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TWENTY
YEARS

THE NEW ERA
OF SECRET LAW

Elizabeth Goitein

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NOTE: *While this report concludes that intelligence agencies have generated a large body of “secret law,” officials representing some of these agencies – in particular, the Office of the Director of National Intelligence (ODNI), the National Security Agency (NSA), and the Department of Justice (as attorneys for the intelligence agencies) – were extremely forthcoming and generous with their time in providing information during the research phase of this report. The author is grateful for their assistance, and considers it to be one manifestation of the increased engagement between the intelligence community’s leadership and civil society in recent years. It is the author’s hope that this engagement will continue and will yield significant and tangible reductions in unwarranted government secrecy in the years to come.*

INTRODUCTION AND EXECUTIVE SUMMARY

On June 8, 2004, *The Washington Post* revealed the existence of a previously secret memorandum drafted by the Department of Justice's Office of Legal Counsel (OLC), which concluded that the laws prohibiting torture did not bind officials interrogating suspected members of Al Qaeda or the Taliban. This was the first in a series of legal opinions that became known as the "torture memos." These documents parsed the domestic and international laws against torture and, in seeming contradiction to their plain terms and historical implementation, determined that they posed no barrier to a presidentially-ordered regime of waterboarding, so-called "stress positions," slamming against walls, exposure to extremes in temperature, and sleep deprivation.

Nearly a decade later, *The Guardian* broke a different story: the Foreign Intelligence Surveillance Court, also known as the "FISA Court," had been secretly authorizing the National Security Agency (NSA) to collect the phone records of all Verizon Business customers — and almost certainly the customers of every other major telephone company — since 2006. This appeared to violate Section 215 of the Patriot Act, which allowed the NSA to obtain such records only if it could show the FISA Court they were relevant to an international terrorism or foreign intelligence investigation. The court, it turned out, had secretly interpreted this law to allow the collection of vast amounts of *irrelevant* records, as long as relevant ones were thought to be buried within them.

What these stories had in common was the government's reliance on "secret law." Both the OLC memos and the FISA Court opinions were authoritative legal interpretations: while they were in effect, they had the same legal force as the statutes they interpreted. Both were concealed from the public and shared with only select members or committees of Congress. And both construed the law in a way that was at best counterintuitive, resulting in a dynamic where the law on the books misled the public, rather than enlightening it, as to the rules the government was actually following.

Americans intuitively understood that this was wrong. In 2008, a subcommittee of the Senate Judiciary Committee held a hearing on "secret law," culminating in the introduction of a bill that would have required OLC to notify Congress when it concludes that a statute does not constrain the executive branch. Although the full Senate never considered the bill, the secrecy of OLC opinions has remained controversial, and efforts to pry them loose through Freedom of Information Act (FOIA) lawsuits continue. In 2015, Congress required the Director of National Intelligence to make public significant FISA Court opinions, in redacted or summarized form where necessary.

Yet despite the instinctive backlash against secret legal opinions by OLC and the FISA Court, there is much about secret law that remains poorly understood. What qualifies as "law" — and, for that matter, how "secret" the law must be in order to raise concerns — are threshold questions that have received little attention. Similarly, few are familiar with the role secret law has played in U.S. history, which provides critical context for the phenomenon we are seeing today. And while the term "secret law" prompts visceral discomfort, it is important to understand *why* secret law is of greater concern than other forms of government secrecy that we tolerate and even condone. The objections to secret law should be articulated, not assumed.

Most of all, there is scant public understanding of the depth and scope of the problem. OLC opinions and FISA Court opinions are the only two manifestations of secret law that regularly make headlines. But OLC and the FISA Court are not the only government entities that make law. Moreover, the factor driving secrecy in OLC and FISA Court opinions — namely, a dramatic increase in the scope of national security activities and authorities — is a potent force throughout much of government. How common is security-driven secret law, and where else is it occurring?

Solving the problem of secret law raises its own set of questions. Are there cases in which disclosure of rules or legal interpretations, even with sensitive facts redacted, could harm national security? How great is that risk, and how does it compare with the harms of secret law? What procedural and substantive reforms could help ensure that the public's interests in both the transparency of laws and the security of the nation are best served?

This report attempts to shed light on these questions, beginning with the foundational inquiry into what secret law is.

Understanding Secret Law

“Law” itself is not easily defined, and there is no simple test to distinguish a law from a policy, guideline, or interpretation. Without question, though, “law” reaches beyond commonly known examples, such as statutes or court opinions, to include any government pronouncement that is treated as binding and that sets a standard for future conduct. As for “secrecy,” it is rarely absolute — a law known to just one person would be of little use — but the disclosure of laws to select members of Congress, or to judges in closed chambers, does not serve the same function as public disclosure. Lawmakers have less incentive to perform rigorous oversight when their constituents are not watching, and judges who hear only from the government are less likely to reach the correct result. Given the inherent practical limits of secret oversight, this report treats as “secret” any law withheld from the public.

The United States does not have a tradition of secret law. To the contrary, a commitment to transparency took root early in the nation's history and has for the most part remained strong; but it has faced three major systemic challenges. The first two — difficulties with publishing and distribution in the 19th century, and the genesis of a new form of agency-made law in the early 20th century — were logistical in nature. The secrecy resulting from them was accidental, and the problems largely solved by legislation. The third challenge, which emerged after World War II and intensified after 9/11, is the rise of the national security state. This challenge is different in kind: it has resulted for the first time in the systematic and deliberate concealment of law.

Why should this concern us? The objections to secret law fall into three main categories: philosophical, constitutional, and practical. Legal philosophers disagree on many issues, but there is strong support for the idea that publicity is an essential attribute of the law. Many of the law's most important qualities — such as consistency, durability, and the power to command or forbid action — depend on its being known. Above all, publicity gives law its moral authority and legitimacy.

The constitutional arguments reinforce the philosophical ones. The rights described in the First Amendment are not only ends in themselves, but tools for meaningful self-governance, which are blunted when the government withholds information. Similarly, the Constitution gives the people the right to elect their representatives and guarantees a republican form of government; but the promise of democracy is hollow if the government can shield its actions from the electorate. And, while the design of the Constitution suggests that some level of secrecy within the executive branch may be tolerated or even protected, it assumes openness on the part of the legislature. Given the respective functions of those branches, it appears the framers envisioned that the law would be public, even if its implementation might on occasion be hidden.

Legal and constitutional theory aside, secret law causes a range of practical harms. When people do not know the law, they cannot urge their representatives to support, oppose, or modify it, nor can they hold the government accountable for violating it. Government actors are aware of this *de facto* immunity, and it creates a moral hazard in which abuses are more likely. Secrecy also inhibits the process by which law ordinarily is made and refined. When laws and legal interpretations are developed without the benefit of input by outside experts and stakeholders, their quality suffers. When secrecy prevents these substandard laws from being reviewed by Congress or the courts, there is no opportunity to correct or improve them.

Many of these same harms can result from government secrets of all kinds, not just secret law. But law is different. It is both more durable and more general than other types of government action: it constrains or authorizes government action across a range of circumstances for (usually) a long period of time. It also serves a function of political self-definition that the individual actions of government actors do not. The law is meant to express the values and norms held by a society. Secret law alienates people from the society in which they live.

Despite these considerable downsides, some might argue that secret law is nonetheless necessary when national security is at stake. This claim must be subject to close scrutiny. While some legal opinions are written in a manner that commingles sensitive operational details with legal analysis, this is not inevitable. If disclosure were mandatory, the authors of legal opinions could write them in a way that would facilitate disclosure, as recent FISA Court opinions have shown. As for rules and regulations — which are created to provide generalized direction, and so do not include names, dates, times, targets, sources, or other details of specific operations — there should rarely be a legitimate need to redact or withhold them.

Surveying Secret Law

After addressing these foundational issues, the report turns to the empirical questions of where secret law is occurring and how much of it there is. It identifies nine areas, across all three branches of government, in which national security has generated a significant amount of secret law. It describes the nature of each type of secret law and highlights known examples that illustrate why secrecy should cause concern. Relying on a combination of public information, interviews and other communications with government officials, and responses to FOIA requests, it attempts — where possible — to provide some indication of how prevalent particular forms of secret law are.

Due to the inherent limitations of the process, the report makes no pretense of presenting a complete or precise picture of any one category of secret law, let alone all of them. A rigorous scientific analysis is simply not possible without the government's cooperation and involvement; for one thing, FOIA provides access only to existing records, and agencies do not systematically document their own levels of secrecy. Nonetheless, even the partial information obtained suggests that secret law is more common than most Americans would imagine.

Legislative Branch

- Congressional committees routinely issue reports containing classified information to accompany intelligence and defense bills. On occasion, the bills incorporate provisions of classified reports by reference, bestowing on them the status of law. There is evidence that some of these incorporated provisions include not just funding or personnel allocations, but substantive regulations. There has been a sharp rise in this practice in recent Congresses.
- Secrecy is the norm when it comes to the legislative histories (including hearings and mark-ups) generated by Congress's intelligence committees. As a result, actors inside and outside government may have varying understandings of the law's meaning, resulting in confusion and inconsistency.

Executive Branch

- Presidents issue national security directives that have the force of law and can have significant impact on the rights and interests of ordinary Americans. In recent decades, the number of these directives has declined, but the rate of secrecy has not: in each administration, a substantial majority of national security directives were withheld from the public when issued. In addition, while executive orders — another form of binding presidential directive — are all published, the president may “modify” or “waive” them simply by departing from their terms, without providing any notice to the public.
- OLC issues legal interpretations that are binding on the executive branch. Documents obtained under FOIA show that at least twenty percent of OLC opinions issued between 1998 and 2013 were classified and therefore unavailable to the public. OLC also produced documents showing that at least 74 opinions, memoranda, or letters issued between 2002 and 2009 on national security topics that include the detention and interrogation of suspected terrorists, intelligence activities, and the law of armed conflict remain entirely classified.
- The Administrative Procedure Act requires agencies to give notice of proposed regulations and invite public comment, while FOIA requires agencies to publish the final rules in the Federal Register. A review of Federal Register entries for the past two decades shows that many intelligence agencies have stretched the national security exceptions in these laws, exempting nearly the entire substantive body of rules and regulations governing their activities.

- The vast majority of binding agreements between the United States and other countries are in the form of “congressional-executive agreements” pre-authorized by Congress, rather than treaties ratified by the Senate. Like treaties, these agreements may touch on the interests of Americans, yet many of them are classified. Documents obtained by the Brennan Center through FOIA litigation show that the U.S. entered into 807 secret agreements with other countries between 2004 and 2014 — comprising 42 percent of the international agreements concluded during this time period.
- The immigration court system is located within the executive branch and operates with much less transparency than Article III courts. After 9/11, the Justice Department closed the proceedings in a category of so-called “special interest” cases. Records obtained through FOIA show there were nearly 800 such cases, resulting in the deportation of more than 500 people. In 2002, the Department replaced this practice with a regulation allowing the government to obtain protective orders on a case-by-case basis. Despite clear evidence that such orders have been issued, the agency that litigates these cases claims it can find no record of them.

Judicial Branch

- Anecdotal evidence suggests that post-9/11 national security-related litigation has led to a rise in the sealing or redacting of opinions. Many decisions in Guantánamo detainees’ *habeas corpus* challenges have been redacted to the point of incomprehensibility. As a result, only those individuals with the relevant security clearances fully understand the legal standard for wartime detention. A similar (if less dramatic) pattern has emerged in cases involving foreign intelligence surveillance and other national security matters.
- After 9/11, the FISA Court, which previously ruled on government applications to conduct surveillance in individual cases, began issuing opinions that authorized and set the legal terms for programs of mass surveillance. Almost all of these opinions were classified. After Edward Snowden’s disclosures in 2013, the Director of National Intelligence released many of the court’s previous opinions. However, through FOIA requests and communications with Department of Justice officials, the Brennan Center has ascertained that most of the significant pre-Snowden FISA case law remains undisclosed, including 25-30 still-classified opinions or orders issued between mid-2003 and mid-2013 that were deemed significant by the Attorney General.

In short, there are significant pockets of secret law across all three branches of government, including some areas — such as presidential national security directives and the rules and regulations of many intelligence agencies — where secrecy dominates. The quality of these laws and interpretations almost certainly suffers as a result of their secrecy, and the agencies that issue or follow them are less accountable to the people they serve. The necessity for this level of secrecy in the law has never been proven; we can do better, and the Constitution arguably demands it. Secret law must once again become the rare exception to the rule.

Reforming Secret Law

The report recommends six reforms that could rein in secret law across all three branches:

- Decisions to withhold legal rules and authoritative legal interpretations from the public should be made by an inter-agency body of senior officials. Such a group has long existed to resolve appeals when agencies deny requests by members of the public to declassify particular documents. Its record suggests that peer agencies bring a healthy skepticism to one another's secrecy claims.
- The standard for keeping law secret should be more stringent than the current standard for classifying information. The constitutional stakes are higher for law than for other types of government information, and routine overclassification suggests that the current standard affords too much discretion in any event. Legal rules and authoritative legal interpretations should be withheld *only* if it is highly likely that their disclosure would result, either directly or indirectly, in loss of life, serious bodily harm, or significant economic or property damage.
- Certain categories of law should never be secret. The disclosure of pure legal analysis, containing no sensitive facts, cannot harm national security. Legal interpretations that purport to exempt the executive branch from compliance with statutes or that stretch statutory terms beyond their ordinary meanings also should not be secret, because the harm to the rule of law, separation of powers, and self-governance is too great.
- When the executive branch issues secret law, it should immediately share the law with the other branches and with independent oversight bodies. There is no valid national security reason to avoid this critical checking mechanism, as there is no evidence that Congress or the courts are more prone to leaks than the executive branch.
- Indefinite secret law is constitutionally intolerable. There should be a four-year time limit on the secrecy of legal rules and authoritative legal interpretations. Renewals should require the unanimous approval of the inter-agency body charged with making secrecy determinations. Two renewals should be permitted, creating an effective 12-year ceiling on the secrecy of laws.
- Americans should know how much secret law exists and the general areas where it is being applied. Each government body producing secret law should be required to make public an index that lists all of the secret rules and interpretations by date, general subject matter, and any other information that can be made available.

Together, these reforms could help ensure that the law is withheld from the public only when the risk to national security outweighs countervailing harms. But we must be vigilant, as secrecy in government is notoriously difficult to contain. If government indexes show that these reforms are failing to curb secret law, they should be revisited, and tighter restrictions — perhaps even a flat prohibition — should be imposed. The time has come to move past the modern era of secret law and return to the nation's historical commitment to legal transparency.

I. UNDERSTANDING SECRET LAW

It is an extremely painful thing to be ruled by laws that one does not know.

— Franz Kafka, *Parables and Paradoxes*¹

Secret law has been condemned for as long as it has existed — that is, throughout history.² It has generally been associated with repressive regimes; in modern democratic societies, people intuitively understand that “[t]he idea of secret laws is repugnant”³ and that their existence is “an abomination.”⁴ In past decades, this intuition led to the enactment of several statutes in the U.S. designed to ensure public disclosure of laws.

In recent years, however, secret law has again reared its head in forms that are more difficult to recognize and confront — in large part because the context is often national security policy, where operational secrecy has long been the norm. To address this more complex phenomenon of secret law, basic intuitions will not suffice. A deeper understanding is needed of what constitutes secret law, its history, its legal and practical implications, and the differences between secret law and secret *implementation* of the law.

A. What Is Meant by “Secret Law”?

In part because the term “secret law” carries such moral weight, it is important to be clear about its definition. Not every pronouncement that guides government action but fails to appear in the United States Code or Code of Federal Regulations is a secret law. On the other hand, the concept of law is broader and more fluid than some might imagine, and secrecy is rarely absolute. Exploring the meaning of these terms will facilitate an understanding of secret law’s significance.

1. What Is “Law”?

Law comes in many forms, some of which are easy to recognize. A statute passed by both houses of Congress and signed by the president is the most obvious example. Another clear example is a regulation adopted by an agency, pursuant to congressional direction, that requires private citizens to take some action (such as filing certain tax forms) on pain of civil or criminal punishment.

A less obvious category is the law made by judges. Congress often frames legislation in general terms to apply to a range of cases. Accordingly, even the most plainly worded statutes may require judicial interpretation in the course of applying them to specific facts. In the U.S. legal system, appellate courts’ interpretations acquire precedential value: they become a part of the statute’s meaning. A statutory interpretation by the U.S. Supreme Court, for example, is binding on all other courts unless overturned by Congress, while an interpretation of the Constitution by the U.S. Supreme Court is the law of the land. Even though it is a frequent refrain in some political circles that judges should not make law, that is in fact what judges must do in a “common law” system, in which courts not only adjudicate individual disputes but generate a body of precedent to guide future decisions.⁵

Perhaps the most ambiguous category of law consists of executive branch pronouncements that govern official action but do not prescribe penalties or otherwise include an enforcement mechanism. Consider, for instance, an agency's guidelines for foreign intelligence surveillance operations; they may be written in a way that suggests an expectation of compliance (using terms like "shall" and "will," rather than "should" or "may"), yet they may create no private right of action — i.e., no right to sue — and no administrative penalties for violations. Is this set of guidelines "law"? Or is it simply a statement of policy?

