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Panel One: Classification and Access to National Security Information

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PANEL ONE: CLASSIFICATION AND ACCESS TO NATIONAL SECURITY INFORMATION

Moderator:
Mary-Rose Papandrea*

Panelists:
Margaret Kwoka, David Pozen, Stephen I. Vladeck**

The following is a transcript of the first panel, discussing classification and access to national security information, of First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment.*[1] *The virtual event also featured a keynote address by Mary-Rose Papandrea*[2] *and a second panel on The Press, Whistleblowers, and Government Information Leaks.*[3]

Papandrea: You guys are in for a treat. We have three of the leading scholars, maybe the leading scholars, on this panel and the next panel on these issues. First, I'll start with introducing Margaret Kwoka. Margaret is a professor at the University of Denver Sturm College of Law, where she teaches administrative law, federal courts, national security, and civil procedure, which you all know I love. We are meant to be soulmates. I can tell. Her research focuses on government secrecy, FOIA, procedural justice, and judicial review of agency actions. She's been published in the Yale Law Journal and a number of other journals, and she is perhaps the leading expert on FOIA. So, thank you, Margaret, for joining us today.

Next, I'll introduce David Pozen. David is the Vice Dean of Intellectual Life and a Charles Keller Beekman Professor of Law at Columbia Law School. He is a leading expert—maybe

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[1] This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.
[2] Mary-Rose Papandrea, *Keynote Address: Examining the Assange Indictment,* 19 FIRST AMEND. L. REV. 213 (2021).
[3] David S. Ardia, Heidi Kitrosser, David McCraw, Mary-Rose Papandrea & David Schulz, *Panel Two: The Press, Whistleblowers, and Government Information Leaks,* 19 FIRST AMEND. L. REV. 253 (2021).

we'll go with the leading expert—on constitutional information law. In 2019, he received the Early Career Scholars Medal from the American Law Institute. I mention that not just to show that he has lots of credentials, but I really like the way they described his work. They described him as a remarkable, widely influential scholar, also creative and thought provoking. And that is exactly the way I would describe him. So, thank you, David, for being with us today.

And finally, last but certainly not least, Steve Vladeck. He is the Charles Allen Wright Chair in Federal Courts at the University of Texas. Many of you probably already know him. He is a nationally recognized expert on federal courts, constitutional law, national security law, and military justice. He is a prolific scholar, so, I'm not even going to start to mention all of his publications. But I will mention he is the coauthor on the leading casebooks on National Security Law and Counter-Terrorism Law. So, some of you are probably reading out of his casebooks in your classes this semester. He is a co-host of a popular blog called *National Security Law Podcast*.[4] He does this with Bobby Chesney, his colleague at UT. It is quite entertaining and really well done, so I highly recommend you check it out. He is also CNN's Supreme Court analyst. And we're just so thrilled you're here, Stephen—thank you for coming.

So, thanks to everyone for coming. My job as moderator is just to pose some questions and let you guys bat them around. I will try to stay out of your way. I thought, Steve, if you don't mind, I'll start with you just to get us started and give the students in the audience some background on our classification system. So, if you don't mind, you can go in any direction you want with this question. But can you just explain how our classification system works? Why does it seem like the executive branch controls the public's access to national security information? What is Congress's role here or what should it be?

Vladeck: That's a great question. And I like going first because then Dave can come in and clean up everything I get wrong, and Margaret can scold both of us. Let me say first, Mary-Rose, this is a real treat, and I really appreciate the chance to be with you guys today. So, national security classification, at least as so described, is a relatively modern phenomenon. We've

[4] THE NAT'L SEC. L. PODCAST, https://www.nationalsecuritylawpodcast.com/ (last visited Apr. 21, 2021).

obviously always had secrets in this country, but the idea of national security classification, per se, is very much a product of World War II and its aftermath—where the government was trying to figure out how to handle massive amounts of national security information; where secrecy, especially as the Cold War was ramping up, became such a critical priority; where there was more need for secrecy on the civilian side of government as opposed to just in the military, as was true during the war. And, so, it starts actually very much, or at least it really ratchets up, during the Truman administration. Harry Truman was the first president to issue a comprehensive executive order with regard to national security classification, even though FDR had taken some steps in that direction during the war. But I think one of the critical points for our conversation is that, at least at first, it was not obvious that this was exclusively a prerogative of the executive branch.

So, there are a couple of early statutes—the Atomic Energy Act of 1954,[5] foremost among them, in which Congress claimed a fair amount of authority to set standards for national security classification, to identify what kinds of information should be classified, and to actually assert a constitutional role in the conversation. I think part of how we've gotten to where we are today, which is a classification system that is very badly, in my view, broken, is that Congress has mostly abandoned the field in the decades since. What started as, I think, an interest in, not perfect, but thoughtful power sharing arrangements has really drifted toward almost pure unilateral executive branch control, to the point where, today, the executive branch asserts, almost reflexively, that national security classification is an inherent power of the President and, perhaps even in some circumstances, one that Congress lacks the power to regulate at all. So, as we talk about what's wrong with the state of national security information today, I actually think the foundational problem is the drift in power, in regulatory authority, away from a sort of joint approach between the political branches and toward the executive, where Congress has basically just dropped the ball and no longer even thinks it's its job to really be actively involved in regulating national security information.

[5] The Atomic Energy Act of 1954, 60 Stat. 755 (1946) (codified as amended in scattered sections of 42 U.S.C.).

Papandrea: Yeah, that's great. I had a feeling that was your view, and that is why I asked you that question. David and Margaret, do you have anything to add on that point? David, go ahead.

Pozen: Thanks. It's an honor to be here for me, too, in this amazing group and also with Mary-Rose moderating. We didn't get your introduction, but a leading scholar in the area. I would echo Steve's points and just note that there's a great book by historian Sam Lebovic called *Free Speech and Unfree News*, in which he has a section about how in the late 1960s and early 1970s Congress had not clearly accepted the legitimacy of the executive branch's growing classification system.[6] And there was this window in the wake of the Vietnam War and the Watergate scandal in which Congress was willing to enact framework national security statutes in areas like war powers and foreign intelligence surveillance, even against presidential vetoes, and assert itself in the national security context.

Both houses of Congress considered bills in the early 1970s that would have legislated a classification system and set the rules for what could be classified and how. But, in the end, in my view, fatefully, Congress decided not to try to, itself, legislate the national security information classification system. Instead, they left that to the executive branch, as Steve said, and allowed people to bring FOIA lawsuits challenging certain information as being improperly classified. Then, in 1974, telling judges they should not give much deference. It's debatable how much Congress meant them to give, but the judges should really actively review assertions of improper classification. And I say a fateful choice because it turned out pretty quickly that judges had no interest in playing that role. They did not want to scrutinize secrets the executive branch said were necessary for national security, and they ended up deferring very, very heavily to the executive branch. So, I think there was a major missed opportunity in that moment when Congress was asserting itself for Congress to take over classification, or at least to assert itself more than it did. Basically, the drift ever since then, ever since the early 1970s, has been toward executive branch supremacy in this area, I think to our democratic detriment. But I won't say more, for now.

