regarding the so-called Global War on Terrorism. During the Vietnam conflict, the Court of Military Appeals had understood the language of the UCMJ to require a declaration of war. *United States v. Averette*, 19 C.M.A. 363, 365 (1970), discussed and cited in Vladeck, 942, n. 49. The 2001 AUMF did not clearly declare war, making the Constitutional posture ambiguous.

³²³ *See* Vladeck, at 942; *United States v. Ali*, 71 M.J. 256, 268-69 (C.A.A.F. 2012), cert. denied, 133 S. Ct. 2338 (2013).

³²⁴ In determining what charges to pursue, the convening authority (CA) must consider whether, and to what extent, classified information may be involved. The CA must then request a declassification review and guidance from the OCA regarding what can be revealed during the proceedings. Because of the cumbersome nature of the process, convening authorities are encouraged to forgo or dismiss charges that would unnecessarily introduce classified information. U.S. Navy, *Litigating Classified Cases*, c. 9, Military Rule of Evidence 505, at 9-2, <http://www.jamesmadisonproject.org/files/Navy%20Litigating%20Classified%20Cases/Chapter%20Nine%20-%20Military%20Rule%20of%20Evidence%20505.pdf>. Trial counsel, in turn, “should carefully select case-in-chief evidence to avoid having to introduce or provide discovery of any more classified information than is necessary to meet the government’s burden.” *Id.* Under some circumstances, the OCA may not allow certain information used at the trial, which may play to the accused’s benefit. It also may adversely impact the administration of justice. If they make the wrong call on the evidence to be presented, and the individual is not convicted, there also is a cost. If the trial would otherwise result in the defense of others in their life, liberty, or property, and the case cannot continue because of the presence of classified material, then there is a harm that is being created by the secrecy. In addition to considerations of justice (and failure to reach a just result), allowing an individual to go free may lead to a repeat offense.

³²⁵ In military courts-martial, defendants are not entitled to share classified information with their counsel unless the lawyer first obtains a security clearance. *See United States v. Schmidt*, No. 04-9018-AF (C.A.A.F. 2004) (setting out process for attorneys obtaining clearances). In terms of evidentiary rules, unlike ordinary trial conditions, in military courts-martial, where classified information is involved, open file discovery is not allowed. Instead, Military Rule of

Evidence (MRE) 505, as aforementioned, integrates a CIPA-like procedure, which allows a military department or government agency to determine that the disclosure of certain material would prove detrimental to national security. See Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990). The directive covers any information determined by the government pursuant to executive order, statute, or regulations, as well as any restricted data, to be classified. See MRE 505 § (b)(1). It conceives of national security broadly, to mean anything relative to the national defense or foreign relations of the United States. MRE 505 § (b)(2). The CA may delete information from the record, substitute a portion or summary of the information, or substitute a statement admitting relevant facts that the classified information would tend to prove. MRE 505 § (d)(1)-(3). For an interesting discussion of how stipulation may be used to the benefit of the defense, see Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. SCH. L. REV. 69, 84 (2003/04). The CA also may provide the document subject to whatever conditions he or she feels are appropriate to guard against the release of information to the accused, or withhold disclosure altogether. MRE 505 § (d)(4)-(5). Any objection that the accused may have to the withholding of information must be made at a pretrial session. MRE 505 § (e). The military judge must defer to the CA's decision, unless he or she "determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial." MRE 505 § (g)(2). The discussion of any government motions is done in camera, ex parte. *Id.* If the accused is found guilty, the material withheld, and the accused's objection is placed under seal and forwarded to the reviewing authority, the accused may never have the opportunity to review or challenge the material. MRE 505 § (g)(4). This issue becomes particularly pronounced in light of the possibility that multiple versions of the same classified information may be present in a case. Trial counsel are therefore encouraged "to limit discovery, at least at the outset, to a viewing in a secure space, rather than allowing physical custody by the defense."