The line between law and policy is, in fact, surprisingly indistinct. Courts have grappled with it when applying the Administrative Procedure Act (APA), a statute that requires agencies to give notice and invite public comment when adopting so-called "substantive rules," which have the force of law, but not when adopting "general statements of policy," which do not.⁶ They have generally held that the distinction turns on the binding nature of the agency's action.⁷ As one federal appeals court put it, "whether the agency action binds private parties or the agency itself with the 'force of law'" turns on "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding."⁸ The test is somewhat circular — a pronouncement has the force of law if it appears to have the force of law — and its application is not always straightforward.

The Freedom of Information Act (FOIA) notably eschews this line-drawing exercise. The first subsection of the Act requires agencies to publish certain types of information in the Federal Register "for the guidance of the public";⁹ the Supreme Court has described this part of FOIA as manifesting "a strong congressional aversion to secret (agency) law" and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law."¹⁰ Under this subsection, "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" are addressed together as one category of information that must be published.¹¹

In addition to its binding quality, another characteristic of law is that it sets standards for future conduct rather than simply ordering an action. The APA's definition of "rule" is instructive: it includes "the whole or part of an agency statement[s] *of general or particular applicability and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."¹² Although the words "or particular applicability" have caused some confusion, experts in administrative law believe that Congress included them to clarify that rules may be directed at a very small number of people.¹³ Thus, in the words of one scholar, "a rule is a legal standard to be applied prospectively to a class," regardless of the class's size. Similarly, "law" may be understood as setting general standards for future conduct, which may in practice govern a single action or thousands.

Many of the specific types of secret law addressed in Part II of this report are self-evidently law under the "binding effect" and "general or particular applicability and future effect" tests. Where there may be some question, the report endeavors to explain why these instruments should be considered law or, at a minimum, why they fall into the category of information that must be published under the "anti-secret-law" provision of FOIA.

2. When Is Law “Secret”?

Having examined what makes law “law,” the concept of “secret” may seem straightforward by comparison. But as one scholar has noted, “there is a vast space between total public disclosure and maximal internal stealth, between sunlight and darkness.”¹⁴ Information may be known to a small number of people within a single executive branch agency, a larger number of people within that agency, or multiple agencies. The executive branch may share the information with certain members of congressional committees, the full committees, or the full Congress. It may release the information to the public in summarized or redacted form, or in full.

Many of the harms that flow from secret law (discussed in detail below) are more pronounced when the number of people who are privy to the law is smaller. For instance, the risk of developing ill-considered legal interpretations that reflect institutional bias or “groupthink” is greater when only a handful of executive officials are involved in formulating them. The opportunity to correct such mistakes disappears when the law itself is kept within this small group. Such close holds also prevent the other branches of government from exercising their constitutional function of providing checks and balances.

The administration of President George W. Bush thus came under criticism for relying on a small cadre of like-minded officials to develop its torture and warrantless surveillance programs and the legal interpretations on which they relied. Time after time, “[t]he policymaking process was . . . rigged to block informational pathways that could have subjected deep secrets to additional forms of scrutiny and revision.”¹⁵ In one famous example, the Department of Justice refused to share its legal justification for the NSA’s warrantless surveillance programs with the NSA’s General Counsel.¹⁶

Few observers believed that the Obama administration would continue this way of doing business. In 2015, however, *The New York Times* reported that the legal justification for the 2011 raid that killed Osama bin Laden was developed by four administration lawyers who “worked in intense secrecy” and were not allowed to consult even Attorney General Eric Holder.¹⁷ While a straightforward application of well-settled law might not require extensive consultation, that is not the task these lawyers faced, as they were required to “stretch[] sparse precedents” to reach their legal conclusion.¹⁸

Recognizing the value of widening the circle even incrementally, some scholars have endorsed something between the small cadre approach and full public disclosure as a solution to executive branch secrecy. Heidi Kitrosser, a professor at University of Minnesota Law School, has focused on ways to improve the executive branch’s “funneling” of information to “discrete groups” within Congress.¹⁹ Harold Hongju Koh, a professor at the Yale Law School and former State Department Legal Adviser, has argued that the administration should submit particularly controversial legal analyses to the intelligence committees, and has proposed other means to strengthen congressional oversight of national security activities.²⁰ Neal Katyal, a professor at Georgetown University Law Center and former Acting Solicitor General of the United States, has underscored the importance of checking mechanisms *within* the executive branch, given Congress’s failure to serve as an effective check.²¹ David Pozen, a professor at Columbia Law School, has posited a “nested structure” whereby disclosure to other branches of government can replace public disclosure where necessary; deliberation among agencies can substitute where disclosure to other branches is “not feasible”; and more robust deliberation within an agency can be pursued as a last resort.²²

Such approaches may hold promise, but they are not a complete solution to the problem of secret law. For one thing, while they might mitigate some of the harms caused by extreme secrecy — such as low-quality legal reasoning and the erosion of constitutional checks and balances — they cannot vindicate the public’s right to petition for redress of grievances, to elect representatives who share their view of the law, or to hold the government accountable in court for legal violations.

Furthermore, solutions that rely on disclosures to congressional committees raise the question of how effective *secret* legislative oversight can be. In a democracy, we expect members of Congress to respond to the will of their constituents and supporters. If they fail in this, legislators know they can be held accountable. The calculus changes when oversight happens behind closed doors. As observed by Jack Goldsmith, who led the Justice Department’s Office of Legal Counsel under President George W. Bush, intelligence committees have little incentive to pick secret battles with the executive branch on national security issues.²³ There are no political rewards to these fights — no victories to splash across constituent newsletters, no legislative favors to dole out to donors. On the other hand, there are political risks: if a terrorist attack were to occur, any actions members had taken to limit the executive branch’s exercise of national security authorities surely would come to light. Under these circumstances, it is unrealistic to think that committee oversight can stand in for broader transparency.

Finally, requiring the executive branch to share its own laws and legal interpretations more widely would not address the problems of secret legislation or secret court opinions. Until a recent study by Dakota Rudesill, a professor at the Ohio State University Moritz College of Law,²⁴ secret legislation was a little-known and unmeasured phenomenon, and there are still no good data on secret court opinions. As shown in this report, however, secret law is a problem across all branches of government.

In short, there is no question that secrecy has gradations. But by the same token, solutions to secrecy may be more or less effective, and a solution that requires only partial disclosure is almost surely a partial solution. This report therefore includes under the banner of “secret law” any law that is withheld from the public, regardless of whether it may be shared among agencies or with certain members or committees of Congress.

B. A History of Secret Law in the United States

The idea that law must be made public has ancient roots. One of the earliest deciphered writings in existence is the Code of Hammurabi, the Babylonian law code of ancient Mesopotamia, consisting of 282 laws inscribed on a man-sized stone and dating back to about 1758 BC. Partial copies of the code, inscribed on clay tablets, have been discovered in various wide-ranging locations.²⁵ The Roman law tradition also embraced public law, beginning with the publication in 450 BC of the Twelve Tables—a set of laws “inscribed on ivory tablets” and placed before the rostra (a large public platform) so that the people could see them.²⁶ The Code Napoléon of 1804 provided that laws promulgated by the Emperor will be “binding on every part of the territory so soon as their promulgation can be known.”²⁷ Even some of history’s most famously autocratic leaders — such as Draco of Athens and Louis XVI of France — stood behind the principle of public laws.²⁸

That said, deliberate attempts to hide the law have an equally long pedigree, generally associated with repressive regimes. The legal historian William Blackstone wrote that the Roman Emperor Caligula promulgated his laws “in a very small character, and hung them upon high pillars, the more effectively to ensnare the people.”²⁹ The Nazi regime’s rumored practice of maintaining secret laws spurred an ongoing philosophical debate among legal scholars about the very nature of law.³⁰ In the Soviet Union, many criminal, environmental, and agricultural laws and regulations were either kept secret or subject only to limited disclosure.³¹

The United States’ own history reflects an early and robust commitment to making the law publicly known and available.³² However, certain periods stand out as exceptions. There have been three systemic challenges to the norm of openness. The first two were logistical in nature — they did not reflect a deliberate intent to conceal the law — and were largely resolved through practical solutions. By contrast, the third challenge, which arose in the mid-20th century and is particularly acute today, involves the government’s purposeful maintenance of secret law in areas touching on national security.

1. Commitment to the Transparency of Laws

In its infancy, the nation adopted accessibility and openness as fundamental norms of the lawmaking process.³³ Although the 1787 Constitutional Convention itself was held in secret, the founders who attended it emphasized the importance of public access to the laws and records of the federal government they were creating. “The people have a right to know what their Agents are doing or have done,” argued James Wilson, speaking at the Convention, “and it should not be in the option of the Legislature to conceal their proceedings.”³⁴ The Federalist Papers underscored that the law must be stable and understandable, in order to ensure its accessibility to the public:

[I]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?³⁵

The First Federal Congress, which met in 1789, thus mandated that a copy of every “law, order, resolution, and vote . . . be published in at least three of the public newspapers,” and that copies be sent to each governor.³⁶ In addition, although the Senate met in closed session until 1795, both chambers were regularly meeting in open session by 1800.³⁷

There were some notable exceptions to this norm of openness in the Republic’s early years; these (not surprisingly) centered on military and foreign affairs. In 1795, the Senate secretly approved a treaty between the nascent Republic and England, and voted to bar any member from copying or disclosing it.³⁸ Around the War of 1812, Congress passed — but did not publish — three statutes regarding the occupation of disputed territory in Florida, along with a resolution that the first two statutes “not be printed or published, until the end of the next session of Congress, unless directed by the President.”³⁹ These laws did not become public until 1818, when Congress passed a law once again mandating “publication of the laws of the United States.”⁴⁰

Notwithstanding these early incidents, efforts to ensure transparency and accessibility prevailed and endured as the government expanded over the 19th century. To help make an increasingly robust and complex body of law available to the public, Congress broadened the distribution of government records and created centralized compilations of federal statutes. Starting in 1800, in addition to publishing enacted laws in three national newspapers, lawmakers required all new laws “to be published in at least one of the public newspapers printed within each state,” and up to three if a single newspaper was insufficient to keep inhabitants informed.⁴¹ Another law authorized the publication of 5,000 sets of the statutes enacted during each session of Congress, 4,500 of which were to be distributed among the states and made available in a “fixed and convenient” location within each county, such as a library or statehouse.⁴²

2. The 19th Century Challenge: Achieving Efficient Printing and Distribution

In the first half of the 19th century, the goal of transparency came up against the cost, logistics, and politics of getting laws printed and distributed. The government was largely reliant on private contractors who provided printing services on an *ad hoc* basis.⁴³ Legislative and executive branch printing contracts were often awarded to friends and allies in the printing trade, many of whom regularly failed to deliver on promised services.⁴⁴ Fifty years passed before a printer was secured to complete publication of the 5,000 sets of statutes called for by Congress.⁴⁵

To address these problems, Congress created the Government Printing Office (GPO) in 1860.⁴⁶ The GPO consolidated printing for all three branches of government and significantly increased the public availability of federal laws and other official documents.⁴⁷ With the passage of the Printing Act in 1895,⁴⁸ the office became responsible for all federal printing, as well as the distribution to libraries throughout the country designated as depositories.⁴⁹ By the turn of the 20th century, “[f]ederal law was available to anyone desiring to examine it,” government analyst Harold Relyea explains, and “publication was routine, largely systematic, and continuous.”⁵⁰

The transparency of judicial opinions underwent a similar evolution. The Supreme Court originally relied on private reporters to record and publish its rulings.⁵¹ In 1817, Congress passed a law to require the hiring of a professional reporter, who would report all Supreme Court decisions within six months of issuance and distribute them throughout the government.⁵² Public access to lower court decisions remained sporadic, however, until Congress established the GPO. The GPO’s mandate includes the publication of judicial opinions; private reporters also greatly increased their coverage, and indeed, they remain the dominant source of court reporting today.⁵³

3. The Early-to-Mid 20th Century Challenge: The Rise of the Administrative State

The next challenge to the transparency of laws was brought about by the rise of the administrative state in the first part of the 20th century. A proliferation of new agencies, issuing social and economic regulations and adjudicating the rights of private parties, resulted in a new kind of law. At first, there was no legal requirement for publication of agency regulations and decisions, and no system for registering or distributing them.⁵⁴ The public and even government officials were often in the dark as to the enactment and repeal of specific administrative laws.⁵⁵ The system was so confused that the government

even brought several cases before the Supreme Court based on laws or regulations that did not exist or had been revoked.⁵⁶

Lawmakers addressed these problems with a trio of laws, beginning in 1935 with the Federal Register Act,⁵⁷ which requires all rules and regulations to be published in an official periodical known as the Federal Register. In 1946, Congress — driven in part by conservative fears of the New Deal, totalitarianism, and federal agencies run amok⁵⁸ — further promoted transparency and accountability through the Administrative Procedure Act,⁵⁹ which requires agencies to follow certain procedures when promulgating rules or adjudicating cases. In 1966, Congress passed the Freedom of Information Act (FOIA),⁶⁰ which strengthened the requirement that agencies publish their laws, policies, and decisions, and gave the public the right to request access to unpublished agency records. It was during the congressional hearings on FOIA that the term “secret law” was born,⁶¹ and the statute’s primary goal was to end it.

4. The Modern Challenge: Secret Law in the National Security State

While the challenges discussed above led to clear failures of accessibility and transparency, they are distinct from the contemporary problem of secret law in an important way. They did not represent “concealment by design”;⁶² to the contrary, the presumption and intent remained one of openness despite practical barriers. This paradigm started to shift after World War II with the Cold War and the rise of the national security state.⁶³ The passage of the National Security Act of 1947,⁶⁴ which restructured the government’s military and intelligence agencies, marked the beginning of the modern effort to conceal laws and legal interpretations in the name of national security.⁶⁵

This effort took various forms. In 1951, President Harry S. Truman signed an executive order giving almost every federal agency broad discretionary authority to classify information “in order to protect the security of the United States.”⁶⁶ Although a 1940 executive order by President Franklin Delano Roosevelt had initiated the modern classification regime,⁶⁷ it was limited to the military and grounded in the Espionage Act of 1938, rather than inherent presidential authority.⁶⁸ Truman’s invocation of executive power to expand the classification system throughout the federal government created a wall behind which to hide secret laws.

The National Security Council (NSC), an advisory body established by the National Security Act in 1947 to assist the president on issues of national security and foreign policy, made the first known use of this tool. Although limited to producing basic policy papers in its earliest years, the NSC rapidly evolved into a presidential pipeline for secret directives on national security.⁶⁹ These directives, assigned different names under each successive administration, gradually normalized secret law within the executive branch. As discussed further in Part II.B.3, the APA and FOIA also made room for secret executive branch law by including exemptions for matters relating to national defense and foreign affairs, which allowed agencies to develop rules and policies in these areas in secret.

By the late 1970s, secret law in matters of national security had extended into the judicial and legislative branches. In 1978, Congress, in an effort to safeguard Americans’ privacy and regulate foreign intelligence collection, enacted the Foreign Intelligence Surveillance Act of 1978 (FISA).⁷⁰ The law

established the Foreign Intelligence Surveillance Court (known as the “FISA Court”) to approve government applications to conduct foreign intelligence surveillance. While judges have always issued search warrants behind closed doors, the person who is subject to surveillance in an ordinary criminal investigation must eventually be notified of the search and can challenge its legality in court. By contrast, FISA Court surveillance orders may, and almost always do, remain secret permanently.

Additionally, in 1979, Congress initiated the practice of attaching a classified schedule of dollar amounts and personnel ceilings — known as the “classified annex” — to intelligence appropriations bills.⁷¹ Like FISA, the classified annex represented an effort to increase oversight of the executive branch’s intelligence activities: it allowed Congress to regulate intelligence spending at a far more detailed level than simply specifying lump sums. Nonetheless, as discussed in Part II.A.1, it became a vehicle for hidden substantive legislation.

This pattern intensified in the wake of the 9/11 attacks. The national security establishment, along with its body of secret regulations and policies, dramatically expanded in size and scope.⁷² New kinds of secret law emerged, such as unpublished changes to executive orders⁷³ and closed immigration proceedings in “special interest” cases.⁷⁴ Congress stepped up its practice of including substantive law in the classified budget annexes.⁷⁵ The FISA Court, which previously had approved individual surveillance applications in secret, began issuing ground-breaking secret legal interpretations that allowed mass surveillance.⁷⁶ Courts defined the permissible legal boundaries of wartime detention in decisions so heavily redacted as to be unintelligible.⁷⁷

When viewed in historical context, it becomes clear that the current practice of deliberately shielding laws and legal interpretations from public view is a significant departure from the commitment to openness and transparency that marked this country’s first two centuries — a change that is altering the character of contemporary governance in the area of national security.