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[6] *See generally* SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA (Harvard Univ. Press 2016).

Papandrea: Yes. We're going to talk a little bit more about that. If you don't mind, Margaret, David mentioned FOIA.[7] And, as I mentioned in the introduction, I think you're the leading expert on FOIA. Can you tell us a little bit about the history and purposes of FOIA and then if you want to share some of the problems you've seen with FOIA?

Kwoka: Absolutely. Thank you. And let me add my thanks both to you, Mary-Rose, for organizing and to the students at the Law Review for organizing this great event. So, the concept of government transparency is old. It dates back at least to the advent of modern-day democracy—the idea that the public would have enough information about what government is doing to participate actively in government. But the idea of FOIA is pretty new. And, so, the statute was enacted in 1966 and, as only the second such government records access provision in the world, the legislative history is pretty clear that the purpose of the law was to promote democratic accountability in this kind of vast and growing administrative state. And journalists were actively involved, not only in lobbying for but, in fact, drafting the very first version of the statute.

So, although there is no limit to who can use FOIA, journalists were imagined to be the prime intended users. But the statute, as drafted, allows any person to request any government records for good reasons, bad reasons, or no reasons at all.[8] And it lists out nine enumerated exemptions to disclosure,[9] one of which is the exemption that, in fact, bakes the classification system into FOIA. Exemption one essentially just exempts out any information that is properly classified pursuant to the governing executive order.[10] And that decision sort of ratifies the idea that the executive branch should be making these classification decisions. Certainly, as Dave mentioned, this is an area where the amount of oversight that the judiciary should exercise is debated. I would say lots of people are unsatisfied with the amount of oversight that is exercised, which is to say not very much, in terms of deference that's given. And that certainly is one problem that has been greatly explored in the literature.

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[7] The Freedom of Information Act, 5 U.S.C. § 552.
[8] *See id.* § 552(a).
[9] *Id.* § 552(b).
[10] *See id.* § 552(b)(1).

The other thing that I'll just briefly highlight in terms of the issues with using FOIA for national security oversight is that not only is that not policed very well by the courts, but, in addition to that, mostly FOIA isn't used the way we thought it would be for oversight at all, national security or otherwise. So, if you look at our nearly a million requesters a year, maybe two and a half to three percent of them are news media or journalists. What has happened over time is that instead of requestors seeking to inform the public about government activities, including in the national security arena, we see just volumes and volumes of very predictable routine requests for information that the public has, potentially, a very legitimate need for but has nothing to do with what we imagine FOIA would be used for. And, so, now FOIA has become, I would say, gummed up, in a word, with just huge volumes of non-oversight requesters.

Papandrea: Yeah, that's great. We're going to talk a little bit more about the national security issues specifically. If you don't mind, David, you have written some really illuminating work on the history, purposes, and evolving function of FOIA, if you wouldn't mind sharing some of your thoughts on that as well.

Pozen: Well, one place to start is where Margaret ended. Who uses FOIA? So, I guess there's no very simple way to tell this story, but there has been, I think, a lot of ways in which the initial vision of FOIA has failed or at least not been fully realized. And we might start that story with who uses it. So, as Margaret says and as her own research has documented, at a lot of agencies, it's overwhelmingly commercial requesters. At others it's, what Margaret calls, first-person requestors trying to learn about themselves and what the government has related to their own lives. And you could make a case about commercial requesters trying to learn about the regulatory environment or about competitors or about relevant things agencies are doing to their business, that there are reasonable causes for them to want to use the statute. And same with the first-person requesters.

But, the fact that the overwhelming number of requesters are from those groups has served to crowd out other more public interested actors like journalists, who were envisioned as the primary beneficiaries of this law. When Congress, in FOIA, said anyone can submit a request for any reason at all—you don't have to tell us why you want information, ask away—it seemed

supremely democratic that it was open to everyone. But in not making a choice, Congress was actually making a choice. There's no escaping making these kind of allocative moves even if you think you're not. Congress basically was saying whoever has the resources and wherewithal to figure out how to use this ostensibly open to everyone system will functionally, effectively get prioritized. And, so, when you open the queue to everyone, parties with the most money and time and attention to focus on FOIA get to use it more. Because agencies withhold a lot of information using the exemptions in FOIA, you have to credibly threaten to litigate to get a lot of the most important information in many contexts, and you're going to need money and lawyers to do that credibly. So, one way in which I think FOIA has evolved in unintended ways and in disappointing ways is in the skew toward commercial requesters and not these public interested requesters.

The second theme, already noted in our first set of comments, is that FOIA has proven largely toothless in the national security context in which, at least for some of the constituencies, a key goal of FOIA was to open up the national security state. I think instead it's largely entrenched and legitimated that state and afforded only modest glimpses into what's going on in the rare lawsuit that produces records. So, there's also been this this story of national security failure.

The third thing I'll say, for now, is I think FOIA also has effectively skewed the way we understand how the government works. I say this because FOIA itself has strict deadlines on when agencies have to turn over documents that have been requested that are really unrealistic in light of the resources that Congress allocates to executive branch agencies to implement FOIA. So, the deadlines are routinely being missed and the volume of requests is such that it's overwhelming for a lot of executive branch agencies to deal with the FOIA requests that come in. So, on the one hand, a lot of people experienced disillusionment and disappointment in government through the FOIA process itself. There's a whole kind of genre of journalism on how horrible FOIA is and how it reveals that our government is feckless and incompetent. Then, you get the records that FOIA produces, and overwhelmingly what journalists do with them is tell stories of government failure and fecklessness. So, at a second level, we have FOIA kind of producing negative images of government.

There has been some literature in the journalism community about why is it that muckraking journalists—journalists who want to tell stories about corruption and abuse in society—shifted in the mid-twentieth century period from looking as much or more at corporate private sector abuses than governmental abuses, and that's been a kind of market shift in where this kind of muckraking journalism focuses. I think FOIA is part of that story. FOIA is a low-cost tool for journalists to get certain sorts of information about bad stuff happening in the world, namely, information about government abuse. So, it channels journalists toward the now cheaper sort of information that they can use to tell those stories—it doesn't reach private sector actors directly, some other countries' freedom of information laws do. So, I think FOIA has given us a distorted and far too negative view of how government works, kind of baked into the very structure of the law. While it was meant to expose real abuses and help promote accountability, I think that the way in which it focuses our critical attention on a certain sort of government behavior and not on what the most violent parts of the states are doing—the national security law enforcement agencies that are most immune from FOIA have enjoyed the strongest exemptions—or what is happening in the private sector has also distorted policy conversations and is a kind of failure. So, I hope that's responsive to the question, Mary-Rose, but in those three ways, I see FOIA as not fulfilling some of [its purposes].