³²⁶ The judge may at any point exclude the public from the courts-martial, where classified information may be involved. This option is not available to the ordinary courts under CIPA. So-called *Grunden* trials carry with them an assumption of necessity: they will only be closed to public scrutiny insofar as the convening authority deems it necessary to protect the classified information. *United States v. Grunden*, 2 MJ 116, 120 (CMA 1977). In *Grunden*, despite the objection of defense counsel, and the trial judge's assurance that he would protect the appellant's rights, the public was excluded from nearly the entire portion of the trial dealing with an espionage charge. Of the nine witnesses who testified, only one covered classified matters in any depth. On appeal, the Court found that the right to a public trial, secured by the Sixth Amendment, had been violated. *Id.* The burden is on the prosecutor to demonstrate the need. The determination of whether to acquiesce in the prosecution's request is made during a closed meeting. See Mil. R. Evid. 505; R.C.M. 806. Military regulations provide various alternatives to closed hearings. The regulations provide, for instance, for silent witnesses to testify about information contained in a classified document, without stating anything about the actual information contained in it, to determine the relevance of the information in question. Courts-martial may use code words or special terms to replace sensitive material, such as Person X, Country Y, or Source Z. The convening authority may make use of screens or disguises to hide witnesses' identities. Imagery also can be protected from public disclosure by only making it available to individuals who have the appropriate clearances. See also *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) (ruling that Article 32 preliminary hearings must be open to the public, absent a specific and substantial demonstration that the proceeding should be closed).

³²⁷ Before the introduction of the UCMJ, as Professor Vladeck notes, the only possibility to obtain review was through collateral proceedings, with jurisdiction being the sole issue that could be challenged. Vladeck, at 943. The UCMJ altered this by establishing an appellate structure, within which the Courts of Criminal Appeals within each service hear appeals from general and, in some cases, general courts-martial. 10 U.S.C. §866. The U.S. Court of Appeals for the Armed Forces provides a third (civilian) layer for appellate review. 10 U.S.C. §867. USCAAF is required to review the record in all capital cases, in cases in which the Judge Advocate General orders a CCA case to be sent to them, and in cases in which the defendant petitions and the court grants review. 10 U.S.C. §867(a). The law does allow for USCAAF decisions to be reviewed by the Supreme Court by writ of certiorari; however, final appeal is only allowable when USCAAF itself has agreed to review the case, or when the Judge Advocate General has certified a case to USCAAF for review—limiting the right. 28 U.S.C. §1259.

³²⁸ Military Order of Nov. 13, 2001, "Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001).

³²⁹ Military Comm'n Order No. 1, U.S. Dep't of Def., 1, para. 6D(5)(a) (Mar. 21, 2002).

³³⁰ *Id.*, para 6D(5)(b).

³³¹ *Id.*

³³² *Id.*, para. 6B(3).

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- ³³³ Military Commissions History, Office of Military Commissions, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>.
- ³³⁴ Hamdan v. Rumsfeld, 548 U.S. 557 (2006); App. To Pet. For Cert. 65a.
- ³³⁵ Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Stevens, J.).
- ³³⁶ Geneva Convention, Art. 3.
- ³³⁷ Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Stevens, J.).
- ³³⁸ *Id.*, citing 10 U.S.C. §821.
- ³³⁹ Military Commissions Act of 2006, Pub. L. 109-366, Oct. 17, 2006. The statute defines “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.” (10 U.S.C. §948a). See also Vladeck.
- ³⁴⁰ 10 U.S.C. §§949a, 949j. See also Vladeck.
- ³⁴¹ 10 U.S.C. §950b. See also Vladeck.
- ³⁴² 10 U.S.C. §950j. See also Vladeck.
- ³⁴³ 10 U.S.C. §949c. See also Vladeck.
- ³⁴⁴ 10 U.S.C. §949a. See also Vladeck.
- ³⁴⁵ 10 U.S.C. §948r. See also Vladeck.
- ³⁴⁶ See Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1 (2009) (history of rendition, expansion post-9/11); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405 (2008) (rendition previously with aim of bringing individual to trial/not for sending to third party country for judicial or extra-judicial proceedings); Jules Lobel, *Extraordinary Rendition and the Constitution*, 28 REV. LITIG. 479 (2008) (focusing on Maher Arar and the transfer of more than 100 suspected terrorists to countries that practice torture); William G. Waver & Robert M. Pallitto, *The Law: “Extraordinary Rendition” and Presidential Fiat*, 36 PRESIDENTIAL STUD. Q. 102 (2006) (danger of judicial deference to executive expertise); Jules Lobel, *Extraordinary Rendition and the Constitution*, 28 REV. LITIG. 479 (2008) (noting that the practice of rendition for torture violates basic principles of international law); Margaret Saterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (arguing that rendition violates the rule of law); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585 (2006) (noting that rendition and torture violate international law).
- ³⁴⁷ The first case to come forward under the 2007 Manual for Military Commissions (which implemented the 2006 MCA) was that of David Hicks, who pled guilty and was sentenced to seven years’ imprisonment for providing material support to terrorists. Notably, the system at the time allowed for significant amounts of secret information to be used against defendants, raising the possibility that secrecy could be used to encourage guilty pleas—essentially, a second-order effect.
- ³⁴⁸ Boumediene v. Bush, 553 U.S. 723 (2008) (consolidated with Al Odah v. United States).
- ³⁴⁹ United States v. Hamdan, Panel Member Instructions, AE 321 (Mil. Comm. Aug. 4, 2008).
- ³⁵⁰ Hamdan v. U.S., 696 F.3d 1238 (D.C. Cir. 2012).
- ³⁵¹ Hamdan v. U.S., 696 F.3d 1238 (D.C. Cir. 2012).
- ³⁵² Al Bahlul v. United States, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (per curiam), en banc rev. granted and panel order vacated, No. 11-1324 (D.C. Cir. Apr. 23, 2013) (en banc).
- ³⁵³ 10 U.S.C. §§948a(6), 948d; 904; 906; 950t, discussed in Vladeck, 946, n. 90-93.
- ³⁵⁴ Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, H.R. 2647, 123 Stat. 2190, Oct. 28, 2009 (Military Commissions Act of 2009).
- ³⁵⁵ The government immediately attempted to use the law to introduce new charges against Ibrahim al Qosi, a Sudanese captive held at Guantánamo Bay, against whom the Pentagon had sworn out charges two years prior. Air Force Lt. Col. Nancy Paul, the presiding officer, denied the government’s request. Carol Rosenberg, *Guantánamo Judge Won’t Expand Sudanese Captive’s War Crimes Case*, MIAMI HERALD (Dec. 3, 2009), <http://www.webcitation.org/query?url=http%3A%2F%2Fwww.miamiherald.com%2Fnews%2Famericas%2Fguantanamo%2Fstory%2F1364075.html&date=2009-12-04>.
- ³⁵⁶ Remarks of the Attorney General, Attorney General Announces Forum Decisions for Guantánamo Detainees, Nov. 13, 2009, <https://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees>