C. What’s Wrong with Secret Law?

It is likely that nearly every legal philosopher of any consequence in the history of ideas has had occasion to declare that laws ought to be published so that those subject to them can know what they are. Few have felt called upon to expand the argument for this proposition or to bring it within any more inclusive theory.

— Lon L. Fuller, *The Morality of Law*⁷⁸

The reasons for secrecy in national security matters — such as the harms that may flow from divulging covert sources of foreign intelligence — are well known, well understood, and often cited. By contrast, while the concept of secret law is intuitively unsettling and its use has always met with criticism, the reasons for this opposition are rarely explored in public discussion. The problems with secret law may be broken down into philosophical objections, constitutional concerns, and practical harms.

1. Philosophical Objections: The Publicity Principle

One reason why secret law is so broadly condemned is that it goes against the very essence of what gives law its moral legitimacy and authority. For centuries, political philosophers have recognized public promulgation as a necessary element of the law. Thomas Aquinas stated that “[p]romulgation is necessary for law to have its binding force.”⁷⁹ Thomas Hobbes, even while proposing an absolutist sovereign, insisted that the sovereign make public the content of, and reasons for, his laws.⁸⁰ Perhaps most famously, Immanuel Kant in the 18th century put forward a principle of “publicity” to serve as a “transcendental” standard of justice for all legal regimes: “All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.”⁸¹

Building on Kant’s idea, the influential legal theorist Lon Fuller identified “promulgation” as one of the eight principles against which legal systems must be measured.⁸² In his seminal work *The Morality of Law*, Fuller defended the necessity of making laws public, even as he acknowledged that the ordinary citizen makes little effort to learn their content. “Even if only one man in a hundred takes the pains to inform himself,” he wrote, “this is enough to justify the trouble taken to make the laws generally available.”⁸³ He elaborated:

The laws should . . . be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them. It is also plain that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.⁸⁴

Fuller’s point was not simply that secret laws are immoral. He believed that secret laws are not “law” at all, citing non-promulgation as the first way in which a ruling authority can “fail to make law.”⁸⁵ A non-public regulation is an autocratic whim, not a principle with the moral and practical authority to bind others.

This notion has particular force in democracies, where the legitimacy of the law stems from the open democratic process that generates it. The costs of secret law in democracies include “inherently less legitimacy for activities that do not receive full democratic due process consideration by the government and the people, who are sovereign.”⁸⁶ Indeed, the secrecy of a law undermines not only the law’s legitimacy, but also that of the lawmaker. In the words of one scholar: “[S]ecret law deprives the governor of his legitimacy, undermining his right to rule.”⁸⁷ Just as secret law is not truly law, a democracy that relies on it is not truly a democracy.

2. Constitutional Concerns

Given the founders’ emphasis on transparency, the U.S. Constitution includes surprisingly few express references — only two — to openness or secrecy. Both references pertain to Congress. The first, known as “the Journal Clause,” states: “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.”⁸⁸ The second, known as the “Statement and Account Clause,” states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁸⁹

Notably, both clauses are transparency-oriented. The Journal Clause, in particular, has been interpreted by the Supreme Court as ensuring “publicity to the proceedings of the legislature,”⁹⁰ even though it allows for some secrecy. As one scholar has observed, “The Journal Clause contemplates legislative secrecy, but only as a deviation from a norm of publicity; the Constitution’s sole grant of a secrecy power is coupled to an anterior duty of disclosure.”⁹¹ The Constitution thus states that the proceedings of Congress *generally* must be public, while its appropriations *always* must be public. Beyond this, the Constitution contains no express commands to divulge — or powers to conceal.

Of course, many of our most cherished rights, and some of the government’s most important authorities, are not explicit in the Constitution’s text. Instead, courts have inferred them from ambiguous language or derived them from the structure or purpose of various provisions.⁹² The Supreme Court has followed this approach in acknowledging certain executive branch secrecy prerogatives. For instance, the Supreme Court has recognized an “executive privilege” that shields communications between the president and close advisors. In doing so, the Court stated, “Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”⁹³ Similarly, the Court has read Article II as according the president implied authority to control access to national security information in certain contexts.⁹⁴

The Court has been much less willing, however, to embrace a similar structural or purpose-based approach when it comes to the public’s “right to know.”⁹⁵ The constitutional right of access to government information, as currently construed, is a narrow one that applies almost exclusively to court proceedings (discussed further below). Although the Court has issued several scolding indictments of “secret law,” these have been in the context of FOIA cases,⁹⁶ not constitutional challenges. And lower courts have rejected challenges to secret intelligence budgets, even though the Statement and Account Clause is the one provision of the Constitution that explicitly and without exception requires government transparency.⁹⁷

Nonetheless, although the Supreme Court has yet to adopt them, there are strong arguments — summarized below — for why secret law violates the Constitution.

The First Amendment

Beginning with an influential article published by Professor Thomas Emerson in 1976,⁹⁸ many scholars have argued that the First Amendment encompasses a public “right to know” that guarantees access to at least some kinds of government information.⁹⁹ There are two main arguments in support of this claim. The first is that the right to communicate or transmit ideas carries with it the right to receive them.¹⁰⁰ The second (and broader) argument is that a central purpose of the First Amendment is to protect and sustain representative democracy by maintaining an informed electorate, and the public must have access to information held by the government to fulfill that purpose.¹⁰¹

The Supreme Court initially did not embrace either reading. In the 1978 case *Houchins v. KQED, Inc.*, a broadcast station challenged restrictions on public access to a jail that prevented it from inspecting certain parts of the building or conducting interviews. The Court upheld the restrictions on the ground that “the media have no special right of access to the [jail] different from or greater than that accorded the public generally.”¹⁰² Although it was unnecessary to reach the issue, the opinion (written by four justices) noted that “there is no constitutional right to have access to particular government information, or to require openness from the bureaucracy The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”¹⁰³

Just two years later, the Court appeared to undergo a change of heart. In *Richmond Newspapers, Inc. v. Virginia*, the Court held that the First Amendment implies a right of public access to criminal trials. Chief Justice Warren Burger, who had written in *Houchins* that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information,”¹⁰⁴ now opined that “[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹⁰⁵ Justice William Brennan, Jr. expounded on this idea in his concurrence, observing that “the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”¹⁰⁶ For this reason, it “entails solicitude not only for communication itself; but also for the indispensable conditions of meaningful communication,” including access to government information.¹⁰⁷

Justice Brennan articulated a two-part test, which the Supreme Court majority later adopted,¹⁰⁸ for determining when the First Amendment supplies a right of access. First, courts should inquire whether there is “an enduring and vital tradition of public entrée to particular proceedings or information.”¹⁰⁹ Second, should courts ask “whether access to a particular government process is important in terms of that very process”¹¹⁰ — i.e., whether public access plays a significant, positive role in the process’s functioning. Together, these are known as the “experience and logic” test.

Applying this test, courts have had no difficulty extending the right of access identified in *Richmond Newspapers* (namely, the right to attend criminal trials) to include civil trial proceedings and related information.¹¹¹ Courts have struggled, however, to determine whether — or how — the two-part test applies outside the courtroom. In the context of agency adjudications, for instance, the “experience” prong becomes problematic because the administrative state is (historically speaking) a recent creation.¹¹² Lower courts are split over whether the right of access extends beyond the courts,¹¹³ and the Supreme Court has offered no guidance or clarification. Many courts and scholars have taken the Court’s long silence as suggesting that the right of access to judicial proceedings is the exception, and that “[d]isclosure of government information generally is left to the political forces that govern a democratic republic.”¹¹⁴

This may be correct as a purely descriptive matter, but it makes little sense normatively. The rationale underlying the First Amendment right of access to judicial proceedings — i.e., that access helps “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”¹¹⁵ — applies with equal force to other types of government information. It would clearly support a First Amendment right of access to government pronouncements having

the force of law. As recounted in Part I.B, the commitment to publication of the law has long and deep historical roots in the United States, thus satisfying the “experience” prong of the public access test. As for the “logic” prong, the transparency of laws is so central to their functioning that many legal philosophers do not consider secret laws to be “law” at all.¹¹⁶

Other Structural Arguments

Several other elements of the Constitution may be read to imply a mandate of openness. The Constitution gives Congress the authority and responsibility to oversee the activities of the executive branch. Although this power is implied rather than express, the Supreme Court has affirmed that “the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function.”¹¹⁷ Access to information held by the executive branch is part and parcel of this power.

Similarly, Article III of the Constitution vests the judicial branch with the authority to resolve “all cases” that fall within a wide-ranging list of parties and issues¹¹⁸ — a power that implies a broad right of access to government information where necessary to perform the courts’ constitutional function. The Supreme Court has held that executive privilege must yield when the judiciary, as a co-equal branch of government, requires the information to discharge its own constitutional responsibilities.¹¹⁹

The Constitution also implies a right of access by the people themselves. At the most basic level, it provides for the direct election of senators¹²⁰ and representatives¹²¹ by the people, and it states that “The United States shall guarantee to every state in this union a republican form of government” (known as the Guarantee Clause).¹²² As Professor David Pozen has pointed out, “[f]or federal elections to be meaningful, and for states to have republican government in any realistic sense, the people must be aware of what their officeholders have been doing.”¹²³

Indeed, reading several provisions of the Constitution together — including the First Amendment, the enumeration of powers, the election provisions, and the Guarantee clause — one might posit a broad public right to information about all kinds of government activity, as secrecy “risk[s] subverting the Constitution’s unifying aim to create a government of laws that would also be controlled by and responsive to the people.”¹²⁴ Most legal scholars, however, agree that the Constitution can tolerate some types of government secrecy, and they focus on determining where lines should be drawn.¹²⁵

Professor Heidi Kitrosser posits one such line that is highly relevant to the question of secret law. She cites several provisions of the Constitution — including the Journal Clause, the large number of senators and representatives, the grant of immunity for members’ “speech and debate,” and the dialogue-driven nature of the legislative process — which support the notion that the founders intended the *legislature* to operate transparently. She then notes other constitutional provisions — including the establishment of a single president and the history of that decision, along with the relative lack of constitutional constraints on presidential actions — which suggest that the founders envisioned the *executive branch* as having more leeway to operate in secret. Given these branches’ respective functions, she infers the

following rule, which she terms “the macro-transparency directive”: “[L]aw execution must be traceable to publicly created and publicly known laws, even if those laws allow their execution to occur in secret (that is, even if they allow micro-secrecy).”¹²⁶ In other words, the law itself must be transparent, although it may sometimes be implemented in secret.

This convincing constitutional argument for the transparency of laws and lawmaking transcends branch divisions. In providing for an open legislature and an occasionally secretive executive, the founders were assuming that the legislature would make the laws and the executive would implement or enforce them. They could not have foreseen a world in which much of Congress’s lawmaking function — and, indeed, some of the courts’ function in resolving disputes — is delegated to administrative agencies. To honor the Constitution’s “macro-transparency directive” today, the presumption of transparency must be applied to executive branch entities as well, insofar as they are engaged in making law.

3. Practical Harms

Many of the constitutional concerns noted above translate into concrete harms. For instance, secret law’s inconsistency with a republican form of government is not merely a theoretical tension. If people are not aware of a law, they cannot ask their representatives to change it, nor can they punish or reward their representatives’ stances on the law at the ballot box. Needless to say, this handicap undermines representatives’ responsiveness and accountability to constituents.¹²⁷ It also suggests a core reason for Kant’s publicity principle, which Professor David Luban has framed as follows: “[A]n action or policy that cannot withstand publicity is one that cannot garner popular consent, and that is why the action is wrong.”¹²⁸

A prime example of this phenomenon was the FISA Court’s secret interpretation of Section 215 of the USA PATRIOT Act (“Patriot Act”) to permit the bulk collection of Americans’ phone records. The court approved the surveillance in May of 2006, but this fact did not become public until 2013. In the intervening period, Congress reauthorized the Patriot Act twice.¹²⁹ After Edward Snowden revealed the court’s interpretation, the American public was able to express its opposition to bulk collection. Congress thereafter refused to reauthorize the Patriot Act, allowing it to lapse for a two-day period in June 2015 before enacting legislation that would end the bulk collection program.¹³⁰ Secrecy thus prevented the people from manifesting their will to and through their legislators, while transparency ultimately allowed this democratic process to unfold.

Secret law also subverts the rule of law in a variety of practical ways. When people are not aware of the rules their government must follow, they cannot hold the government accountable for violations of those rules or otherwise assert their own legal rights against the government.¹³¹ Indeed, they cannot even protest the abrogation of their rights.¹³² Government actors are, of course, aware of this *de facto* immunity. The secrecy of law thus not only makes it harder to challenge violations, it makes violations more likely. In the same vein, secrecy allows the government to develop unfair laws or to apply them an unfair manner, safe in the knowledge that there will be no repercussions.¹³³

Another harm resulting from secrecy is the creation and perpetuation of bad law. Secrecy inhibits the process by which law is made and refined — a process that begins with public participation. The

legislative process affords ample opportunity for stakeholders to express their views. When it became apparent in the early twentieth century that administrative agencies were developing regulations with little or no public input, Congress passed the APA to require (at a minimum) public notice and comment. The purpose was not to pay deference to a theoretical public right. Rather, Congress believed that input from the public — including experts outside of government and people directly affected by the proposed measures — leads to better-informed lawmaking and, thus, better laws.¹³⁴ On the flip side, when laws are made without public involvement — particularly when they are made by small groups of government officials acting in secret — the result can be the entrenchment of existing institutional norms, biases, and even mistakes.¹³⁵

We have seen many examples of this in the post-9/11 era. Returning to the NSA’s bulk collection of Americans’ phone records, the FISA Court did not even issue a written opinion on this matter until 2013 — soon after the Snowden disclosures, but seven years after the court first exercised jurisdiction over the program. When a judge finally felt compelled to put the court’s previously secret legal reasoning in writing, the result was criticized for its lack of rigor and failure to address countervailing case law.¹³⁶ A more extreme example is the series of “torture memos” issued by Justice Department officials John Yoo and Jay Bybee, which interpreted the laws prohibiting torture to permit waterboarding and other barbaric techniques. When Jack Goldsmith became the head of OLC in 2003, he reviewed the memos and found them so “deeply flawed,” “sloppily reasoned, overbroad, and incautious,” that he took the unprecedented step of withdrawing them a mere two years after their issuance.¹³⁷

In these examples, unusual circumstances — Snowden’s disclosures and Goldsmith’s courage — enabled other government actors to step in and address the legal mistakes. Ordinarily, however, secrecy not only facilitates bad law; it interferes with the normal process by which law and legal interpretations are corrected or improved. For instance, the Justice Department defends OLC’s extraordinary powers by noting that Congress can always step in if OLC has misinterpreted the law. As a former OLC official has noted, however, “the secrecy of much of OLC’s work undermines any notion that Congress can fix an opinion’s errors.”¹³⁸ The courts, too, are presumptively available to correct an unconstitutional law or an incorrect statutory interpretation, but no one can seek judicial review of a secret law.

The FISA Court illustrates how secrecy can play havoc with judicial development of the law — a process that normally includes three layers of review and literally hundreds of judicial actors in the federal system. Approximately 670 district court (i.e., trial-level) judges¹³⁹ in 94 different districts constitute the first layer; their interpretations are guided by the arguments of the opposing parties in the case and any existing precedent, including opinions issued by the Supreme Court or the appellate court for the relevant district (which are binding) and opinions issued by other trial judges or appellate courts (which are at most persuasive). Parties unhappy with these interpretations may appeal to one of 13 federal appellate courts, each of which may render its own interpretation (unless the Supreme Court has already resolved the issue), often with the benefit of all the analysis performed by multiple judges at the trial level or by their sister appellate courts. Finally, if and when a case reaches the Supreme Court, the Court is generally able to draw on the work of multiple district and appellate courts, as well as — more often than not — a plethora of legal scholars and other commentators who have weighed in on those courts’ public rulings. This process of assessing, comparing, and honing decisions across jurisdictions and levels of review makes it more likely that the judicial system as a whole will get to the “right” result.