Papandrea: Yeah, and I do recommend that if you want a deeper dive on any of these topics, these three panelists have written extensively on all of them. So, we're just trying to get at the surface of them today. Steve, if you don't mind if I turn back to you, could you tell us a little bit more about what's going on in the courts? So, one of the things I'm going to be pressing you on today are all the different branches of government and how they might play as a checking function on the executive branch. We talked a little bit about Congress, and we'll return to Congress momentarily. Can we talk more about the courts and why is it that the courts have rejected Congress's call to not defer to the executive branch and look and see if something is properly classified? Can you tell us a little bit more? And, Margaret, just to tee you up, you're next to tell us more about what you see going on in the courts.

Vladeck: Yeah, I mean, I think it's the right question. And, I think Dave already alluded to a lot of this—that courts have, in many respects, underread both the plain text and the clear purpose of FOIA. But it goes so far beyond FOIA. And I think that's actually a larger part of the problem, which is that in non-FOIA contexts, there has been, over the past forty years, built up this massive doctrine of judicial deference in national security cases that then seeps into contexts where statutes expressly contemplate a role for the courts. So, FOIA is one example. There's a statute called the Anti-Terrorism Act[11] that's supposed to be an aggressive civil remedy for acts of international terrorism that courts have construed implausibly narrowly because of concerns of interfering with national security and foreign policy. So, I think, there's a larger trend that really, again, started in the 1970s. This time, I think because of shifts in the ideological balance of the federal court, shifts in appointments to the federal courts where, starting with the Supreme Court, but really quickly seeping into the lower courts, there is more and more of this idea that it's not appropriate for courts to, "second guess," determinations that the executive branch makes in national security cases and giving that definition a very broad ambit.

So, national security cases are everything from classic national security disputes to the dispute between Amazon and the Department of Defense over the Jedi contract where everything is national security. And this sort of goes back to where we started because the justification for this deference doctrine is constitutional avoidance—the idea that Article II blesses the executive branch with a broad range of national security powers and that it's actually a separation of powers problem for the courts to unduly intrude into the sphere of the executive in national security cases. The irony being that, again, as came through in our in our prior colloquy, I think the premise is flawed. I don't think Article II gives the executive branch undisputed primacy in this space. I think the problem is that Congress has largely abandoned its role in this context. So, we see this starts during Vietnam as a military deference doctrine about how we're not going to second guess things the military is doing, but it quickly expands beyond the military to what the intelligence agencies are doing, to what the FBI is doing. The enactment of FISA, the Foreign Intelligence Surveillance Act in

[11] 18 U.S.C. §§ 2331 *et seq.*

1978,[12] which creates an express judicial review mechanism, is nevertheless perceived as further reaffirming. All of this is Article II dominance in national security.

When courts start scaling back damages remedies against federal officers under *Bivens*[13]—the idea that the Constitution provides for damages remedies when federal officers violate the Constitution—they start in national security cases. The first steps toward getting rid of *Bivins* come in cases implicating national security. So, I think Margaret can say a bit more about the specific ways that the courts have, I think, underread FOIA. But, I think it's part of this broader disease where, even the context of a prepublication review dispute where it's a contract dispute that obviously needs an arbiter, courts are like "oh, it's not our job to really second guess what the executive branch is doing." I think it is a fundamental misunderstanding of the judicial role, of what it was originally, of what the founders intended, of what Congress intended, and of how this sort of judicial abdication reinforces the significance of the legislative abdication.

Papandrea: Yeah, thank you so much for that, Steve. If you don't mind if I just ask you a follow up before I turn to Margaret. Can you say a little bit more, not just about the constitutional delegation of this authority to the executive, but the capacity and the ability of courts to be involved in these decisions? Because I know a lot of people generally, maybe I'm looking at a lot of my students actually, say the courts are not well equipped to get involved in these decisions. So, I think it might be worth pausing on that just for a moment and talking more about whether the courts can do this.

Vladeck: It's an assertion you hear a lot. And, I think Harvie Wilkinson might be the most prominent espouser of this assertion on the federal bench today. And here's the problem—it is utterly belied by experience. What do I mean? Let's take a couple of categories of cases. So, first, there is FISA, the Foreign Intelligence Surveillance Act, where Congress specifically creates a judicial process for secret review of incredibly secret national security processes and foreign intelligence

[12] The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, Oct. 25, 1978, 92 Stat. 1783 (1978) (codified as scattered sections of 50 U.S.C.).
[13] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

surveillance.[14] The government has never complained that that process has unduly jeopardized national security information. It hasn't identified a single case where a leak came out of the FISA Court. And the courts have shown they haven't always, I think, gotten the law right—I suspect that we can each identify decisions from the FISA Court that we disagree with—but no one's questioned their competence to do it. And, indeed, in 2001 and 2008, Congress expanded the role of the FISA Court in foreign intelligence cases, at least largely because Congress, I think, rightly understood that reviewing highly sensitive factual proffers in foreign intelligence surveillance cases is actually not beyond the capacity of federal courts.

Let's take a second example. Guantanamo habeas petitions. So, we spent the better part of seven years fighting over whether the federal courts could hear Guantanamo habeas petitions at all from 2000 to 2008, and it culminated in the Supreme Court's 2008 decision in *Boumediene*, which said yes.[15] Then, we actually had sixty-five plus Guantanamo habeas petitions heard by the federal courts, even though the circumstances of their detention were highly classified. Even though the factual disputes animating the review were highly classified, the federal courts did their job, and no one—at least in the district court who was hearing these cases—none of the district judges said, I have no idea how to do this. None of the district judges said, this is beyond my competence. It was only a couple of the appeals judges, who didn't actually have to review any of that information, who complained about whether this was an appropriate judicial exercise.

And then, last but not least, there's criminal prosecutions in national security cases, whether under the Espionage Act[16] or for criminal counterterrorism violations, where there's often an awful lot of classified information that is at stake, whether as part of the government's case in chief or as part of the defendant's defense. Congress has passed a statute to deal with the graymail concern that defendants could use classified information, CIPA, the Classified Information Procedures Act.[17] But, there's also a pretty sophisticated body of case law about how the government

[14] *See* 50 U.S.C. § 1803 (establishing the FISA court).
[15] Boumediene v. Bush, 553 U.S. 723, 793–96 (2008).
[16] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).
[17] The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified in scattered sections of 18 U.S.C.).

can strike the balance between preserving national security secrets and protecting the constitutional rights of defendants under the Fifth and Sixth Amendments. And so, every time a judge or an observer says courts can't handle these cases, I want to point them to thousands of FISA cases, dozens of Gitmo habeas petitions, and hundreds of criminal prosecutions and say, what about those? And, actually, the Federal Judicial Center put out a book called *National Security Case Management Challenges*,[18] which is meant to be a guide to courts. It's on my shelf, I should have brought it as a prop. But it's like here's thousands of pages of examples of federal courts dealing with national security challenges, and not always getting them right, Mary-Rose, but just dealing with them. So, every time someone trots out the lack of competence argument, I say, well, I've got thousands of pages of evidence to the contrary.