³⁵⁷ Petition for a Writ of Certiorari, *Al-Nashiri v. Obama*, Mar. 20, 2017, p. 3, <https://www.lawfareblog.com/nashiri-files-cert-petition-habeas-case>.

³⁵⁸ 8 CFR §3.27 (“All hearings, other than exclusion hearings, shall be open to the public” [with exceptions noted]).

³⁵⁹ 8 CFR §3.27(a).

³⁶⁰ 8 CFR §3.27(b).

³⁶¹ 8 CFR §3.27(c).

³⁶² See discussion, *infra*, and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

³⁶³ Email memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001). See also Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 95 (2004); *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, 14 HUMAN RIGHTS WATCH (August 2002).

³⁶⁴ Email memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001), at ¶¶10, 11.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ Letter to Senator Carl Levin, Chair, Senate Permanent Subcommittee on Investigations, from Daniel J. Bryant, assistant attorney general, July 3, 2002.

³⁶⁸ *Rabih Haddad v. John Ashcroft et al*, 221 F.Supp.2d 799 (2002).

³⁶⁹ 221 F.Supp.2d 802-803, quoting *Zadvydus v. Davis*, 533 U.S. 678 (2001).

³⁷⁰ “ A deportation proceeding, although administrative, is an adversarial, adjudicative process, designed to expel non-citizens from this country. “[T]he ultimate individual stake in these proceedings is the same as or greater than in criminal or civil actions.” See *N. Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 301 (D.N.J.2002). “[D]eportation can be the equivalent of banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 391, 68 S. Ct. 10, 92 L. Ed. 17 (1947), and the Court has taken note of the “drastic deprivations that may follow when a resident of this country is compelled by our [g]overnment to forsake all the bonds formed here and go to a foreign land when he often [may] have no contemporary identification.” *Woodby v. INS*, 385 U.S. 276, 285, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966). Moreover, “[t]hrough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.” *Bridges*, 326 U.S. at 154, 65 S. Ct. 1443. As such, “[t]hat deportation is a penalty at times a most serious one cannot be doubted.” *Id.* at 154, 65 S. Ct. 1443.” *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir.2002), cited and quoted in 221 F.Supp.2d 804. See also *E.G., Fitzgerald v. Hampton*, 467 F.2d 755 (D.C.Cir. 1972); *Pechter v. Lyons*, 441 F.Supp. 115 (S.D.N.Y. 1977).

³⁷¹ 221 F.Supp.2d 804.