Contrast this process with that of the FISA Court before the enactment of reform legislation in 2015. With only a handful of exceptions over its nearly 40-year history, the court heard only from one party: the government. Although companies that were ordered to assist the government with its surveillance could challenge the order, they lacked an incentive to do so, and there was only one known instance of such a challenge before Snowden's disclosures.¹⁴⁰ If the court ruled in the government's favor (as it did in nearly every instance), the case ended there. In the few cases where the court ruled against the government, the government was allowed to appeal the decision to the three-judge Foreign Intelligence Surveillance Court of Review. In other words, instead of several hundred judges weighing in publicly on difficult legal questions and honing the answer through three levels of appeal, the FISA system has traditionally consisted of one court secretly deciding issues presented by one party, with appeal available only if that party loses.¹⁴¹

In 2015, the USA Freedom Act required the establishment of a panel of independent attorneys (designated *amici*, or "friends of the court") on whom the FISA Court can call to provide perspectives other than the government's.¹⁴² However, the Court may determine in any instance that the involvement of *amici* is not appropriate and simply proceed without them. Moreover, the proceedings remain secret and not subject to wider testing by other courts, and only the government has a right to appeal. Operating in this legal echo chamber, the chances that FISA Court judges will misinterpret the law — and perpetuate that misinterpretation in subsequent decisions — remains high.¹⁴³

Some contend that secret law is problematic only if it is withheld from those who are expected to follow it. If a law imposes obligations on members of the public, the argument goes, then the law must be public; but if it imposes obligations only on government officials, it is sufficient for those officials to know its terms.¹⁴⁴ This argument ignores the problems described above, such as the constitutional infirmities of secret law, the public's inability to shape secret law or challenge its violation, and the corrosive effective of secrecy on the quality of lawmaking. None of these problems is mitigated if the law in question governs only official conduct.

Moreover, the argument suggests a cramped view of the law and its reach. The law not only creates obligations but establishes rights; indeed, the government's obligations and the people's rights are often flip sides of the same coin. A law or interpretation that limits or permits government surveillance, for instance, places no legal obligations on private citizens, but it affects their legal right to privacy in their communications. Even if a law governing official conduct does not affect the public's legal rights, it is highly likely to affect private citizens' *interests* unless it is wholly ministerial in nature.¹⁴⁵ The act of "government," after all, involves two entities — the governors and the governed.

4. Why Is Secret Law Worse than Secret Implementation?

One might well ask: why the special concern over secret law, as opposed to other kinds of secrecy? In particular, why should society be willing to tolerate a higher level of secrecy when it comes to the details of how the government is *implementing* a law? True, if members of the public do not know what the law says, they cannot hold the government accountable for violations; but they face the same problem if the violations themselves are hidden.

Some commentators see no difference between secret law and other types of secrecy, while others assume that secret law is particularly objectionable without probing the reasons. Few have put forward a principled basis for treating secret law differently. A significant recent exception is Professor Dakota Rudesill, who distinguishes between “secret law” and “secret fact.” Rudesill notes that secrecy undermines some of the very qualities that define and legitimize “law,” including consistency (laws that are secret may or may not be in harmony with one another) and the ability to obligate (it is difficult to enforce compliance with an unknown law). He also points to the “constitutional norm” against secret law and contrasts it with the weaker constitutional norm against secret fact — a version of Kitrosser’s “macro-transparency directive.” Secret law, in short, is in tension with constitutional norms and values in ways that secret implementation is not.¹⁴⁶

These are important distinctions, to which others may be added. Law is more durable than acts of implementation. Within political constraints, the head of an agency may freely change her mind about how to implement a regulation, but she must initiate a time-consuming, multi-stakeholder process if she wishes to amend or repeal it. Even when the law is not a published regulation but rather a secret legal interpretation created with the input of only a handful of officials, there are cultural and institutional barriers to dislodging it, which is why Goldsmith’s decision to withdraw the torture memos was so unusual and momentous. Because secret law is more apt to become entrenched, so, too, are its negative effects. A discrete operation and a law are equally likely to be ill-considered if developed in secret by an insular group of officials, but the operation may be over (or may be re-thought) in a matter of days, while the law will likely have a much longer shelf life.

Generally speaking, law is also broader in its effects. As discussed above in Part I.A.1, a law is more than a simple command to perform an action. It is a standard that governs future actions, potentially in a large number of cases. A standard that is poorly conceived, contrary to the will of the people (were they able to express it), or perhaps even unconstitutional is more dangerous than a single action or set of actions that share those same characteristics.

In addition, the law serves a function of political self-definition that other government actions do not. Christopher Kutz, a professor at the University of California’s Berkeley Law School, has observed that the law is “a way of organizing the answers to the collective questions of membership: Who are we, what are we for (or against), and where are we going?”¹⁴⁷ It embodies the collective norms that are embraced by, and help to define, a society.¹⁴⁸ Accordingly, “law’s secrecy hurts us existentially, because it deprives us of the way in which, once we are organized as a polity, law tells us who we are, by constituting our *orientation* in moral and political space — what values and acts we project into the world.”¹⁴⁹ This orientation is important even if individual members of the polity may not share the values expressed in law. As Kutz notes, secret law “denies my capacity to understand my values in relation to the state. I cannot thereby understand myself *either* as in harmony or in dissonance with my polity. . . . [P]olitically speaking, it severs me from membership in my state.”¹⁵⁰

This aspect of the law provides an additional answer to the question of why members of the public should be concerned with secret laws that do not impose affirmative obligations on them. In addressing the laws and legal interpretations governing official torture, Kutz observes:

[T]he relevance of these norms is no weaker just because you might not be subject to them, because you are an unlikely interrogator or interrogee. As a member of the polity you nonetheless have a stake in the question of torture, a stake independent of whether you can or have cast a vote on the matter, or see the state as speaking in your name. The acts may be done by the executive, without regard to democratic voice. But the executive is a part of our embodiment in public space, and we understand ourselves internally at the same time as we understand ourselves externally as well.¹⁵¹

Arguably, a similar challenge to political self-understanding would exist if the law were public but the government's actions were routinely inconsistent with it. And, as noted above, secrecy in government action can make it impossible to secure accountability for systemic violations of even the most transparent laws. It is unlikely, however, that the government would undertake any official program that violated published law without generating some secret legal cover. As Professor Peter Shane has noted, "No sane President claims to be above the law, and every administration will take pains to defend controversial actions as legal."¹⁵² For every secret program that flies in the face of published law, there is likely to be an authoritative secret legal interpretation behind it. In such cases, the damage to democratic governance and accountability can still be traced to secret law.

D. Is Secret Law Necessary?

Defenders of some secrecy in the law argue that national security considerations may justify withholding the law, just as they may justify withholding any other type of information. The executive order governing classification permits officials to classify "government information" that meets certain criteria, and it makes no exception for information that takes the form of a law. Moreover, all of the public access provisions of FOIA — including those that require publication of substantive rules — are subject to a list of exemptions, which leads off with an exemption ("Exemption 1") for "properly classified" information.

This raises a threshold question: is pure legal analysis ever properly classified? Put differently, can releasing a discussion of statutory or regulatory text, judicial precedent, and legislative history ever be reasonably expected to cause damage to the national security? There is scant case law addressing this question. One district court held in 2015 that a CIA legal memorandum could be withheld under FOIA's Exemption 1 if it pertained to intelligence sources and methods; the court accepted the CIA's claim that it was unable to disentangle and release any meaningful information.¹⁵³ In another recent case, the Second Circuit Court of Appeals stated, "We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation."¹⁵⁴ Even in these cases, however, the information that appears to justify classification is not the legal analysis itself but the operational details it may reveal. The real question, then, is whether "in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts."¹⁵⁵

As matters stand today, the answer is almost certainly yes. While redactions will usually be possible, they may be so pervasive and so interspersed that no meaningful information remains. After all, the

entities generating classified legal documents do not expect them to be released and therefore do not write them with an eye toward public disclosure. The law does not generally require agencies to create alternative versions of classified documents that might facilitate a more readable redacted version, or unclassified summaries of those documents that are not susceptible to redaction.

But this does not answer the question of whether secret law is inevitable. If the authors of binding legal interpretations knew in advance that the product must be made public, they could write those interpretations in a manner that minimized the entanglement of legal analysis with classified fact. Indeed, after several FISA Court opinions were made public by Snowden and (in response) by the Director of National Intelligence, that court began writing at least some of its opinions with an eye toward public disclosure — a practice that will likely become standard now that the USA Freedom Act requires the release of a redacted or summarized version of all significant FISA Court opinions. The Department of Justice’s Office of Legal Counsel similarly could write classified opinions in a manner that facilitated redaction or summary, if required to do so.

It is conceivable there would remain cases in which the legal interpretation could not be understood without reference to the details of a particular, highly sensitive operation. In those cases, a heavily redacted version or extremely vague summary could still be made contemporaneously available (so that the public would at least know of the existence of the interpretation), and the full interpretation could be made available immediately after the specific operation concluded. But the government would have to abandon its position that in the national security context, unlike the criminal context, the existence of particular investigations or operations may be concealed indefinitely. The necessity for this kind of permanent secrecy has never been established, and the costs — not only to the transparency of law, but to the integrity of recorded history — are simply too high.

In short, the problem of commingled law and fact is real, but it can be addressed. Moreover, this problem should largely be limited to opinions applying the law to particular circumstances. It should rarely if ever arise in the context of rules and regulations themselves, which apply generally and do not specify dates, times, targets, sources, or other details of specific operations.

Some defenders of secret law nonetheless argue that disclosing the rules and regulations governing certain activities may harm national security because it will alert people to the fact that a particular type of activity is occurring. For instance, the executive branch refused for years to make public the legal interpretations that discussed the general rules for bulk collection of Americans’ phone records, on the ground that awareness of even the broad contours of the program would enable terrorists to take steps to evade its reach.¹⁵⁶

One problem with this argument is that it proves too much. The rules governing the bulk collection program were no more specific or revealing than the rules governing criminal wiretaps, set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, or those governing foreign intelligence surveillance on U.S. soil, set forth in FISA. No one inside or outside the intelligence establishment has argued that these laws should not have been published. To the extent they might theoretically “tip off” some targets about behaviors to avoid, that harm is clearly outweighed by the importance of publishing the laws that govern surveillance.

In any event, there is cause for skepticism of the claim that the efficacy of surveillance programs depends on concealing, not just the identities of particular targets, but the programs' very existence. This claim was behind the secrecy of President Bush's warrantless wiretapping program. Yet, when the general framework of this program was made public through leaks, the executive branch did not abandon it on the ground that its efficacy had been compromised. Instead, the administration pushed to have the program continued under public laws. Congress obliged, codifying the program in Section 702 of FISA, and executive officials continue to tout its effectiveness.¹⁵⁷ Similarly, the bulk collection of Americans' phone records, which was kept secret allegedly to preserve its utility, was replaced with a narrower program designed to accomplish the same end. The rules for the new program are contained in public law, yet their publicity did not affect the administration's assessment that the program would provide the intelligence establishment with the tools it needs.¹⁵⁸

In theory, a rule or regulation could be so granular in its description of activities that its release would effectively reveal specific targets or operations, rather than just general programs. In determining how this theoretical possibility should affect our tolerance for secret law, it is important to bear in mind the adage that "hard cases make bad law"¹⁵⁹ — i.e., principles that are designed to resolve the most difficult cases at the margins of an issue may not work well when applied to the general run of cases. Experience suggests that giving officials the discretion necessary to shield rules and regulations in "appropriate" cases inevitably leads to a proliferation of secret law in cases where it is not warranted. That state of affairs, explored in the next part of this report, may well be causing more harm than the risks it is intended to address.

Finally, some observers worry that requiring law to be made public could have perverse consequences. They argue that it could discourage government actors from seeking or providing legal guidance,¹⁶⁰ returning us to the state of relative lawlessness in matters of national security that existed before the 1970s. There is a reason, however, that agencies today solicit legal opinions when contemplating sensitive operations. Rules and legal interpretations provide cover for officials' actions, protecting them against criminal and civil liability, not to mention public opprobrium in the event of the operation's disclosure. In today's world of "intelligence legalism,"¹⁶¹ intelligence agencies would be more likely to refrain from activities that lack any formal legal authority than they would be to conduct such activities without first obtaining a legal justification. Nor is it likely that congressional committees would simply give up on regulating intelligence programs — a power they have exercised for nearly forty years — if the current practice of incorporating classified annexes into law by reference were ended.

A related concern is that a publication requirement would drive law further underground, as government entities would eschew formal legal opinions in favor of advice conveyed over the phone or other informal means. Indeed, some officials posit that the recent decline in the annual number of formal OLC opinions is attributable to an increase in FOIA requests and the consequent potential for publicity.¹⁶² There is a simple solution to this problem: a requirement that any legal statement carrying the force of law must be memorialized in writing. Agency attorneys would still be free to provide oral advice, but it could not be considered authoritative unless memorialized when provided, nor could officials rely on it in seeking to avoid liability for their actions.

To summarize, there is a range of problems that could in theory spring from a broad requirement that the law be made public. Some of these problems are not particularly compelling on close examination. Others are real, but there are ways to mitigate them — at least to the point that they do not outweigh the constitutional and practical reasons for law’s publicity. Put simply, we have been far too tolerant of secret law in recent years. The results can be seen in the next part of this report.

II. SURVEYING SECRET LAW

Having explored what secret law is and what makes it problematic, there remains an empirical question: how prevalent is secret law? Only two manifestations have garnered much public attention: secret memoranda produced by OLC, and secret opinions issued by the FISA Court. Moreover, the public debate on these has been hindered by a lack of data. How many OLC opinions have been withheld from the public on national security grounds? How many significant legal interpretations rendered by the FISA Court remain classified? Is secret law the rare exception to the rule, or does it dominate in the area of national security — which itself comprises an increasingly large share of government activity?

A full accounting of secret law is impossible, due to the famous Rumsfeldian phenomenon of “unknown unknowns.”¹⁶³ There may well be categories of secret law whose very existence remains a secret.¹⁶⁴ The government, however, does not always attempt to (and often cannot) hide the fact that certain categories of secret legal interpretations exist; even when it does, the fact may eventually become public due to leaks, reports to Congress, or other means. Based on the public record, it is possible to identify at least nine distinct areas, spanning all three branches of government, in which law is withheld from the public — and sometimes from Congress — on national security grounds.

The Brennan Center has also attempted to discern the amount of secret law in certain categories. In this effort, the Center relied on a combination of public documents, interviews and other communications with government officials, and records obtained through FOIA. Due to the inherent limitations of this process and the wild card of “unknown unknowns,” there is no pretense that the resulting information presents a complete or precise picture. Assembling comprehensive statistics regarding the number of published versus unpublished legal pronouncements in any given category would require government cooperation, if not participation. Nonetheless, even the partial information the Center was able to obtain suggests that secret law is more prevalent than many would imagine.

A. Legislative Branch

[S]urely there can be no greater legal monstrosity than a secret statute.
— Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*¹⁶⁵

A statute is the prototypical form of law. Indeed, for many Americans, the term “law” is likely synonymous with a bill enacted by Congress and signed by the president. It is revealing, then, that we take for granted the public nature of statutes. If it emerged that there was a secret volume of the U.S. Code containing the laws Congress chose not to publish, the scandal would rival Watergate. Moreover, it is unlikely Americans would be placated by assertions that these laws did not place direct obligations on the public, that they were intertwined with sensitive facts, or any of the other arguments used to justify the secrecy of equally binding non-statutory law.

There is no secret volume of the U.S. Code. However, far under the radar of public consciousness, Congress has been enacting a particular form of secret law for almost four decades, and recent years

have seen a sharp rise in this practice. Moreover, secret legislative history is the norm in the national security area, with the result that the executive officials who implement a statute may have a very different understanding of its meaning from that of the public.

1. Classified Annexes

After a special Senate investigative committee — known as the “Church Committee” for its chairman, Senator Frank Church — revealed widespread abuses by the CIA, NSA, and FBI, Congress created permanent committees in both chambers to oversee intelligence activities. Previously, funding for intelligence activities had been hidden within the appropriations bills for the Department of Defense, and the armed services and appropriations committees were informally consulted or secretly briefed on how the funds were spent. Beginning in 1979, the intelligence committees began regulating intelligence programs through annual intelligence authorization acts.¹⁶⁶

The intelligence authorization bills were accompanied by committee reports, which is standard practice when a committee approves a bill. These reports, however, were fairly brief and general, with the important details appearing in a lengthier classified annex. The appropriations and armed services committees adopted this practice and began issuing classified annexes to the reports accompanying the Department of Defense appropriations and authorization acts. The practice has continued to this day.