Papandrea: Excellent, excellent. Margaret, now that I realize that you're a civil procedure professor, your work makes a lot of sense to me. I know you've written extensively about maybe what we should do in the court system or some sort of reforms to help this FOIA litigation in the national security context be a little more effective. It would be great if you could build on some of the things Steve said and share some of your ideas in this area.

Kwoka: Absolutely. And, in the same way that I completely agree, we have ample evidence that courts are competent at resolving these disputes, I also think they're just very reticent to in many cases. So, in some ways, Congress has tried to re-empower the federal courts at various times. And I think FOIA is a good example of that where Congress tried to reinstate essentially de novo review after the Supreme Court took it away in classification cases. And it was unsuccessful, to be honest. If we look at FOIA litigation, there's been recent empirical work done showing that it's almost impossible to win an exemption one case, a classification case, under FOIA. And I think there's various reasons why.

If you have some of your Civ Pro students on as audience members, maybe they'll appreciate a couple of the ways in which I think courts are sort of shirking their duty. And a lot of it is procedural. So, for example, in FOIA cases, courts routinely

[18] ROBERT TIMOTHY REAGAN, NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (6th ed. 2015).

start with the premise that discovery is inappropriate. That's not in a rule anywhere. Nobody has a statute about that. It's not in FOIA. It's just a federal case with the federal rules of civil procedure governing. There's no reason why people can't get discovery. But, the courts say, "well, FOIA cases, that's not appropriate." Yet, there may be many factual disputes that are not about the contents of the records that matter in classification. It could be about the classification authority. It could be about other things that were considered at the time, reasoning that could be given without revealing the contents of the records. And pushing past discovery, you get to summary judgment. I'm hoping your Civ Pro students are appreciating this.

Papandrea: If they don't, I will kill them.

Kwoka: So, you get to summary judgment, and in FOIA cases, the government bears the burden of proof even though they're the defendant. So, that's different from a lot of litigation, but it means that, at summary judgment, it's up to them to kind of show their best hand and win or lose. And, yet, what happens is they show their best hand, and, even when the court thinks it's not good enough, they just let them go try again. This is certainly true in national security cases, among others. Another, and I think this might be the biggest one in national security cases, courts do not want to use their power to engage in in-camera review. And it's something that everyone agrees the courts have the power to do. In cases where they use in-camera review to actually look at the disputed records, we have no evidence that this goes wrong. Just as Steve just said, we have no evidence that courts are not competent to look at these records and make these determinations. And yet, you will see case law saying, we only use in-camera review in extreme circumstances or as a last resort. So, they won't actually use the power they have to review these cases.

And then, and this is maybe the most blatant national security related kind of deference, but the standard is de novo review. You will see court after court say, "yes, yes, but we give substantial weight to the government's affidavits in these cases," and so much so that you will see cases that say we review exemption one under a substantial weight review standard, which is not a standard. They are in every way giving deference to the government. I will say—and I know we've really listed quite a parade of problems, and I agree with all of them—I think

like Steve said, courts can do this, like we have volumes of evidence that this kind of role is appropriate. That's true in FOIA cases, too. And we also do see glimmers of success. And I'm happy to talk more about ways in which I think there is some evidence that, even in the national security context, FOIA can be useful in terms of oversight and for journalists. That said, the courts are not the place where they're mostly winning those battles.

Papandrea: Here's a question I didn't send to you all, so feel free to tell me that you have no comment. Do you think it would help to replace FOIA or supplement FOIA with the recognition of a constitutional right of access to this information? So, I know that such a right is not established by any means in the jurisprudence of this Court. But drawing in part on Heidi's work, Heidi's on the next panel, and I was asked to write about this recently for Geoffrey Stone's book on national security secrecy.[19] So, I was thinking a lot about whether there should be a constitutional right of access to national security information rather than a statutory one. Do you have any thoughts? Maybe David, I'll go to you. Do you have any thoughts on whether we should think of this as a constitutional right, rather than as a statutory right?

Pozen: I guess I don't see the distinction as being very meaningful in practice in terms of what it would mean for people seeking access to this information. Although, there's a lot of literature on how FOIA is effectively a quasi-constitutional measure. In the absence of an affirmative right to know, as some other countries' constitutions provide for, we've basically legislated the equivalent, and it provides for judicial review—ostensibly under de novo, very favorable to the requestor standards—and has a highly reticulated scheme for how you can get this information. I can't really imagine that a constitutional right would be stronger on the substance or that it wouldn't be qualified by the same limitations, like for national security information. So, I think the bigger problems here are not in the formal classification of the requesting right—is it statutory, is it constitutional, or both—but in the kind of problems that Margaret and Steve were discussing, which have to do more with judicial incentives than with judicial competence.

[19] NATIONAL SECURITY, LEAKS AND FREEDOM OF THE PRESS (Geoffrey R. Stone & Lee C. Bollinger eds., 2021).

I'll just add another anecdote quickly on that front, which is my first job out of law school was working as an aide for Senator Ted Kennedy on the Senate Judiciary Committee, and we worked on a bill called the State Secrets Protection Act.[20] It was a response to perceived Bush administration abuses in overusing the state secrets privilege to defend against civil actions alleging torture, extraordinary rendition, and other abuses. And the Bush administration would come into court and say, "no, it's all privileged, it's a state secret, whether or not we do extraordinary rendition." And judges were deferring in a blanket fashion and just throwing out the cases at the outset. What was so striking about our bill was it really just reaffirmed stuff the courts already could be doing, just as Margaret and Steve were saying. You should use in-camera review, you already can, but it's a great idea. Special masters, if you find something really complicated you can appoint a special master to help you figure it out. You can ask for summaries of information if it would be overwhelming to see the full scope of it.

So, the fact that judges already have this authority but don't want to exercise it, I'll just note, could point us in two reform directions. One is just keep bashing the judges. Pass statutes like the State Secrets Protection Act, which just nudge them all the more so to use the authority they have. Maybe try to appoint some new judges who want to review this material in a more robust manner. Or it could counsel moving away from the courts and just basically realizing that even though they are capable of doing it—as Steve notes, they do it in other contexts––they've shown time and again they don't want FOIA national security review to be a big part of what they do. And if that's a more or less stubborn, if regrettable, feature of our system, that might suggest that Congress needs to do more itself, as far as active oversight. It might suggest that stronger whistleblower protections would be useful, or other affirmative disclosure obligations where executive agencies just have to put stuff out rather than respond to individual requests that can be litigated. At a high level of generality—we're all noting the same problem, which is judicial review—we could say "bad judges, do more," and try to prod them to do that, or we could actually just move away from the courts, if we think what we've really learned from many years of trying to get judges to do more on FOIA is that

[20] S. 2533, 110th Cong. (2007-2008).

it's going to be a very, very hard lift to get them to play the role that many civil libertarians want them to.