³⁷² 221 F.Supp.2d 804.

³⁷³ *North Jersey Media Group, Inc. v. John Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

³⁷⁴ *Id.*

³⁷⁵ *North Jersey Media Group, Inc. v. John Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

³⁷⁶ *Id.*

³⁷⁷ 8 CFR Part 3; EOIR 133; AG Order No. 2585-2002; Fed. Reg. 67(102), May 28, 2002, *36799.

³⁷⁸ *Id.*

³⁷⁹ Trading with the Enemy Act of 1917, 40 Stat. §411, Oct. 6, 19167, codified at 12 U.S.C. §§95a-95b and 50 U.S.C. App. §§1-44.

³⁸⁰ *Id.*

³⁸¹ Daniel A. Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN (July 28, 2014), <http://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/>.

³⁸² Exec. Order 9095, Mar. 11, 1942 (Wilson).

³⁸³ *Id.*, ¶ 3. Leo Crowley, former chair of the FDIC, served as APC, obtaining a wide range of businesses. In 1946, the functions transferred to the Attorney General. Exec. Order 9788, Oct. 15, 1946. That office was not formally abolished until 1966. Exec. Order 11281, May 13, 1966 (Johnson).

³⁸⁴ Trading with the Enemy Act, 50 USC s 1702(a)(1) (1977).

³⁸⁵ 50 USC § 1702(a)(I)(B) (2001).

³⁸⁶ Executive Order No. 12947, 60 Fed. Reg. 5,079 (23 January 1995), reprinted as amended in 50 USCA. s 1701 (2003).

³⁸⁷ *Id.* The definition of specially designated terrorist as found in 31 CFR 595.311 reads: “(1) Persons listed in the Annex to Executive Order 12947; (2) Foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found: (i) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or (iii) To assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and (3) Persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other specially designated terrorist.”

³⁸⁸ Executive Order No. 13099, 63 Fed. Reg. 45,167 (20 August 1998).

³⁸⁹ Executive Order No. 13224, (23 September 2001), 3 CFR 786, 790.

³⁹⁰ *Id.*

³⁹¹ 18 U.S.C. §§2339A-2339(B). See also Laura K. Donohue, *U.S. Efforts to Stem the Flow of Funds to Terrorist Organizations: Export Controls, Financial Sanctions and Material Support*, in DIRTY ASSETS: EMERGING ISSUES IN THE REGULATION OF CRIMINAL AND TERRORIST ASSETS 261 (Colin King & Clive Walker eds., 2014).

³⁹² Watch listing provides a good example: as Professor Anya Bernstein has noted, “Reports indicate that people are commonly listed in terrorist watch lists based on suspicions ranging from the constitutionally impermissible to the absurd.” Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFFALO L. REV. 461, 466 (2013). Being Quaker or member of a pro-gun lobby appear to be sufficient. *Id.*, at 467. Despite a high error rate, the Transportation Security Administration operated its passenger screening programs for years without any method to either report or to correct errors. *Id.*, citing Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C. R. – C. L. L. REV. 435, 475 (2008). Due process was nowhere to be found.

The No-Fly list proves similarly relevant. The Terrorist Screening Center maintains a Terrorist Screening Database to which the FBI and National Counterterrorism Center contribute the names of known or suspected terrorists, who are then prevented from flying. Congressional Research Service, *The Terrorist Screening Database and Preventing Terrorist Travel*, Nov. 7, 2016. See also *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012). For a significant amount of time after the list was created, the government refused to tell people they were on it—even after they had been prevented from flying—let alone the reasons why. See *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012).

The Committee on Foreign Investment in the United States (CFIUS), an interagency committee that reviews transactions involving foreign investment that may undermine U.S. national security, does not publicly acknowledge the deals they are inspecting. Far from becoming less invasive, in September 2019, Treasury published proposed regulations to implement the Foreign Investment Risk Review Modernization Act of 2018, which broadened CFIUS’s authority to look at investments that had previously fallen outside its jurisdiction. Instead of just transactions that could result in foreign control of a U.S. business, the agency can look at either direct or indirect non-controlling investments, by a foreign person, that affords that individual access to technical information, certain rights, or a role in substantive decisionmaking. U.S. Department of the Treasury, *Fact Sheet: Proposed CFIUS Regulations to Implement FIRRMA*, Sept. 17, 2019, <https://home.treasury.gov/system/files/206/Proposed-FIRRMA-Regulations-FACT-SHEET.pdf>.