Committee reports are not themselves law. They are legislative history, expressing the views and the intent of committees of Congress. However, Congress has sought to turn various provisions of classified annexes into law by incorporating them by reference into the actual bills. Thus, nearly every intelligence authorization bill has stated that the funding authorizations and personnel ceilings “are those specified in the classified Schedule of Authorizations.”¹⁶⁷ The defense authorization and appropriations bills in some years have gone further, stating that the entire classified annex “is hereby incorporated into this Act.”¹⁶⁸

Still other bills have sought to incorporate specific elements of the classified annexes. Although none of the annexes has become public, the wording of some of the incorporation provisions makes clear that the incorporated material includes not only funding and personnel allocations, but substantive regulations. For instance, the 2004 defense appropriations act authorized a program for “[p]rocessing, analysis, and collaboration tools for counterterrorism foreign intelligence, as described in the Classified Annex.”¹⁶⁹ The defense appropriations act for the following two years allocated a total of \$4.8 billion for “classified programs, described . . . in the classified annex.”¹⁷⁰ More recently, *The Washington Post* reported that a classified annex prohibited relocating the drone strike program from the CIA to the Department of Defense.¹⁷¹

The Office of Management and Budget within the executive branch has recognized this practice for what it is: secret law.¹⁷² Moreover, when the president signs intelligence and defense bills into law, classified annexes are “not readily accessible,”¹⁷³ and the House and the Senate do not generally vote on committee reports¹⁷⁴ or their annexes. It is thus questionable whether the incorporation by reference of classified annexes satisfies the constitutional requirements of “presentment,” under which legislation

must be presented to the president for his signature, and “bicameralism,” under which both houses must pass identical versions of legislation.¹⁷⁵

Professor Dakota Rudesill recently undertook a comprehensive study — the first of its kind — to determine how frequently classified annexes have resulted in the creation of secret law. His findings are sobering. Since the 95th Congress (1977-1978), there have been 124 provisions, located within 68 different statutes, that have purported to give classified language the status of law.¹⁷⁶ These provisions have stretched to encompass military activities with no clear intelligence component, such as electronic warfare and missile programs, the “Star Wars” missile defense program from the 1980s, and military operations in Iraq.¹⁷⁷ Perhaps most notably, the past two Congresses enacted more secret law than the 95th through 102nd Congresses combined.¹⁷⁸

2. Secret Legislative History

Even where the material within classified annexes is not incorporated into law, its secrecy is problematic. Committee reports are one of the most influential forms of legislative history, and they can play a significant role in understanding the meaning and scope of legislation.

When interpreting a statute, the touchstone of a court’s inquiry is congressional intent.¹⁷⁹ If the text is ambiguous, legislative history can shed light on Congress’s purpose. Judges differ on the usefulness of legislative history — Justice Antonin Scalia dismissed its value,¹⁸⁰ whereas Justices John Paul Stevens and Stephen Breyer promoted its use¹⁸¹ — and there has been a decrease in the Supreme Court’s reliance on it in recent years.¹⁸² Nonetheless, Supreme Court cases interpreting statutes continue to cite legislative history on a regular basis, and to acknowledge that “[a]nalysis of legislative history is, of course, a traditional tool of statutory construction.”¹⁸³ Committee reports are considered particularly influential; as the Court has stated, “In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill.”¹⁸⁴

Courts are by no means the only interpreters of legislative intent, or even the most important. Some scholars have noted that agency officials are the primary interpreters of statutes, as they must construe the laws they are implementing.¹⁸⁵ Indeed, because most national security matters rarely find their way into courts, intelligence agencies are often the sole interpreters of the authorities granted to them by the legislature. Like courts, agency officials rely on legislative history; in one study, three out of four rule drafters within agencies reported that they considered legislative history to be useful in interpreting statutes.¹⁸⁶

This reliance may be even heavier within the intelligence establishment. Even when not incorporated into bills by reference, classified annexes purport to give “directions” to agencies,¹⁸⁷ and representatives of both branches have confirmed that the agencies routinely follow them.¹⁸⁸ This form of legislative history thus comes very close to being a form of (secret) law.

Another significant source of secret legislative history is the intelligence committees’ hearings and mark-ups. Like committee reports, these sources are not themselves law. However, they can be critical to understanding legislative intent — and, thus, the law itself — in cases where the statutory text is unclear. Statements of members and witnesses at hearings — particularly those of agency witnesses

charged with implementing the legislation — may offer important clues, while the acceptance or rejection of amendments at mark-ups can shed light on committee members' views of the law.¹⁸⁹ These types of legislative history are routinely unavailable to the public when it comes to legislation on intelligence-related matters. For instance, between 2011 and 2014, the Senate intelligence committee held 165 closed hearings and 15 open ones; of the House intelligence committee hearings, 71 were closed and 18 open.¹⁹⁰

When secret legislative history obscures Congress's intent, executive officials who are privy to that history may have one understanding of the law, while those who are not may have another, resulting in inconsistent implementation. Even if all implementing officials have access to the legislative history, their understanding of the law may well diverge from that of the public; and if most of the officials who implement the law are unaware of the history, they may implement it very differently than how the lawmakers intended.

A recent example of the importance of legislative history is the FISA Amendments Act's provisions establishing who may be "targeted" for electronic surveillance. The executive branch takes the position that "targeting" a person entails collecting not only her communications, but the communications of anyone else who merely mentions her.¹⁹¹ The interpretation seems strained on its face, but the statute does not define the term, and much of the legislative history that could shed light on the legislators' intent is classified.¹⁹² It is thus impossible for the public to know whether the executive branch's interpretation — which greatly increases the scope of the NSA's surveillance and its impact on Americans — is consistent with congressional intent.

B. Executive Branch

The constitutional purpose of the executive branch — as its name suggests — is to execute the laws, not to make them. And yet, the Supreme Court has long recognized that "the political branches have a role in interpreting and applying the Constitution,"¹⁹³ and that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."¹⁹⁴ Agencies have always been called upon to resolve ambiguities in the law through their own interpretations, which may themselves carry the force of law when issued in binding form. Moreover, as the administrative state expanded during the early decades of the 20th century, Congress began delegating to agencies the task of filling gaps in legislation through regulation, and Congress routinely charges agencies with resolving disputes through administrative adjudication. Finally, the president may issue rules or directives, either pursuant to statutory authority or in those areas where the president has constitutional authority to act without legislative authorization. When conducting any of these activities, executive branch actors are effectively making law.

While these forms of executive law-making may be necessary, they are problematic in one respect. The framers of the Constitution designed the executive branch to be able to act with speed and (on occasion) secrecy. These qualities can be advantages when staging a law enforcement action or engaging in foreign diplomacy, but they do not lend themselves to sound, democratically accountable lawmaking.¹⁹⁵ Congress attempted to solve this problem through statutes requiring publication of executive branch rules and directives and public participation in agency rulemaking, but left certain national security

carve-outs. The executive branch has pushed the limits of these and other exceptions, resulting in a substantial body of secret law. In addition, because the courts and Congress tend to play a lesser role in national security matters, executive-made law is often the sole and final word in this area, compounding the harms that flow from secrecy.

1. Unpublished Presidential Directives

Presidents issue many different types of directives, including executive orders, proclamations, memoranda, certificates, and more.¹⁹⁶ The Congressional Research Service has noted that “most of these instruments establish policy, and many have the force of law.”¹⁹⁷ In passing the Federal Register Act, Congress sought to ensure the public availability, not only of agency regulations, but of binding presidential directives as well. The Act thus requires publication in the Federal Register 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.”¹⁹⁸ The Federal Register also must include “documents or classes of documents that the President may determine from time to time have general applicability and legal effect.”¹⁹⁹

Despite this requirement, some categories of presidential directive that may carry the force of law are not published or otherwise accessible to the public. Two important examples are national security directives and secret changes to executive orders.

National Security Directives

After its creation in 1947, the National Security Council began producing policy papers of varying kinds. While some were merely bases for discussion, others included policy recommendations that were signed by the President and thus put into effect. This practice has continued under every administration, although the nature of the directives has varied somewhat and presidents have used different names to describe them (including “NSC Policy Papers,” “National Security Action Memoranda,” “National Security Presidential Directives,” and others).²⁰⁰

Courts have described these presidential directives as “formal notification[s] to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs, generally requiring that such department or agency take some follow-up action.”²⁰¹ The directives have the same legal force as executive orders. The Department of Justice has concluded that both are legally binding on the relevant executive agencies, do not “automatically lapse upon a change of administration,” and generally “remain effective until subsequent presidential action is taken.”²⁰²

National security directives go beyond internal governance or the conduct of foreign affairs; some affect the legal rights and interests of Americans, including private citizens and companies as well as those who work for the government. For instance, President George W. Bush’s National Security Policy Directive (NSPD) 27 established guidelines for the licensing and operation of privately owned commercial satellite systems.²⁰³ NSPD 29 called for broader sharing among agencies of biometric information in potential national security cases.²⁰⁴ President Obama’s Presidential Policy Directive (PPD) 19 prohibits certain retaliatory actions against whistleblowers within intelligence agencies and requires agencies to

establish a process for resolving claims.²⁰⁵ PPD 30 details some of the procedures to be followed when a U.S. national is taken hostage abroad.²⁰⁶

Even those directives that might not directly affect private citizens often provide legal authorities that have significant consequences for the nation. A directive issued by President Reagan, which remained classified until 2013, provided the authorization for CIA support and recruiting of a force of 500 Contras in Nicaragua, plus 1,000 additional men trained by Argentina, on an initial budget of \$19 million.²⁰⁷ The U.S. military invasion of Grenada in October 1983 also was authorized by a secret presidential directive, parts of which remain classified today.²⁰⁸

Most national security directives are not made public, and many are not provided to Congress. At a hearing in 2012, Senator Richard Lugar revealed that “[t]he administration has refused to share Presidential Policy Directive 11 (PPD 11)” — a directive bearing on the future size and configuration of the U.S. nuclear arsenal — “with the Congress.”²⁰⁹ President George W. Bush issued a directive providing for “continuity in government” in the event of a devastating attack or emergency; the details were contained in a classified annex to the directive that was withheld even from the House Committee on Homeland Security.²¹⁰ A 1992 study by the General Accounting Office found that Congress was not routinely notified of the issuance of national security directives and that none of the relevant congressional committees “are regularly receiving copies” of such directives.²¹¹ The GAO observed, “[I]t is impossible to satisfactorily determine how many [directives] issued make and implement U.S. policy and what those policies are.”²¹²

In 1976, a Senate special study committee on emergency powers raised the alarm about secret presidential directives, observing that “there is no formal accountability for the most crucial Executive decisions affecting the lives of citizens and the freedom of individuals and institutions.”²¹³ The potential for secret directives to undermine the democratic process is apparent. In October 1983, a Department of Justice policy referencing a presidential directive became public. The directive included a provision requiring executive branch employees to submit to polygraph tests during investigations of unauthorized disclosures of classified information, as well as a provision requiring former employees who once had access to highly classified information to submit any publications to the government for pre-publication review.²¹⁴ Once disclosed, these provisions proved controversial, and Congress swiftly acted to block them.²¹⁵ Had the directive remained secret, the will of the public and the legislators would not have been carried out.

In cases where withheld directives later become wholly or partially public, it is often apparent that their initial withholding was unnecessary. In May 2013, President Obama issued a classified document titled “Presidential Policy Guidance,” a previously unknown designation, accompanied by a brief public fact sheet. The guidance set forth the procedures that must be followed and the standards that must be met in order to capture or exercise lethal force against a terrorist suspect overseas. The administration denied a FOIA request by the American Civil Liberties Union (ACLU) for the document, and nearly three years of litigation ensued. In July 2016, the judge ordered the administration to provide a redacted version of the document to the ACLU, and that evening, the Department of Justice posted the guidance without announcement.²¹⁶

Although sections of the guidance are heavily redacted, the document provides much greater detail than the fact sheet that originally accompanied its issuance.²¹⁷ Moreover, there is no ostensible means by which the internal procedures and legal standards reflected in the guidance could enable a suspected terrorist to evade a drone strike or capture. The guidance, in other words, contains information of significant public interest and could safely be released in redacted form; yet it took years of litigation to reach this result.

Notwithstanding the outcome of that lawsuit, the legality of keeping presidential directives secret remains unsettled. In one recent case, a federal judge held that an unclassified but unpublished national security directive issued by President Obama — Presidential Policy Directive 6 (PPD-6), dealing with foreign aid and development — must be made public under FOIA. The judge noted that “PPD-6 carries the force of law as policy guidance to be implemented by recipient agencies.”²¹⁸ She rejected the government’s argument that the directive was a privileged presidential communication, concluding that this privilege does not apply to “widespread distribution throughout the executive Branch of a final, non-classified presidential communication that carries the force of law.”²¹⁹ She further took the government to task for “adopt[ing] the cavalier attitude that the President should be permitted to convey orders throughout the Executive Branch without public oversight — to engage in what is in effect governance by ‘secret law.’”²²⁰

On the other hand, judges have upheld the non-disclosure of *classified* presidential directives, deferring to the government’s assessments that disclosing the directives could reasonably be expected to harm national security.²²¹ Moreover, in another recent case, a federal judge held that FOIA does not apply to the White House, and therefore closely-held presidential directives are not subject to FOIA requests. The judge expressed sympathy, however, for the argument that this result would facilitate the expansion of secret law in the executive branch.²²²

The scope of the problem is indeed substantial. Most administrations have issued national security directives in the dozens if not hundreds, and the contents of most of these remained classified for years or decades (with some remaining secret to this day). President Truman issued 100 such directives; President Eisenhower issued 188; Presidents Kennedy and Johnson together issued 370; Presidents Ford and Nixon issued 318; President Reagan issued 325; President George H.W. Bush issued 79; President Clinton issued 75; President George W. Bush issued 81²²³; and President Obama has issued at least 41.²²⁴

As these figures show, the number of national security directives issued by presidents has been on the wane under the past few administrations. The rate of secrecy, however, has not: about a quarter of the directives issued up through the end of the Reagan administration were released publicly,²²⁵ while initial release rates in subsequent administrations have ranged from zero to slightly over one-third (see table), averaging about 16 percent. Moreover, it is difficult, without more information, to assess the significance of the decline in the number of directives issued. It is possible that there is simply less executive-made law in this area (and thus less secret law). It is also possible, however, that these presidential orders are being issued in some other form, or that the relevant law-making increasingly is being delegated to the national security agencies, whose directives receive less scrutiny.

Administration	Total	Still unavailable/ classified ²²⁶ (including as percent of total)	Declassified with redactions or partially declassified	Fully declassified	Issued with classified and public elements: public directive with classified annex, classified directive with fact sheet, classified and unclassified version, etc.	Unclassified but not publicly available due to other restrictions on sharing	Made public at time of issue (including as percent of total)
H.W. Bush	79	17 (21.5%)	30	32	0	0	0 (0%)
Clinton	75	38 (51%)	3	8	9	11	6 (8%)
W. Bush	81	38 (47%)	2	4	8	0	29 (36%)
Obama	41	27 (66%)	0	0	4	1	9 (22%)

Secret Changes to Executive Orders

Executive orders are perhaps the best known form of presidential directive. They have been issued by every president since the founding of the nation, and have addressed almost every topic of governance imaginable.²²⁷ Moreover, as a 1957 report issued by the House Government Operations Committee stated, “When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.”²²⁸

While the House report suggested that executive orders “usually affect private parties only indirectly,”²²⁹ it is clear that this effect is often quite significant. For instance, executive orders were used to suspend *habeas corpus* during the Civil War²³⁰ and to intern Americans of Japanese descent during World War II,²³¹ and they are used today to establish lists of diseases for which Americans may be involuntarily quarantined.²³²

Statutory law requires the publication of executive orders in the Federal Register “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.”²³³ While this exception could potentially provide a plausible basis for non-publication in a substantial number of cases, it does not appear that presidents have chosen to invoke it. Executive orders are numbered sequentially, and the Executive Orders Disposition Tables Index maintained by the National Archives and Records Administration shows no missing or otherwise unpublished executive orders.²³⁴

In December 2007, however, Senator Sheldon Whitehouse gave a speech on the Senate floor that threw the transparency of executive orders into grave doubt. Congress had recently enacted the Protect America Act, a law that included a provision allowing the NSA to intercept the communications of Americans without a warrant while they were traveling overseas. Attempting to quell concerns about this provision, administration officials claimed that Executive Order 12333, which permits overseas surveillance of Americans only upon the Attorney General’s determination that they are agents of a foreign power, would provide the necessary safeguards. However, Whitehouse persuaded the administration to declassify part of an OLC opinion, which he quoted as follows:

An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.²³⁵

According to the OLC opinion, the president did not even have to give notice to the public that he had “modified” or “waived” the executive order, let alone explain how.

The tacit modification or waiver of published orders is one of the most pernicious forms of secret law. Not only are members of the public unaware of the true state of the law; they are actively misled, as the law that has been modified or waived remains, unaltered, on the books. This violates one of the core principles of law set forth by Fuller: the rules as enforced must be congruent with the rules as promulgated.²³⁶ In 2008, Senators Russ Feingold and Whitehouse co-sponsored legislation that would require the president to give public notice when departing from the terms of a published executive order.²³⁷ But the legislation never received a vote, and the OLC opinion blessing the secret modification of published executive orders presumably remains in effect.

It is impossible to gauge how prevalent this form of secret law is. To do so, one would have to ascertain how many times a president has acted contrary to the terms of an executive order — information that is not made public and not readily subject to a FOIA request. However, the very existence of an OLC opinion blessing the practice suggests that it has happened in the past and is capable of recurrence. And the existence of a clear inconsistency — not merely a tension — between the written law and the operative law renders this phenomenon exceptionally concerning.

2. Classified Office of Legal Counsel Opinions and Other Legal Memoranda

A Quasi-Judicial Interpreter of the Law

The Office of Legal Counsel (OLC) within the Department of Justice is responsible for issuing controlling legal advice to the president and other executive branch agencies. This authority is granted to the Attorney General by statute, but delegated to OLC by regulation.²³⁸ The advice may be issued formally or informally, in writing or through oral communication. Written advice may take the form of memorandum opinions; letters or memoranda to agency officials; or file memoranda, which often memorialize advice given to officials more briefly or informally. (Except where otherwise indicated by context, this report uses the term “OLC opinion” to describe controlling legal advice issued by OLC in any form.)