Vladeck: I'll say really quickly, I mean, my reaction to that is, can't we have both? Right? Which is to say, I think there's no reason why these reforms are inconsistent with each other. The other piece of this, and I'm curious what Dave and Margaret think about this, is, at least in theory, we now have a larger number of judges who claim fealty to textualism on the bench than was true for a long period of time. So, it seems to me that if Congress were—to borrow Dave's [thought]—to sort of bash the judges a little bit, amend FOIA to make clear that various prior decisions and interpretations were incorrect, and provide clearer access to information in non-FOIA cases, it seems to me that, yes, judges will still resist that. But if we're going to have judges who claim that when this text is clear they have no latitude, my reaction is, well, let's take advantage of that. Right? And let's take that out for a spin. As opposed to the judges who are into more purposive interpretations who could say, "oh, Congress surely didn't mean for us to play such a role in these cases."

Papandrea: Yeah. And I think, David, I read in your work, and probably Steve as well, thinking about affirmative disclosure obligations that don't wait for someone to ask for something. And, this goes to a bigger question I wanted us to talk about. You've given me so much to think about. I know Margaret has written about your work, and I know that provoked her to think a lot about whether we have fetishized transparency, and whether we should rethink how important transparency is. You've really made me think about how transparency, just to be transparent, can't be the way we approach this, we need to think a little bit more thoughtfully. I think in the national security context, that's really important because, as we all know, there certainly have to be some national security secrets that are kept secret, even if judges did their duty to review FOIA requests and so on and so forth. To preserve the ability of this country to defend itself, some secrets are essential. So, I think that your work has particular salience in this area, and I was hoping you could share your thoughts on how we should think about transparency—you're really changing the conversation with your scholarship.

Pozen: Thanks. Well, I'll try to be really brief and just note in recommending affirmative disclosure where agencies just

have to put out certain categories of information even in the absence of a request, I am really building on Margaret who's talked a lot about how that could work. It actually does exist in the FOIA we have to a limited extent, and I think we both think it's a promising general approach to build on, rather than waiting for a request to come in, responding, subjecting it to the exemptions, litigating, and all the other issues we've just raised.

On the bigger issue, Mary-Rose, on how to think about transparency in a democracy, I can't give a very succinct answer, but I'll just say my main argument in some recent work has been no one really thinks transparency is a first order primary virtue of a good society. I think it borders on mysticism to think that it is. Transparency may contribute in important ways to first order values like self-rule and in some kind of deontological democratic sense or effective government performance at delivering important social goods or human flourishing or journalism, you know, accountability journalism that works. There are a lot of things that transparency may contribute to, but, actually, if it's right that transparency is never the goal, it's other things, we need to always ask, how well does transparency serve those other ends? And when we dig into the empirical, experimental, and theoretical literature, which is now global and voluminous, it turns out to be really complicated. When transparency well serves democratic accountability or effective agency performance or pick your primary value, turns out to be highly contingent and contextual. In a lot of cases, transparency can inhibit deal making by members of the legislative branch. It can produce skewed representations of government, as I was suggesting earlier. It can kind of distort more than it reveals. And working through when and how it does that is complicated and probably not something I should get into now. But the big message is, if it's right, that transparency is not something to be reified or fetishized in itself. It's not a first order value of government. There is no theory of a just society or political morality that I know of that would say that transparency is the maximand. It's just an input into other things that we really care about. And then we just have to be kind of relentlessly pragmatic and empirical and always ask well when does transparency produce better or worse government? And that is going to lead us in some cases to want less transparency, actually, and in other contexts, like I think the national security one, to want a lot more.

Papandrea: Could you say just a little bit more, if you don't mind, because I'd love to hear a little bit more of your thoughts, applying your thinking on transparency specifically to national security. You just said something super interesting, which is that maybe we do need more transparency in national security. Part of it is what we were just discussing how we're not getting a lot of information, would you mind saying another word about that?

Pozen: Yeah, I guess this reflects in part my contestable priors, my views about what the world should look like that not everyone will share. But, I tend to think that we should be most concerned about operations of government that are violent, physically coercive, and so there's a kind of, I don't know, liberal primacy of state violence and just what we should worry about. And so that directs our attention to what the national security and law enforcement agencies are doing right at the outset. Second, we have a very well-established historical pattern of over concealment, I think, in the national security and law enforcement context. So, we tend to know that this sort of information about areas where the state is using coercive force and violent force, which we really want to know about, also is an area where the government has persistently shown itself to be unwilling to produce that information. If I were designing a transparency regime afresh, I would think that we would want to home in on the national security area as a kind of starting point for where we need most transparency. In contrast, I'll just note the U.S. regulatory and social welfare agencies—the National Labor Relations Board, HUD, the EPA—these are world historically transparent administrative bodies. They are some of the most accountable and visible regulatory entities the world has ever seen. It's not clear to me that marginally more transparency for them would do good at all. It might actually be perverse and prevent them from promoting environmental protection, civil rights, and their statutory mandates. In contrast, I think our national security agencies are relatively unchecked, have way more money, way more power to do dangerous things in the world. And, so, I would start from there. But that's a crude first pass of an answer, Mary-Rose.

Papandrea: No, that's awesome. Margaret, I want to apologize for failing to give you credit for advocating for some affirmative obligations. So, please accept my apologies. I saw you had written a response or a reflection on David's work

attacking this sort of fetishism with transparency. I would love to hear a little bit more of your thinking on how we should think about what information the public actually needs.

Kwoka: Yeah thanks, and certainly no apology is necessary. This is an open field with lots of people having interesting thoughts about how we should move forward. I think affirmative disclosure is one of them. I want to go back to something that Steve said earlier—why can't we have both, or maybe all, of these kinds of mechanisms is maybe where I come down. Requestor driven transparency does become sort of this burden on regulatory agencies and social welfare agencies. That said, I haven't seen any alternatives that we know of that really do some important things that FOIA does, and that really does lead me to say I think one of the problems with this debate about kind of costs and benefits is that with FOIA, you can sort of maybe take a stab at quantifying the cost, both just in terms of money and personnel time and burden on agencies and other things like that. It may be imperfect, but you can sort of try. With the benefits, it's almost impossible to quantify. What do we say are the benefits of knowledge we get from FOIA requests? Most news stories, journalists, don't show their work. They won't even mention maybe how they got information. So, you don't even know when FOIA or other open records laws at the state level might have played a role. Even when we do know, how do we quantify the benefit the public gets of knowing something? And that's assuming that we're only counting the oversight benefits, and I think it serves some other important roles as well.