Courts have noted that “there is considerable authority that [an opinion of the Attorney General] is binding on an executive official who requests the opinion on a matter of law.”²³⁹ A former head of OLC observed that “executive branch agencies have treated Attorney General (and later the Office of Legal Counsel) opinions as conclusive and binding since at least the time of Attorney General William Wirt,”²⁴⁰ who served as Attorney General from 1817 to 1829. OLC’s views thus “conclusively resolve the legal question presented, short of subsequent judicial review.”²⁴¹

The authoritative nature of OLC opinions does not depend on whether they are delivered formally or informally, in writing or over the phone. Speaking at a public conference in 2015, the head of OLC stated:

There are a lot of different ways in which OLC gives advice. A very small piece of that is writing formal opinions. The vast majority of our advice is provided informally — is delivered orally or in emails. That is still authoritative. It is still binding by custom and practice in the executive branch. It's the official view of the office. People are supposed to and do follow it.²⁴²

Given that OLC opinions are binding in the same way a court's would be, OLC's function is frequently described as “quasi-judicial” in nature.²⁴³ Indeed, because many of the issues that OLC addresses are unlikely ever to be the subject of litigation, OLC often effectively substitutes for the courts, and its interpretation becomes the “final word.”²⁴⁴ Viewed in this light, OLC and Attorney General opinions “comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters.”²⁴⁵

Even if a court subsequently disagrees with an OLC opinion, the opinion retains legal effect in one important way. Attorney General Michael Mukasey stated that “the Justice Department . . . could not investigate or prosecute somebody for acting in reliance” on an OLC opinion.²⁴⁶ Jack Goldsmith confirms that such a prosecution would be “practically impossible . . . even if the opinion turns out to be wrong.”²⁴⁷ OLC opinions, in short, have the ability to effectively amend the penal provisions of the criminal law for any actions taken during the time the opinion is in effect. CIA agents thus referred to certain provisions of an OLC memorandum on torture as a “Golden Shield” against potential future liability.²⁴⁸

Because of its unique and powerful role, OLC has developed a tradition of neutrality that is different from the typical role of an advocate. In Goldsmith's words, “[T]he office has developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court within the executive branch.”²⁴⁹ At the same time, however, former OLC attorneys have confirmed that “OLC . . . face[s] great pressure to conform its views to those of the President.”²⁵⁰ OLC alumnus Harold Hongju Koh states: “Like all accommodating lawyers, OLC is eager to please its clients so that it can both maximize its own business and ‘stay in the loop.’”²⁵¹ The institutional norms of neutrality within the office “exist to counter OLC's own understandable desire to please its principal client, the President, by telling him what he wants to hear.”²⁵²

The Torture and Warrantless Surveillance Memos

Despite its importance, few Americans had heard of OLC until *The Washington Post* obtained a copy of one of the OLC “torture memos” and revealed its contents in a June 2004 story.²⁵³ These memos infamously concluded that the president is not bound by U.S. laws prohibiting torture when acting as commander in chief; that the infliction of pain does not constitute torture unless “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”; and that specific techniques the U.S. government considers torture when applied by other countries, such as waterboarding, were not torture when used by the U.S. against Al Qaeda or Taliban suspects.²⁵⁴ They were developed in the utmost secrecy; only a small

handful of lawyers in the White House, Justice Department, and CIA were involved,²⁵⁵ and the White House ordered OLC not to show the torture memos to the State Department, which would have raised strong objections.²⁵⁶

Around the same time, the White House engaged one hand-picked OLC attorney, John Yoo, to provide legal justification for the Bush administration's warrantless surveillance programs. Although the programs violated the Foreign Intelligence Surveillance Act (FISA), which at the time required the government to obtain a court order when conducting domestic surveillance of communications between foreign targets and Americans, Yoo concluded that this law did not bind the president when it came to the programs at issue. Once again, the legal justification was developed in extreme secrecy; Yoo's supervisors were not informed about the program, and the NSA's own lawyers were not allowed to see his opinions.²⁵⁷

When their substance was revealed, the torture and warrantless surveillance memos caused immediate controversy — not only because of the disturbing conduct they authorized, but also because of the apparent conflict between the relevant statutes and the memos' secret interpretation. It became clear that there were two parallel regimes of law at work: the written law that the public was allowed to see, and a very different set of rules — the ones that the government actually followed — which were set forth in top secret legal opinions. Speaking about one of the torture memos, a former government official stated: “To learn that such a document was classified had the same effect on me as waking up one morning and learning that after all these years, there is a ‘secret’ Article to the Constitution that the American people do not even know about.”²⁵⁸

The secret law was also bad law. As noted above, when President Bush appointed Goldsmith head of OLC in 2003, Goldsmith was so appalled by the poor quality of the torture memos that he officially withdrew two of them.²⁵⁹ John Yoo's memos on warrantless surveillance, which remain largely classified today, apparently were no better: Goldsmith observed that administration lawyers dealt with FISA “the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.”²⁶⁰ The opposition by Goldsmith and other Department of Justice officials who learned of the memos' analysis nearly precipitated a constitutional crisis, with senior Department leadership threatening to resign *en masse*.²⁶¹ The torture and warrantless surveillance memos thus illustrate the many hazards of secret law.

Are Secret OLC Opinions Legal?

The Freedom of Information Act was intended to preclude the development of secret law. It requires agencies to publish in the Federal Register not only “substantive rules of general applicability,” but also “statements of general policy or interpretations of general applicability.”²⁶² When members of the public have sought to obtain unpublished OLC opinions, however, the government has argued — and many courts have agreed — that the opinions are exempt from disclosure because they are shielded by the “deliberative process” privilege.

The deliberative process privilege protects records reflecting the back-and-forth among agency officials before final decisions are made. It covers “recommendations, draft documents, proposals, suggestions,

and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”²⁶³ The Supreme Court has made clear that the deliberative process privilege cannot protect records that constitute an agency’s “working law.” In the Court’s words, FOIA’s exemption for deliberative records, “properly construed, calls for disclosure of all ‘opinions and interpretations’ which embody the agency’s effective law and policy, and the withholding of all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be.”²⁶⁴

An OLC opinion is not an exchange of ideas among individual attorneys regarding how the law might be interpreted; it is the Department of Justice’s final and official interpretation of the law. Some courts nonetheless have held that OLC opinions are “deliberative” because the ultimate *policy* decision — whether to implement a particular program or course of action — lies with the agency that sought OLC’s counsel, not OLC. OLC opinions, these courts suggest, are merely one factor that the deciding agency considers. As the United States Court of Appeals for the D.C. Circuit asserted, “OLC does not speak with authority on the FBI’s policy; therefore, the OLC opinion could not be the ‘working law’ of the FBI unless the FBI ‘adopted’ what OLC offered.”²⁶⁵

This analysis conflates two distinct agency decisions. The Justice Department makes a final, binding decision regarding how the law is to be interpreted. The requesting agency then makes a separate decision regarding what course of action to take. In some cases — for instance, where an agency wishes to implement a program that OLC finds to be incurably unconstitutional — the agency’s course of action may well be dictated by OLC’s decision. In other cases — for instance, where an agency is considering a program and the OLC deems it to be lawful — the agency has wide latitude, and may choose to implement the program fully, partially, or not at all. But even in the latter circumstance, the fact that OLC cannot dictate the *policy* decision does not make its *legal* decision any less final or binding — any more than a court’s legal interpretation is rendered “deliberative” if it leaves the agency with multiple policy options. OLC decisions remain the “working law,” not only for the Department of Justice and the requesting agency, but for the entire executive branch.

The non-deliberative status of OLC opinions is confirmed by the manner in which the Department of Justice treats them. The opinions are indexed and used as precedent in later cases²⁶⁶ — a practice that courts have considered a telltale sign of “working law” in other contexts.²⁶⁷ OLC’s internal rules provide that these precedents should be accorded a measure of “stare decisis,” meaning that they generally should retain effect from administration to administration regardless of political or ideological differences.²⁶⁸ Past opinions may not be disregarded, but they may be formally reconsidered, amended, or withdrawn. A 2010 study by Trevor Morrison, a professor at the New York University School of Law and former OLC attorney, showed that this practice is rare: only 5.63 percent of OLC’s legal interpretations were subsequently modified or repealed.²⁶⁹

Outside of FOIA litigation, the government readily acknowledges the final and binding nature of OLC opinions. OLC officials describe the office’s opinions as constituting “the final word on the controlling law” in the absence of a judicial ruling.²⁷⁰ They agree that an agency displeased with an OLC opinion “cannot simply ignore” it; indeed, the practice of submitting requests for reconsideration to OLC would be unnecessary if OLC opinions were mere suggestions.²⁷¹ One former acting head of OLC has written that even the president, who alone may adopt legal interpretations that override the Attorney General’s, “would violate his constitutional obligation if he were to reject OLC’s advice solely on policy grounds.”²⁷² These are not the hallmarks of a deliberative document.

Some courts that have deemed OLC opinions “deliberative” have nonetheless held that the privilege can evaporate or be waived in certain circumstances. These include cases where an agency expressly adopts or incorporates the opinion in its policy,²⁷³ or where officials make repeated public statements citing the legal justification contained in the opinion.²⁷⁴ These rulings provide access to a narrow category of OLC opinions. However, courts have set the bars for express adoption and for waiver quite high. More fundamentally, these decisions ignore the reality that OLC opinions are themselves a form of law, rather than mere legal advice that has no effect absent the subsequent actions or statements of officials. And they do not address the problem of classification: while courts have had little opportunity to rule on this question, the U.S. Court of Appeals for the Second Circuit recently held that classified OLC opinions could be withheld from disclosure regardless of whether they constitute “working law.”²⁷⁵

Claims that OLC opinions should be shielded from disclosure by the attorney-client privilege are equally flawed. The privilege encourages candor in the attorney-client relationship by protecting information provided by a client to her attorney in confidence in the course of seeking legal advice.²⁷⁶ As with the deliberative process privilege, however, the attorney-client privilege cannot shield authoritative statements of law.²⁷⁷ When an agency solicits an OLC opinion, what it seeks is not “legal advice”;²⁷⁸ it is closer to a declarative judgment issued by a court. Parties seeking such judgments may well be reluctant to disclose a contemplated course of action that the court may then deem illegal, but that is the price for obtaining legal certainty.

While OLC opinions are unique in their ability to bind the entire executive branch, other types of secret legal memoranda may also serve as “law” if they are treated by an agency as binding or if they otherwise constitute the agency’s official legal interpretation. Courts have thus required agencies to disclose “binding agency opinions and interpretations” that the agency “actually applies in cases before it.”²⁷⁹ These interpretations can be just as important, and their non-disclosure just as problematic, as secret OLC opinions. For instance, when it began, the Iran-Contra affair rested on a legal opinion by the CIA’s general counsel and a cursory analysis by a junior lawyer on the president’s Intelligence Oversight Board that Oliver North hid in his office safe.²⁸⁰

How Secret Are OLC Opinions?

Between the start of the Carter administration through the end of President Obama’s first year, OLC produced 1,191 publicly available written opinions.²⁸¹ According to insiders, however, these published documents comprise only a fraction of OLC’s written opinions, and OLC’s publication policies have varied widely over the years.²⁸²

In 2012, the Sunlight Foundation, a non-profit organization focused on government transparency and accountability, sought to determine what proportion of OLC opinions was unpublished. Aggregating the opinions listed on two separate OLC webpages and on another website containing federal agency responses to FOIA requests, the group identified 509 opinions issued in the previous 15 years, and determined that 39% of these opinions were not published.²⁸³ The analysis, however, was based on lists that excluded classified opinions. As of 2013, the Department of Justice refused to disclose its internal lists of classified OLC opinions and withheld them in full in response to FOIA requests.²⁸⁴

Through its own FOIA requests, the Brennan Center has obtained several documents that shed light on the number of classified OLC opinions issued over time. One set of documents includes entries from OLC’s “classified daybook” spanning the years 1989-2013, along with an index of these entries. According to OLC FOIA staff, the daybook is intended to be a comprehensive listing of OLC opinions classified at all levels except the highest one: TS/SCI, or “Top Secret/Sensitive Compartmented Information.”²⁸⁵

The reason why opinions classified as TS/SCI are not recorded in the daybook is itself revealing. “Compartmented” information is so highly protected that sometimes only a few individuals are authorized to have knowledge of and/or access to it. Even the titles of compartmented OLC opinions may be classified at the highest level and their disclosure restricted to a handful of officials. Accordingly, the people who would be authorized to read a comprehensive listing of compartmented OLC opinions – i.e., those officials who are “read into” every compartmented program on which the OLC is asked to opine – may not extend much further than the president of the United States and a few others. There is no internal reason to produce such a listing.

It appears, however, that OLC at least occasionally creates lists of classified advice provided in connection with particular TS/SCI programs or categories of programs. OLC produced ten such lists to the Brennan Center. Nine are entirely redacted except for each opinion’s year of issuance. The tenth, dated April 29, 2008, includes seventeen documents; one is redacted, and the remaining sixteen are TS/SCI opinions relating to CIA interrogation techniques and conditions of confinement at CIA detention facilities.²⁸⁶

OLC also produced two charts classified as TS/SCI: an “Index of Classified OLC Opinions and Other Signed Memoranda Conveying Legal Advice to Other Executive Branch Officers or Entities Concerning [Redacted],” and an “Index of Classified OLC Legal Advice Related to [Redacted].”²⁸⁷ Both charts span from 2002 to 2009, and the few entries in the charts that are not fully redacted relate to CIA and Department of Defense interrogation techniques and to whether persons captured and detained in Afghanistan are protected under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The first chart includes 43 entries; the second contains 93 entries.

OLC provided the Brennan Center with additional information to help interpret the documents it produced. According to the office, the subject matter of the two charts is “not limited to issues of detention and interrogation,” but addresses “a broader range of topics, including national security, the United States’ response to terrorism, intelligence sharing and intelligence activities, and the law of armed conflict.” All of the documents on the chart with 43 entries also appear on the chart with 93 entries. Eleven of the entries on the larger chart are either draft opinions or informal lists or outlines, rather than final memorandum opinions, file memoranda, or letters conveying advice to officials. In addition, 25 of the documents that appear on that chart also appear in the classified daybook, and one appears on the TS/SCI list of CIA detention and interrogation opinions. OLC also cautioned that there might be overlap between the chart and the nine fully redacted TS/SCI lists, but stated that it could not confirm how much overlap, if any, exists.²⁸⁸ These additional facts inform the Brennan Center’s analysis, below.

Two noteworthy revelations emerge from these documents. The first relates to the 93-entry chart. Eighty-two of the entries are final opinions, memoranda, or letters; of these, only eight are unredacted. Thus, at least 74 OLC opinions, memoranda, or letters dating from 2002-2009 on several of the most important legal issues arising after 9/11, including intelligence gathering and the detention and interrogation of suspected terrorists, remain classified and unavailable to the public.

It is certainly possible that some of this secret advice involved little new legal analysis and merely applied previously articulated legal standards to particular situations. Even so, such a large body of secret law on such a consequential set of topics raises serious questions. Among other things, as the torture memos vividly illustrated, OLC is more likely to abandon its special duty of neutrality when no one is watching. Former OLC attorney Trevor Morrison has stated:

Publicity may be the best means of motivating OLC's lawyers to preserve the independence and integrity of the office. With publicity comes the possibility of public scrutiny, and with that comes an incentive for OLC's lawyers to uphold the stated standards of the office lest they tarnish their own professional reputations.²⁸⁹

Second, the documents produced by OLC reveal a high rate of security-driven secrecy in OLC opinions. The table at the end of this section indicates the total number of opinions classified at the non-TS/SCI level between 1989 and 2013, as reflected in the classified daybook; the number of opinions on the TS/SCI lists provided for the same time period; the number of opinions that appear on the TS/SCI charts (including memorandum opinions, file memoranda, and letters, but excluding drafts and informal lists or outlines); and the total number of unclassified opinions for the years 1998-2013.²⁹⁰ It shows that OLC issued *at least* 135 classified opinions between 1998-2013, comprising 20 percent of the total. In other words, during this time period, at least one out of every five OLC opinions was classified.

This secrecy is rendered more problematic by the occasional withholding of classified OLC opinions, not just from the public, but from Congress. This practice was unknown before the Reagan administration, and it remained rare before 9/11.²⁹¹ In recent years, however, the Department of Justice has relied on executive privilege to withhold OLC opinions even from the committees with jurisdiction over the opinions' subject matter. A notable example is the Obama administration's refusal to provide the intelligence committees with the OLC memoranda on targeted killing. After a Justice Department white paper that contained much of the memos' legal reasoning was leaked to the press, the administration turned some of the OLC advice over, but several memos still have not been shared with the committees.²⁹² When the executive branch withholds its interpretation of the law from Congress, that not only inhibits Congress's oversight function; it also prevents Congress from taking remedial legislative action when the executive branch misinterprets laws or claims it is not bound by them.

Year	Number of Classified Opinions (non-TS/SCI)	Number of Opinions on Nine TS/SCI Lists	Number of Opinions on TS/SCI List Re: CIA Detention/ Interrogation	Number of Opinions on TS/SCI Charts	Number of Unclassified Opinions
1989	5	0	N/A	N/A	Data Not Available
1990	3	0			
1991	0	2			
1992	0	0			
1993	1	0			
1994	2	8			
1995	2	1			
1996	0	2			
1997	0	0			
1998	1	0			57
1999	1	4			37
2000	0	0			47
2001	0	2			73
2002	11/2*	2/0-2**	1	82	55
2003	3/0*	4/0-4**	0		36
2004	8/2*	3/0-3**	7/6*		41
2005	4/1*	1/0-1**	3		24
2006	2/0*	0	2		20
2007	0	4/0-4**	4		22
2008	2/0*	4/0-4**	N/A		32
2009	3	9/0-9**			28
2010	2	8		N/A	19
2011	2	5			12
2012	0	3			16
2013	0	1	10		
1998 to 2013	39/14*	50/23-50**	17/16*	82	529

* The first number reflects the total number of opinions for this category and time period; the second reflects the number of opinions for this category and time period that do not overlap with the 82 opinions on the TS/SCI charts. The second number is used in calculating the total number of classified opinions from 1998-2013.

** The first number reflects the total number of opinions for this category and time period; the second reflects the possible range in the number of opinions for this category and time period that do not overlap with the 82 opinions on the TS/SCI charts. OLC was unable to specify how much overlap exists, if any, so the Brennan Center assumed complete overlap on one end of the range and no overlap on the other. Complete overlap was assumed in calculating the total number of classified opinions from 1998-2013.

3. Unpublished Agency Rules and Regulations

The model of the statute as the prototypical example of “law” may be anachronistic in the age of the administrative state. Scholars of administrative law acknowledge that “Congress has delegated vast lawmaking authority to federal agencies by statute,”²⁹³ and that “[a]gencies constantly create what we regard as law, making and remaking legal rights and duties at a frenetic pace.”²⁹⁴ Indeed, as the administrative state grows ever larger and Congress becomes increasingly gridlocked, the executive branch may fairly be characterized as the primary lawmaking branch. In 2013, agencies’ proposed and adopted rules filled 80,000 pages of the Federal Register, while the 133rd Congress (2013-2014) managed to fill only 1,750 pages in the compilation Statutes at Large.²⁹⁵

Under FOIA, agencies must publish in the Federal Register “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.”²⁹⁶ They also must “make available for public inspection in an electronic format” any “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.”²⁹⁷ As the courts have recognized, Congress “indicated unequivocally” that these provisions are designed “to forbid secret law.”²⁹⁸

FOIA contains exceptions, however. Intelligence agencies have construed these exceptions quite broadly, with some agencies effectively exempting themselves from FOIA’s publication requirement. In the national security establishment, secret rules are the norm rather than the exception, and many agencies operate under their own unpublished code of federal regulations. This is a massive source of secret law that has largely escaped public attention to date.²⁹⁹

The first exception on which agencies rely is the exception for classified information. Commonly known as “Exemption 1,” it applies to matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such order.”³⁰⁰ Intelligence agencies classify many of the rules governing their operations,³⁰¹ thus triggering Exemption 1.

The classification of rules and regulations is problematic for two reasons. First, as discussed above, the secrecy that necessarily attends the details of particular intelligence operations should not normally extend to the general rules governing how operations may and may not be conducted. Generally speaking, the law itself should not be classified.³⁰²

Second, even if there were instances in which classifying agency rules was appropriate, there is broad agreement among insiders and experts that the federal government classifies far too much information unnecessarily. Current and former government officials have estimated that between 50 and 90 percent of classified information could safely be released.³⁰³ Courts, however, are extremely deferential to classification determinations and almost never overturn Exemption 1 claims. As Adam Samaha, a professor at the New York University School of Law, explains, “Often judicial deference is appropriate. But the operation of Exemption 1 has crossed into a constitutional danger zone, especially considering widespread agreement that the executive classifies too much information in the first place.”³⁰⁴ Classifying the law is a dubious proposition; overclassifying it is intolerable.

Intelligence agencies also rely on “Exemption 3,” which applies to matters “specifically exempted from disclosure by statute,” if the statute requires non-disclosure “in such a manner as to leave no discretion on the issue” or if it “establishes particular criteria for withholding or refers to particular types of matters to be withheld.”³⁰⁵ The CIA’s website makes clear that it considers almost any information about its activities, which could include rules governing anything other than the most mundane administrative matters, to be shielded by Exemption 3:

[FOIA] Requesters should also be aware of several additional factors. The CIA Information Act, 50 U.S.C. 431, exempts from the search, review, and disclosure provisions of the FOIA all operational records of the CIA maintained by its National Clandestine Service, its Directorate of Science and Technology, and its Office of Security. By the term operational records, we mean those records and files detailing the actual conduct of our intelligence activities. . . . In addition, requesters who seek records concerning specific actual or alleged CIA employees, operations, or sources and methods used in operations will necessarily be informed that we can neither confirm nor deny the existence of any responsive records.³⁰⁶

The NSA’s FOIA webpage is similarly discouraging in tone. In addition to citing Exemption 1, it lists multiple statutes that it claims would trigger Exemption 3. The broadest of these is a law stating that “[n]othing in this chapter or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, *or any information with respect to the activities thereof*, or of the names, titles, salaries, or number of the persons employed by such agency.”³⁰⁷

There are several other statutes that arguably would exempt some intelligence agencies’ rules from FOIA’s publication requirement. These include provisions allowing (but not requiring) the NSA and certain other intelligence agencies to exempt their “operational files” — defined differently for each component, but generally including information about certain kinds of activities — from disclosure.³⁰⁸ They also include the National Security Act, which states that “[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.”³⁰⁹ Even though an official disclosure made to comply with the publication requirements of FOIA would seem to be an “authorized” one, this provision has been construed to exempt from FOIA any information regarding sources and methods, regardless of the information’s sensitivity or classification status.

While one might logically distinguish between information about an agency’s activities and the rules governing them, intelligence agencies do not appear to make this distinction, as they rarely, if ever, publish such rules. Since 1994, the CIA has published nine final rules in the Federal Register. None of these relates to the CIA’s core substantive activities: one relates to security on CIA installations within the U.S., one governs debarment and suspension procedures for CIA contractors, and one removes information security regulations that were required by an executive order no longer in force; the remaining five relate to FOIA, classification, and document access.³¹⁰ The NSA published two final rules during this same time period,³¹¹ while the Office of the Director of National Intelligence (ODNI), which was created in 2005, published 11, and the FBI only 6 — largely focused, again, on access to records, records management, Privacy Act implementation, and

similar matters. These numbers are orders of magnitude lower than the output of other sizeable government agencies.³¹²

Intelligence agencies fail to publish their rules even when there is no clear statutory basis for non-publication. For instance, the Attorney General's Guidelines for Domestic FBI Investigations, which are unclassified, have never been published in the Federal Register; until relatively recently, they were not made public at all.³¹³ The Guidelines set forth the tools FBI agents may use, and the standards they must follow, in conducting ordinary criminal investigations as well as national security ones. Despite the title "Guidelines," they are clearly intended to bind FBI agents; indeed, the document specifies that "[d]epartures from these Guidelines must be approved by the Director of the FBI, or by an Executive Assistant Director designated by the Director."³¹⁴ The Guidelines include 46 pages of substantive general rules and authorities that have significant impacts on Americans' rights.³¹⁵

When intelligence agencies do publish their rules, they often simply release them on their websites rather than publishing them in the Federal Register, and the rules generally have not gone through the "notice and comment" procedure that is standard practice throughout the rest of the executive branch.³¹⁶ Although publicly available rules that were developed in secret are not "secret law" in a strict sense, some of the concerns surrounding secret law flow from the insular process by which it is developed, and these concerns can apply equally in cases where the final product is made public. The purpose of notice and comment procedures, as discussed above, is to ensure that the agency benefits from the expertise and perspective of private parties.³¹⁷ Particularly in the realm of national security, "policies within the executive branch are developed in a climate of isolation and ideological rigidity, predictably undermining the soundness"³¹⁸ of the resulting decisions.³¹⁹

An interesting counterexample to the general norm of non-publication is the rules issued by ODNI. These rules apply across the intelligence community and are meant to promote coherence and consistency in intelligence policy. They are issued as part of an "IC Policy System" that involves four "instruments": Intelligence Community Directives (ICD), Intelligence Community Policy Guidance (ICPG), Intelligence Community Standards (ICS), and DNI Executive Correspondence (EC).³²⁰ ODNI describes the first three of these instruments as establishing rules or requirements rather than mere suggestions or guidelines: ICDs, which operate at the highest level of generality, "establish policy and provide definitive direction to the IC";³²¹ ICPGs must be consistent with ICDs but "may establish subordinate responsibilities";³²² and ICSs, which are subordinate to ICDs and ICPGs, provide (among other things) "specific . . . sets of rules . . . for intelligence or intelligence-related products, processes, or activities."³²³

These rules can have significant effects on the rights and interests of Americans. For instance, ODNI's directives and guidance instruct intelligence community elements to protect civil liberties and privacy, and detail the processes that must be in place for that purpose;³²⁴ set limits on intelligence officials' contacts with the media;³²⁵ establish a coordinated approach to warning individuals or groups about specific threats of harm;³²⁶ regulate the sharing of intelligence information, including information concerning Americans, with foreign governments or entities;³²⁷ and create a process for determining when information held by intelligence agencies is exempt from discovery obligations in ordinary litigation.³²⁸

None of these rules has been published in the Federal Register, either in proposed or final form. However, ODNI increasingly is publishing these rules on its website when they are issued, and is reviewing and posting previously issued rules as well. In September 2015, ODNI informed the Brennan Center that 98% of ICDs, 75% of ICPGs, and 54% of IC policy memoranda (the precursors to the new instruments, which remain in effect unless or until superseded) had been published. By July 2016, these rates of publication had increased to 100%, 96%, and 70%, respectively.³²⁹

It is unclear why many of these rules were undisclosed in the first instance (and why some of them remain secret). Some may be classified, but there are known instances of unclassified ODNI directives remaining secret for many years or being issued in redacted form.³³⁰ It is similarly unclear why ODNI does not follow the APA's procedures for publishing notice of proposed rules, soliciting public comment, and publishing the final version in the Federal Register. Notably, ODNI does not publish any of its ICSs because it does not view them as establishing policy, even though the directive that establishes and explains the IC Policy system describes these instruments as setting forth "specific . . . sets of rules . . . for intelligence or intelligence-related products, processes, or activities."³³¹

Notwithstanding these caveats, ODNI's rate of publication appears much higher than that of the individual intelligence components ODNI oversees. The 100% publication rate for ICDs, in particular, stands out as a rare and commendable achievement within the intelligence establishment. ODNI's relative transparency serves as proof of concept: rules and regulations governing the activities of intelligence agencies can be made public without harm to national security.

4. Secret International Agreements

In 1918, President Woodrow Wilson gave a speech to Congress in which he outlined "Fourteen Points for Peace," intended as principles to guide negotiations to end World War I. The first of these was a call for "[o]pen covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view."³³² Nearly a century later, international law, in the form of binding agreements between nations, is one of the most significant sources of secret law in the United States.

Article II of the Constitution gives the president the authority to negotiate treaties, which go into effect only with the consent of two thirds of the Senate. Like the Constitution itself and the laws passed by Congress, treaties are "the supreme law of the land."³³³ While the negotiations are often highly secretive, the Senate approval process ensures a level of publicity and democratic accountability, and Congress has required publication of all Senate-approved treaties in a compilation entitled "United States Treaties and Other International Agreements."³³⁴

Few Americans realize, however, that Article II treaties today constitute a small and ever-shrinking proportion of international agreements. There are also "sole executive agreements," entered into by the president based on inherent executive authority; "ex post congressional-executive agreements," negotiated by the president and submitted to both houses of Congress for a simple majority vote; and "ex ante congressional-executive agreements," negotiated by the president pursuant to authority delegated by Congress in advance. The agreements that do not require legislative ratification — the

sole executive agreements and the ex-ante congressional-executive agreements — have become the dominant source of international law in the U.S.: between 1980 and 2000, there were 375 treaties and a small number of ex post congressional-executive agreements, but more than 3,000 sole executive agreements and ex ante congressional-executive agreements.³³⁵

The “vast majority of international agreements in force” in the United States today take the form of ex ante congressional-executive agreements.³³⁶ The legislative authorizations that form the basis for these agreements tend to be extremely broad and contain no time limits. For instance, the Foreign Relations Authorization Act of 1972 states simply, “[T]he President is authorized to conclude agreements with other countries to facilitate control of the production, processing, transportation, and distribution of narcotic analgesics. . . .”³³⁷ The subject matter of such agreements can be just as significant (and consequential to Americans) as that of regular Article II treaties — a recent example being an agreement with China on the safety of drugs and medical devices³³⁸ — and they have the same legal force.³³⁹ They are typically negotiated by officials in federal agencies and their counterparts in other countries.³⁴⁰ There is no notice-and-comment procedure or other way for interested parties to express their views.

While Congress has required the publication of all treaties, the requirement to publish other forms of international agreements includes several exceptions.³⁴¹ For all but one of these exceptions, copies of the unpublished agreements must be made available by the Department of State on request; however, that provision does not apply to agreements that are unpublished because “the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States.”³⁴²

In addition, while the State Department must transmit all international agreements to Congress no later than 60 days after they enter into force, there is an exception for any agreement “the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States.”³⁴³ These instead are relayed to the foreign affairs committees only, “under an appropriate injunction of secrecy to be removed only upon due notice from the President.”³⁴⁴ Each year, the Secretary of State must submit to Congress a report containing an index listing each agreement that was signed in the previous year and that “has not been published, or is not proposed to be published, in the compilation entitled ‘United States Treaties and Other International Agreements.’”³⁴⁵

Even leaving aside the exceptions for agreements with national security implications, timely compliance with publication and congressional notification requirements tends to be the exception rather than the rule. Until recently, many agreements were not publicly available until at least a year after they had gone into effect.³⁴⁶ Moreover, because agencies that negotiate agreements often fail to report them to the State Department as required by law, the agreements are not timely reported to Congress.³⁴⁷ Oona Hathaway, a professor at the Yale Law School and an expert in international law, has thus observed that “Congress and the public are unable to learn much, if anything, about executive agreements until well after they have already entered into effect.”³⁴⁸

Agreements that are unpublished for national security reasons may remain secret for years or decades, particularly those that are classified. There is no regular publication that enables the public to see how many international agreements are kept secret on national security grounds. Although the yearly

publication “Treaties in Force” purports to include “treaties and other international agreements of the United States on record in the Department of State on January 1, [year], which had not expired by their own terms or which had not been denounced by the parties, replaced, superseded by other agreements, or otherwise definitely terminated,”³⁴⁹ it in fact does not list — even in redacted form — classified agreements, nor does the State Department’s public list of international agreements that have been provided to Congress.

A 2001 report by the Congressional Research Service, however, may give some sense of historical rates of classification. The report includes a table that indicates the number of reports provided to Congress after the reporting deadline, and the number of these that were classified, between 1978 and 1999. Aggregating the data, there were 1,245 agreements transmitted late, of which 117 — or just over nine percent — were classified.³⁵⁰ Of course, the percentage was almost certainly lower for agreements that were transmitted on time, given that the statute permits delayed notification for classified agreements. That said, experts observe that secret agreements have become more common after 9/11,³⁵¹ and Senate Foreign Relations Committee staff estimated in 2009 that roughly 5 to 15 percent of all executive agreements (comprising sole executive agreements and ex ante congressional-executive agreements) are classified.³⁵²

This may have been an underestimate. As noted above, the State Department has since 2004 been required to submit annual reports to Congress containing an index, which may be classified, of all the international agreements executed in the prior year that the State Department does not intend to publish.³⁵³ In response to FOIA litigation brought by the Brennan Center, the State Department released these indexes, redacted in a manner that allows the reader to ascertain the number of agreements. They show that the executive branch entered into at least 807 unpublished international agreements during the eleven years spanning 2004-2014, with the number peaking in 2005 and 2006.³⁵⁴ When compared with the 1,137 international agreements published during the same period,³⁵⁵ that suggests a secrecy rate of 42 percent in binding agreements between the U.S. and other countries.