But even in its imperfect state, a couple of years ago, I did a series of interviews with journalists who are using FOIA a lot.[21] And one of the things that I found really interesting was that I was trying to group people by what subject matter they were using FOIA to get at. These are, of course, a select group of mostly investigative journalists who have the time to go through this kind of process. One of the three areas I found that journalists were really using FOIA was national security. And it's counterintuitive because of all the things that we just said about how ineffective it is. For example, you're going to have David McCraw on later today, and he'll tell you that the reporter he represents most at *The New York Times* in FOIA cases is Charlie Savage, who's a national security reporter, who does

[21] MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT (forthcoming 2021).

more FOIA requesting than anyone else at *The Times*. I did these interviews sort of seeing how journalists are making use of FOIA and why in this area, and a couple of themes emerged. One is, oftentimes, even if the security agencies themselves, like the NSA or the CIA, are sort of impenetrable with FOIA, adjacent agencies have a role in these matters, and, actually, you can get really useful information. I talked to, for example, Will Parrish at *The Intercept*, who uses FOIA in his reporting routinely and used it extensively at the FAA concerning some issues that were arising at the Dakota Access Pipeline protest at Standing Rock. And Seth Freed Wessler uses it extensively in his investigative reporting. I talked to him about a series he did for *The Nation* about immigrant-only private prisons. So, [using FOIA to request information from] security and law enforcement adjacent agencies has been more successful.

Another theme that came out is that security agencies also don't want to turn over information through non-FOIA mechanisms. So, their public relations office, or their public information officer, or generally their press secretaries, they're not as free turning things over. There aren't actually as many leaks out of those agencies as there are out of non-security, non-law enforcement agencies. So, given that the other mechanisms for getting information from these agencies actually are also more buttoned down, FOIA is oftentimes the only option. I talked to reporters who said, yeah, it's not great, but it's the only thing I've got left. And, so, I do think here we're talking about the only mechanism we have in some instances. It's driven by an outside agenda. Unlike affirmative disclosure, someone doesn't have to preview what journalists might need one day or what might be interesting or what might arise and come up with a category that would encompass all of that. Unlike whistleblowers or leakers, it doesn't depend on the individual decision making of a single government official and their willingness to risk some amount of personal consequence, sometimes great personal consequence, to expose that information or their own view of what the public should know.

FOIA is the only kind of enforceable statutory right where the agenda is set by the outsider, and I don't see a replacement for that. Now, I think that there are a lot of things we could do to be making it work better. And I think a lot of them center on trying to, as Dave said, have it do more of the work we want it to be doing and less of the work that we don't want it to be doing.

I think there are ways we can do that without sort of throwing it out as a mechanism amongst the tools.

Papandrea: You just said a million interesting things, and I wish I could follow up on all of that. But for the sake of time, I'm going to let Steve follow up on whatever he found interesting in what you and David have just said.

Vladeck: And I'd rather hear Margaret talk, but I'll just say really briefly, I think one thing about this is a First Amendment problem, right? I really do think that I go back to Potter Stewart's famous speech *Or Of The Press*.[22] There are reasons why we don't want to overprotect speech with the First Amendment and why one of the ways that we preserve First Amendment values is by neither shielding nor prosecuting, particularly protected behavior. I think that's an important part of the transparency conversation as well. I think what Stewart said was that the First Amendment is neither an official secrets act nor a freedom of information act,[23] and I think that's the balance that is the right one to strike. The reason why I think it has gotten so off kilter is because striking that balance requires active participation by all three branches. So, just to tie these threads together, the balance is messed up because the branch most likely to move the First Amendment toward an official secrets act in that paradigm is the one that today has most of the power.

Papandrea: Do you have any thoughts you want to add before we conclude? And Steve, just staying on you, what sorts of things should Congress be doing that it's not doing? And you can go anywhere you want with that question.

Vladeck: A lot. Just to take a couple of things that I think are relevant to this conversation, I think there should be penalties for misclassification. As of now, the only incentive for wrongly classifying a document is that it gets declassified. That's not what we call a good incentive structure. So, Congress should think about some way of actually putting teeth into classification limits. Congress should reassert its own ability to actually have a role in defining what national security information is and is not. Congress should provide much more expressly for judicial

[22] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).
[23] *Id.* at 636.

review of classification decisions in other contexts, collateral attacks on classification outside of the FOIA context. Congress should overrule a whole bunch of pretty bad D.C. Circuit FOIA decisions that Margaret could probably cite chapter and verse. There are so many things, but they all to me, Mary-Rose, circle around the same core principle, which is reasserting that the national security information is a three-branch conversation, not a one branch homogeneity.

Papandrea: Well, before we turn it to questions, and I snuck a peek at the chat, we have some very interesting questions coming our way. I want to give you guys a chance to, and this will be a lightning round, offer your thoughts on the legacy of the Trump administration and maybe what we can expect under Biden. And so, David, go.

Pozen: I mean, disgrace, brutality. I'm not sure in the transparency area that it's been so notable on FOIA so much as it has been in ramping up assertions of executive privilege vis-a-vis Congress. Kind of consistent with Steve's story of congressional decline, the Trump administration made more sweeping assertions of executive privilege. We're not just going to withhold specific documents, it's whole categories of inquiry we're not going to allow you to pursue. And then Congress went and litigated those disputes rather than just try to directly punish the Trump administration by blocking appointees or not appropriating funds for programs. So, I didn't love the congressional response to Trump administration stonewalling on issues of executive privilege separate from FOIA but connected maybe.

Just one other quick thing, which is on Steve's theme about Congress. I find, Josh Chafetz's work very useful.[24] He has talked about how there are some limited examples of members of Congress using their power under the Speech or Debate Clause in the Constitution, which protects members of Congress from penalty for things they say in carrying out their official duties.[25] He notes, for example, that in the Pentagon Papers[26] controversy, one member of Congress, right around the time that

[24] Josh Chafetz is a Professor of Law at Cornell Law School. *Josh Chafetz*, CORNELL L. SCH., https://www.lawschool.cornell.edu/faculty-research/faculty-directory/josh-chafetz/ (last visited Apr. 26, 2021). Professor Chafetz's scholarship focuses on constitutional law and American politics. *Id.*

[25] *See* Josh Chafetz, *Congress's Constitution*, 160 PA. L. REV. 715, 745–50 (2012).

[26] N.Y. Times Co. v. U.S., 403 U.S. 713 (1971).

the newspapers were breaking the story, took to the floor of Congress and just read into the record some of the most relevant portions of what Ellsberg had leaked without fear of criminal or civil sanction.[27] And he documents how that has dried up. Members of Congress basically doing their own version of declassification, which is constitutionally protected in this manner, isn't something we see happening with any frequency nowadays.[28]

Ron Wyden at points in recent years was crying foul about terrible things that were being done in terms of electronic surveillance of Americans, the kind of stuff that broke with the Snowden leaks. He wrote anguished letters about how upset he is that the American people would be furious if they knew how the executive branch was interpreting various statutory authorities in the surveillance area. But, it didn't seem to be something he was seriously thinking about that he would just go and tell the American people. You know, he'd probably be removed from the Intelligence Committee, but he would have otherwise been free of sanctions. So, just another power of Congress that's sitting there unused. The intelligence committees, also, they have rules that allow them to declassify against executive branch objections information they think has been wrongly declassified. They almost never have used that authority. So, sorry for going on and moving away from Trump.

Papandrea: You all have so many interesting ideas. I'm sorry we don't have all day to spend with this panel. Margaret, do you have any closing thoughts on Trump vs. Biden or anything like that, reflections?

Kwoka: I'll just add that I think one of the legacies that's going to be really hard for us to climb out of is the damage to the reputation of the press and the view of the press amongst the American public. Now, I'm not saying we were at a great place before the Trump administration on this front, but I think there has been a deep cut into the role of the press, the view of the integrity of the press. I don't know how we come back from that any time soon, and I do worry about that legacy.

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[27] Chafetz, *supra* note 25, at 745–50.
[28] *See id.* at 742–53.

Papandrea: I share that same concern. Thank you, Margaret. And Steve, before we go to questions, do you have any thoughts on the legacy of Trump and moving forward under Biden?

Vladeck: Margaret's point is complicated yet further by the ongoing fight over whether First Amendment-like ideas should apply to social media in light of Trump's suspension from Twitter and Facebook and everything else. I think the problem is that we are certainly going to be having a national conversation about free speech principles on social media. But in the wrong direction, from my perspective, and in response to the wrong prompts, where the notion that there's no such thing as bad speech or that the right way to combat false speech is true speech. I think we've seen a lot of evidence that that may not actually be true anymore. Leaving aside Trump to Biden, I think Trump himself is an incredibly complicated inflection point for the First Amendment because even folks like me—who I would never think of myself as a First Amendment absolutist, but certainly err on the side of more speech than less—I'm not as uncomfortable with some of these more restrictive things as maybe I ought to be. I think that's a sign of just how much the conversation has gotten messed up and just how much the dangers of leaving everything to the executive branch going forward have been exacerbated by the administration that was just not beholden to conventional political checks.

Papandrea: Yeah, great observations there. I'm going to turn it over to our symposium organizers to run a Q&A.

McNeil: First of all, thank you so much. This was brilliant, and on behalf of everybody at *First Amendment Law Review*, I am so grateful that you all shared this with us today. I'm going to turn over to some questions now, and I will say to audience members, you can continue to submit questions if you like. But first, let me start with this one: Professor Vladeck just touched on the prepublication review system for books and articles by former military and intelligence officials. But could you elaborate on the concerns with that system and the court cases currently challenging it? How does that fit into this framework and what you've talked about with regards to the courts providing deference to the executive branch? Professor Vladeck, if you would like to talk on that. And then anybody can add on.

Vladeck: Sure. And I'll just use John Bolton[29] as a foil for why the prepublication review process sucks. And I don't mean to put too fine a point on it. The problem is that the prepublication review process is basically almost whatever the executive branch says it is. So, even if the executive branch approves a book like John Bolton's book, and the book goes to the publisher, if they change their mind before the book is out they can just revoke their prepublication review. It's mostly contractual, which is part of why it's so hard for those on the other side to ever prevail in disputes because they've waived most of their rights. But it's contract law on steroids, where basically every presumption is made in favor of the executive branch—the executive branch can change its mind with no sanction, the executive branch can't really be challenged on whether the information it's claiming is sensitive national security information actually is. There's no real mechanism to collaterally attack the assertion that information is not appropriate for publication in the prepublication case review process. So, it's this remarkable thing where powerful people who aren't worried about those sanctions can try it anyway, like John Bolton did, but where the power is all sort of in one direction. And, there's almost no mechanism to push back if the executive branch is blocking publication or objecting to certain information for purely partisan or political reasons as opposed to for legitimate national security reasons.

Pozen: I'll just note there's a lawsuit right now being brought by a group at Columbia, in part, the Knight First Amendment Institute at Columbia University, along with the ACLU, challenging on First Amendment grounds the prepublication review system.[30] In addition to the points that Steve makes, that lawsuit highlights just how much standards seem to vary. Depending on which agency you worked at, you may face a very different prepublication review procedure, and it is very hard to tell what the standards are. So, it's just kind of a

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[29] In 2020, the Trump administration sued John Bolton, a former national security advisor in the administration, trying to prevent Bolton from profiting off of his memoir because, according to the Justice Department, the memoir contained classified national security secrets in violation of Bolton's prepublication review agreement. Maggie Haberman & Katie Benner, *Trump Administration Sues to Try to Delay Publication of Bolton's Book*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/us/politics/john-bolton-book-publication.html.

[30] *Edgar v. Haines: A lawsuit challenging the government's system of "prepublication review,"* KNIGHT FIRST AMEND. INSTIT., https://knightcolumbia.org/cases/edgar-v-haines (last visited Apr. 21, 2021).

labyrinthine and opaque process. And if it's right that FOIA is so weak, much weaker than Congress initially intended in the national security area, that makes it all the more important that other transparency mechanisms can fill the void. The writings of former employees about what they experienced, which come with a kind of time delay for that reason are, I think, generally less likely to be very damaging. These are people who generally have been socialized, at least to some extent, into the bureaucratic culture. They're going through a publisher, that's another round of review, and there's some time lag between what they observed and what they're writing. I think it's a kind of publicity generally that we should want, and, so, I join Steve's criticisms of the existing system of prepublication review.

McNeil: Thank you both. Our next question is, can Professor Kwoka share more about courts tendency to grant substantial weight to the government's position or evidence? Has this been a tendency as long as there has been FOIA litigation, or is it a recent trend? How are those opposing to the government able to overcome the substantial weight given to the government? Professor Kwoka, if you would like to speak to that, and, then again, I'll open it up.

Kwoka: Yeah, absolutely. The "substantial weight" language arises with the national security exemption. In addition to exemption one, which covers classified information,[31] exemption three incorporates other statutory exemptions,[32] and one of them that's notable is a statutory exemption that applies to most CIA information and intelligence information. It's about intelligence sources and methods, which it turns out is defined very, very, very, very broadly. When one of those two exemptions is at stake is when you see that language crop up. In 1974 is when the amendments sort of tried to reify the de novo review for national security cases in FOIA,[33] and it was shortly thereafter that you start to see courts develop this new set of language that says, "yes, the review is de novo, but we grant substantial weight to the government's affidavit describing the factual circumstances that are dispositive to whether the exemption applies." And so, the answer is yes, it's been around for a very long time.

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[31] 5 U.S.C. § 552(b)(1).
[32] *Id.* § 552(b)(3).
[33] *Id.* § 552(a)(4)(B).

And the other, how you can get over it. Frankly, very infrequently. Very, very, very infrequently. That said, there's a couple of things that I think are worth saying about FOIA litigation dynamics that change the calculation a little bit. One is—especially those folks who can litigate because they have the resources for a lawyer, either in-house counsel, say at *The New York Times*, major media outlets who have the resources to litigate or who have found pro bono counsel or something of the like—if you have the resources to litigate, once you sue, everyone sort of agrees that you get a better response. There's a second set of eyes, there's an AUSA government attorney who's representing the agency who's also looking at it, and says come on, you can't really withhold all this stuff. So, there's sort of a backend thing that happens between the agency and their lawyer that improves the quality of the response and increases the amount that's disclosed.

The other thing that I would like to say about FOIA litigation is that a lot of it is winning by losing slowly. Oftentimes if you sue a government, you've asked for a category of records––all records mentioning, relating, pertaining, talking about, referencing blah, blah, blah subject matter, whatever it might be, like the Unabomber. Then the question is, what do you start to get as the litigation proceeds? Once you sue, oftentimes the government says, okay, well, we'll give you this stuff, but we're still withholding that. Then you might negotiate a bit more, then release a bit more. By the time you get to summary judgment, your dispute may have been narrowed down to a very small amount of records. And along the way, you might have gotten a lot of what you want, and then you'll lose. But you got a lot of what you want before you lost. So, I think just looking at the point of judicial decisions in FOIA is too myopic a view of what the potential is there.

McNeil: Thank you. I'm going to read two questions at once because I feel that they will be cohesive. What kinds of reformations would you like to see in the judiciary to ensure that the executive is not given excessive deference in national security issues? And would creating more transparency in the FISA Court help? And then the other question is, if FOIA doesn't work as well as we hope it would and the courts and Congress are deferential to the executive branch, is there any way to check the executive's power in national security matters? It's a little scary thinking that the executive has such control and is only being

checked by the secretive FISA Court. Professor Pozen, since I haven't started with you yet, or actually, Professor Vladeck, you're unmuted. So, I assume you want to talk.

Vladeck: David can go first.

McNeil: Okay, Professor Pozen, and then we can hear from Professor Vladeck.

Pozen: There are various ways I could go with that. How to make the courts do more I think is a really tough puzzle because if the underlying reason why they're not doing more already has more to do with their preferences and incentives than with tools that Congress could give them, as I think it does, then it's hard to solve a problem that comes more from judicial psychology, motivation, reputational incentives or the like. Then I think we, both civil society and Congress more importantly, could nudge the courts to really do something more like de novo review, do more in-camera review. At a minimum that could be mandated. Rely on special masters and the like. The substantial weight piece that Margaret was talking about, that's from a committee report. And Steve was noting how atextual judges are being—perhaps ironically, in the case of textualist judges here. The statute says de novo review; it's actually a committee report that's being used to vitiate Congress's words.

Beyond that, I'll just note that there are other models of getting at executive branch national security information other than FOIA and judicial review. I think congressional oversight is a huge one that could be ramped up. There are inspectors general within the executive branch, but quasi-independent, who have already grown in significant numbers in recent decades and could be relied on even more extensively. There are leaks and whistleblowing. So, I don't think we're trapped in that kind of FOIA or bust, judicial review or bust, binary. I think there are these models which have been to some extent developed in recent decades, but I think FOIA gets so much of the attention in these transparency conversations, sometimes to the neglect of these other mechanisms.

McNeil: Professor Vladeck, do you have anything to add?

Vladeck: No, I mean, I agree with David. I don't think we have to put these things in contest with each other. I think it's all swimming in the same direction of providing more accountability for the executive branch's assertions in this space.

McNeil: I think that we are going to end on this one final question. If citizens have to go through FOIA to obtain federal agency records that are not harmful to national security or other exemptions, such as certain records from an agency like Fish and Wildlife, is it feasible for agencies to make these records publicly available on their websites or create a separate online government database that the public can access? Could this help decrease the amount of FOIA requests and lawsuits and help return FOIA to some of its intended purposes, like national security? What are the concerns about affirmative disclosure? I'll open it up to anybody who wants to start.

Pozen: I think Margaret should lead us here.

Kwoka: Yes, absolutely, is the short answer. And, in fact, this is something I've spent really a lot of time writing about—you know, there is currently no mandate, incentive, or money to do that. But if there were, and I think there's various ways one could design those things to be operationalized, it would make a huge difference. So, I'll give you a couple of examples that support exactly the point that the question raises. So, for all of these businesses that are requesting information from the government, lots of them are just—by lots I mean thousands of requests at many agencies, at EPA, at the SEC, at FDA, big regulatory agencies in particular—they are routine. The FDA gets thousands of requests every year for their facilities inspection reports. It's just a different inspection every time, but they could just post a database of all their inspection reports. The SEC gets thousands of requests for publicly filed documents that were originally under a confidentiality order and that's expired. They could just be published online. So, for some of these things we could make this whole category of records affirmatively available and preempt the need for those requests.

The other piece of that is for individuals requesting their own files. Most of them are actually immigration files. So, DHS now gets more than half of all FOIA requests in the federal government—medical files, law enforcement files, family histories, a lot of genealogy going on in FOIA. We could find

other mechanisms for people to get their own records, including administrative discoveries. For example, any of you who might be interested in immigration, in removal proceedings there is no administrative discovery. So, the only way you can get the government's file is through FOIA. We could look at other things that are non-FOIA reforms that would preempt the need for all these folks to resort to FOIA as a really second best [mechanism]. Most of these folks aren't well served by FOIA either. It's just that they don't have an alternative.

The last part was what are the concerns about this? The real concern is just that agencies have no incentive structure to make these kinds of changes. And I think there's ways that we could structure incentives, but there hasn't been any push in that direction.

Pozen: I'll just add really briefly that I agree with everything Margaret said. Where affirmative disclosure can realistically be done, I think we should be looking to do more of it. I would just note that it's political economy and kind of sociology are different from FOIA requests. It's not so easily weaponized. You know, the most well-resourced entities like regulated firms in FOIA, they have a tool with which they can get basically extremely cheap discovery with no limits on relevance. They could just ask for everything in an attempt to needle their overseers and kind of find out things with which they can threaten to sue regulators, and FOIA we've seen weaponized in a lot of contexts by regulated entities. That's not so easy to do with affirmative disclosure, nor do you need deep pockets to use affirmative disclosure. So, who's benefiting and who's losing? The profile looks different and, I think better, when you have affirmative disclosure. And, the sociology point, FOIA introduces a kind of adversarial dynamic in the relationship between citizen and government. You want something, you demand something from government, and you threaten to sue them if they don't provide it. There's some maybe European scholarship on how this creates a kind of anti-governmental, anti-statist gloss to it, the way that you're invited to see the government as your litigation opponent through a mechanism like FOIA. Affirmative disclosures, the government on its own is proactively giving you stuff you might want, and it has a different kind of sociological valence. So, I am all for affirmative disclosure where it can be done.

McNeil: Thank you all so much. This was so impressive and such a wonderful experience. Dean Papandrea, do you have anything you want to add?

Papandrea: Just that was an hour of heaven for me. So, thank you so much for coming to hear the three leading experts in this area. This discussion really made my year. So, thank you.