Year	Unpublished Agreements Reported to Congress Under 1 U.S.C. § 112b(d)	Treaties and Agreements Published in <i>Treaties and Other International Acts</i>	Percent of International Agreements Not Published
2004	64	131	33%
2005	112	83	57%
2006	101	111	48%
2007	85	110	44%
2008	86	109	44%
2009	52	98	35%
2010	59	142	29%
2011	58	82	41%
2012	58	84	41%
2013	73	93	44%
2014	59	94	39%
Total	807	1,137	42%

5. Closed Immigration Proceedings

Just as agencies routinely perform the legislative function of rulemaking, many also perform the judicial function of adjudicating cases and controversies. In the process, they issue decisions that are binding on the parties before them and sometimes on future parties, thus effectively making law.

The immigration court system is a particularly significant example. Housed within the Department of Justice's Executive Office for Immigration Review (EOIR), the system includes approximately 250 Immigration Judges assigned to 57 administrative courts, as well as the Board of Immigration Appeals (BIA), an administrative appellate body comprised of up to 17 board members.³⁵⁶ Immigration Judges and BIA members are not "Article III" judges — they are not nominated by the president and confirmed by the Senate; rather, they are administrative law judges appointed by the Attorney General.³⁵⁷ Nonetheless, the cases they decide can have life-and-death implications for the parties who come before them (for instance, cases involving refugees who seek asylum in the U.S.) and can involve complex questions of law.

Despite the important matters it handles, the immigration court system is, by all accounts, a deeply troubled one.³⁵⁸ A crushing case load and dearth of resources have led to an enormous backlog, and judges are forced to rush through cases that have been pending for years. Most participants have no lawyer and no way to find one.³⁵⁹ Translation services are spotty. The president of the National Association of Immigration Judges analogizes the judges' task to "dealing with death penalty cases in traffic court."³⁶⁰

Lack of transparency is one of the system's hallmarks even in cases without national security implications. Immigration Judges may choose to issue written decisions, but they generally issue them orally, and a memorandum summarizing the decision is sent to the parties.³⁶¹ Proceedings (including oral decisions) are recorded but not transcribed unless appealed to the BIA.³⁶² Parties may obtain record copies of proceedings on request, but non-parties must file a FOIA request (and therefore must be aware of the decision in the first place).³⁶³ Although regulations require most proceedings to be open to the public,³⁶⁴ this requirement appears to be commonly flouted, especially in the roughly 50% of cases that are heard in immigration detention centers.³⁶⁵

As for the BIA, if an individual board member decides an appeal, she is barred from issuing a written opinion if she believes that the Immigration Judge reached the correct result, that any errors were either harmless or non-material, or that the issues are either squarely controlled by existing precedent or "not so substantial" as to warrant a written opinion.³⁶⁶ If a matter is serious enough to warrant review by a three-member panel, the BIA must issue a written decision and serve it on all the parties.³⁶⁷ However, the decision is binding only on the parties involved in that case, unless the Attorney General, the Secretary of Homeland Security, or a majority of the BIA's members decide to designate the decision as precedential.³⁶⁸ There are no published criteria for making this determination; a regulation that would have established such criteria was proposed in 2008 but never finalized.³⁶⁹ Precedential decisions are published in the bound volumes of the "Administrative Decisions Under Immigration and Nationality Laws of the United States."³⁷⁰

The system is even more opaque in cases that involve national security considerations. Since the 1950s, the law has provided for the use of secret evidence (i.e., classified evidence that the alien is not permitted to see) in certain categories of immigration proceedings, and Congress expanded this authorization in 1996.³⁷¹ The use of secret evidence to exclude or deport individuals from the country is highly controversial in its own right and raises significant due process concerns.³⁷² These concerns are compounded when classified information forms the basis of legal rulings, transforming secret evidence into secret law. While immigration court rules appear to require written decisions in cases involving classified evidence, any classified information must be included in a classified attachment, with the decision stating that “the ‘attached’ classified information was a factor in that decision.”³⁷³ The BIA must follow a similar procedure in resolving appeals.³⁷⁴

After 9/11, additional measures to permit secrecy were put in place. In the aftermath of the attacks, Chief Immigration Judge Michael Creppy issued a memorandum (known as the “Creppy Memorandum”) requiring Immigration Judges to follow certain steps in cases that the Attorney General designated as “special interest” matters. Judges were ordered to close proceedings to the public and not to disclose any information about these cases.³⁷⁵ In mid-2003, the government acknowledged that more than 600 secret immigration hearings had taken place.³⁷⁶

The secrecy of these proceedings was disturbing for many reasons, including the potential for secret law to be made. Statutes enacted in the preceding few years — including the Antiterrorism and Effective Death Penalty Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and the Patriot Act — had made significant changes to the immigration laws, many of which were national security-related.³⁷⁷ It is quite possible that Immigration Judges were required to interpret some of these relatively recent changes when adjudicating “special interest” cases. There is no way to know for sure whether their rulings broke new legal ground, as much of what transpired in these proceedings remains secret today.

Media representatives filed lawsuits, arguing that the blanket closure of proceedings violated the First Amendment right of access to the courts. Applying the “experience and logic” test described in Part I.C.2 of this report, the Sixth Circuit Court of Appeals found the practice unlawful,³⁷⁸ while the Third Circuit Court of Appeals upheld it.³⁷⁹ By the time these courts ruled, however, the Department of Justice had issued a new regulation creating a regime of protective orders intended to replace the Creppy Memorandum.

The regulation, which remains in force today, is both narrower and broader than Judge Creppy’s directive. It is narrower because it requires judges to issue protective orders only where the government makes a showing of “substantial likelihood” that specific information “will, if disclosed, harm the national security . . . or law enforcement interests of the United States.”³⁸⁰ It is broader because it allows judges to prohibit parties, witnesses, and attorneys in the case from divulging information³⁸¹ — something the Creppy Memorandum did not do³⁸² — and because it extends beyond national security to include ordinary law enforcement matters. If a protective order is granted, court documents that include the protected information, including any written opinions that rely on it, are filed and kept under seal.³⁸³

It is challenging to assess how much secrecy this three-part regime³⁸⁴ — decisions that rely on classified addenda, secret decisions in “special interest” cases (2001-2003), and decisions shielded by protective orders (beginning in 2002) — has engendered. With regard to the first category, a comprehensive review is not possible because Immigration Judges’ decisions are not published and BIA decisions need not be published unless they are deemed “precedential.” That said, a careful review of the BIA’s 749 precedential decisions since 1990 shows that *none* of them makes reference to classified information, even though the BIA must explicitly indicate when classified material was a factor in its decision.

It is theoretically possible that the BIA has never considered classified evidence in an important case. However, considering that classified evidence has been used in dozens if not hundreds of cases,³⁸⁵ it seems more likely that the BIA fails to explicitly acknowledge its consideration of classified evidence and/or avoids granting “precedential” status to decisions with classified components, thus leaving individual Immigration Judges to render their own (unpublished) legal interpretations in cases with national security implications.

As for rulings issued in secret under the Creppy memo’s regime, EOIR responded to the Brennan Center’s FOIA requests by producing a chart, dated April 23, 2003, which lists 782 matters that appear to comprise the “special interest” cases.³⁸⁶ The Department of Homeland Security’s Immigration and Customs Enforcement (ICE), which represents the government in immigration proceedings, produced another chart — this one dated November 26, 2003 — which lists 767 such cases.³⁸⁷ (The reason for the differing tallies in the charts is not clear, but it could reflect adjustments to the cases’ status in the intervening seventh-month period.) The ICE document shows that, in 535 cases, individuals were deported or removed as a result of the judges’ secret rulings, and six were “[r]emanded to U.S. Marshals.”

Data on protective orders has proven harder to come by. In response to a FOIA request for motions for protective orders filed in immigration cases and orders granting them, ICE, which is responsible for filing such motions, maintained that it could not locate any, despite the fact that litigation files for immigration cases must be maintained in the ICE’s case management system for 75 years.³⁸⁸ The Brennan Center prevailed in three administrative appeals, yet each time a new search was ordered, ICE turned up no motions — although it produced handbooks explaining how such motions should be filed as well as templates for filing them, and EOIR produced a document that listed 133 matters described as “protective order cases.”³⁸⁹ Thus, for now, the amount of secret immigration law created under the shield of a protective order remains a secret.

C. Judicial Branch

As discussed in Part I.C.2, courts have found a First Amendment right of public access to a wide range of criminal and civil proceedings in regular Article III courts. This right is bolstered by the Sixth Amendment’s right to a public trial in criminal cases.³⁹⁰ The Supreme Court has been clear that “secret judicial proceedings would be a menace to liberty,”³⁹¹ that “[j]ustice cannot survive behind walls of silence,”³⁹² and that “[w]hat transpires in the court room is public property.”³⁹³

When it comes to the courts' legal rulings, there are additional reasons for transparency. A common law system relies on adherence to precedent; if the precedent is not made public, the law may be applied — or be perceived to apply — inconsistently or unfairly. As Justice Scalia admonished, “When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*.”³⁹⁴ For this reason, “[t]he written opinion is the foundation of the common law.”³⁹⁵

Moreover, as with any other kind of law, transparency improves the quality of judicial decisions. Judge Alex Kozinski of the Ninth Circuit Court of Appeals has noted that publication prompts judges to write better-reasoned opinions: “The time — often a huge amount of time — that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone.”³⁹⁶ Secret opinions also remove an important mechanism for ensuring that statutory law remains subject to democratic control, as Congress cannot enact new legislation to override a judicial interpretation of a statute — nor can the public urge Congress to do so — if the interpretation is not disclosed.

Although transparency is the default in judicial opinions, there are exceptions. The phenomenon of heavily redacted opinions has reared its head in post-9/11 national security cases. In addition, over the past decade, a specialized court that once engaged in a less controversial form of judicial secrecy — issuing foreign intelligence surveillance warrants in individual cases — began issuing significant classified interpretations of the law in cases affecting millions of people.

1. Redacted or Sealed Judicial Opinions in Regular Article III Courts

The First Amendment right of public access to the courts is not absolute, and courts have recognized a number of scenarios in which hearings may be closed, documents may be filed under seal, or opinions may be redacted. Indeed, on occasion, entire cases may be placed under seal, although usually on a temporary basis. There is a fairly wide range of interests that may justify such measures, including the protection of confidential business measures, the privacy of minors, and — of course — national security.³⁹⁷

In 2009, the Federal Judicial Center (FJC), a government office charged by Congress with conducting research to improve judicial administration, undertook a study of sealed cases in federal courts. Using electronic filing data supplemented by outreach to court clerks' offices, the FJC identified every case filed in district court in 2006. It determined that 576 out of 245,326 civil cases (.2 percent) and 1,077 out of 66,458 criminal cases (1.6 percent) were sealed at the time of review.³⁹⁸ Magistrate judge cases were considered as a separate category and involved a much higher percentage of sealed cases, as magistrate judges hear applications for search warrants.³⁹⁹

The FJC study is the most comprehensive one available, but it dramatically understates the degree of secrecy in the courts due to the FJC's methodology. The FJC counted as “sealed” only those cases in which the public is denied any access to docket information (such as the name of the case, the date of its filing, or the judge assigned to it) as well as to the filings themselves. Even a case in which every document was sealed was not counted if there was *some* public information about the case. The number of sealed opinions no doubt far exceeds the number of entirely sealed cases, and the number of redacted opinions is much greater still.

Determining the number of opinions that are sealed or redacted for national security reasons, and assessing how this number has changed over time, would necessitate a time-consuming and resource-intensive process of combing through the filings in a statistically significant sample of court cases. It also would require significant outreach to and cooperation from the court clerks' offices, as the reason for the sealing or redaction of filings may not be apparent from the public docket, and a large proportion of entirely sealed cases do not appear on the docket at all. The FJC would be best positioned to undertake this worthy project. In the meantime, there is anecdotal evidence to suggest that the post-9/11 expansion of the national security establishment and the authorities it exercises has led to a bump in judicial secret law.

Guantánamo Cases

A notable example is the slew of *habeas corpus* cases filed by detainees seeking release from the prison at Guantánamo Bay. In *Boumediene v. Bush*, the Supreme Court held that Guantánamo detainees had the right to petition for *habeas corpus*, but left open a number of legal questions, including the standard of proof for detention, the applicable evidentiary rules, and the limits of the government's detention authority.⁴⁰⁰ The District Court and Court of Appeals in Washington, D.C., which Congress charged with resolving the detainees' petitions,⁴⁰¹ have had to address these novel issues in over 60 cases.⁴⁰²

The vast majority of the decisions have been redacted, sometimes extensively, or separated into sealed opinions and public versions that provide only vague summaries.⁴⁰³ In some cases, the reader cannot even discern the legal question the court is answering; in others, the pervasiveness of the redactions renders the opinion virtually unreadable. This secrecy effectively prevents the public from knowing the law regarding indefinite detention.⁴⁰⁴

Examples abound. The appellate court's decision in *Bensayah v. Obama*⁴⁰⁵ addresses the sufficiency and reliability of the evidence against the detainee, but the discussion is so heavily redacted that it provides scant guidance on these questions beyond the bare finding that the evidence against Bensayah was insufficient.⁴⁰⁶ The initial opinion in *Ameziane v. Obama*⁴⁰⁷ concludes that the district court relied on an "inappropriate factor" in assessing whether a detainee may disclose information the government wishes to protect, but the factor itself, along with the appellate court's analysis, is redacted. In *Basardh v. Obama*,⁴⁰⁸ the following question tees up the court's opinion: "[T]he only issue before the Court is a narrow one — what, if any, relevance does Basardh's [redacted] have to a determination of the lawfulness of his continued detention?"⁴⁰⁹ The D.C. Circuit Court's opinion in *Latif v. Obama* is so heavily redacted, *The New York Times* referred to it as "Mad Libs, Gitmo edition."⁴¹⁰

Even where the legal question or standard is not obscured, the redaction of relevant facts can hamper the reader's understanding of the courts' legal analysis. In the words of one commentator, "a legal standard is virtually meaningless without the accumulated precedent of its application to facts."⁴¹¹ In addition to impeding the public's understanding of the law, excessive redaction of important facts can leave judges without sufficient guidance and undermine the consistency of judicial decision-making. "The inevitable result of the redactions is inconsistency in the lower courts because the courts lack meaningful examples from the circuit of how to apply the test to specific facts."⁴¹²

In particular, the district court erred by elevating Ameziane's interest [REDACTED] over the government's interest in [REDACTED]

Such prioritizing was an executive prerogative, and it was "not within the role of the [district] court[] to second-guess executive judgments made in furtherance of that branch's proper role." *Bismillah*, 501 F.3d at 187–88 (internal quotation marks omitted). Crucially, this does not mean Ameziane never will have the opportunity to [REDACTED]

means only that those [REDACTED]

Rather, it [REDACTED] The failure to accord "substantial weight and deference," *Fitzgibbon*, 911 F.2d at 766, to the government's assessment of its foreign relations and national security interests was error.

C

Finally, the district court erred by basing its ruling on an inappropriate factor. The court held that the "[m]ost important[]" factor weighing against the government's request for protection was that "protecting [REDACTED] would serve little purpose" because [REDACTED]

[REDACTED] July 8 Op. [REDACTED] The first problem with the district court's approach is [REDACTED]

[REDACTED]

(Excerpt from *Ameziane v. Obama*)

Two instances in which redacted or removed information was disclosed shed some light on what the public is not seeing. In the first case, *Abdah v. Obama* (known as *Uthman*),⁴¹³ Judge Henry Kennedy, Jr. of the D.C. District Court issued an opinion on March 16, 2010, with minimal redactions. The next day, it was removed from the docket. Westlaw was asked to remove the opinion and the detainee's lawyers were told to destroy their copies.⁴¹⁴ A new, extensively revised version was released on April 21. Because a media organization retained its copy of the original decision, a comparison is possible.⁴¹⁵ The revised version omits more than eight pages from the original without any mention of its removal. That information describes a range of evidence submitted by the government and discounts much of it due to problems with the documents and witnesses. In addition, the revised version states that the detainee was captured "in the general vicinity of Tora Bora," where U.S. troops were engaged in a battle against Al Qaeda forces; the original version revealed that he was captured in Parachinar, which is 12 miles from Tora Bora and separated by a treacherous mountain range that takes two to three days to cross.⁴¹⁶ The revised version thus obscures the poor quality of the government's intelligence and other problems with the evidence.

In the second instance, *Al Alwi v. Bush*, Judge Richard J. Leon of the D.C. District Court followed his usual practice of releasing two versions of the opinions: one with classified information and one with an unclassified summary of facts.⁴¹⁷ In this case, however, the classified version was redacted and released during appeal.⁴¹⁸ The redacted version contains a far greater level of factual detail regarding the evidence on which the detainee was deemed to be associated with the Taliban and al Qaeda. Moreover, the redacted version reveals that the majority of the government's allegations were supported by the detainee's own statements during interrogations, and rejects the detainee's argument that these statements should be discounted because he was subject to "harsh interrogation" tactics— aspects of the decision that do not appear in the unclassified version. The discrepancy between the two versions suggests that the judge's unclassified summary was more vague than necessary to shield classified information. Moreover, the information left out of the summary was important to the public's understanding of the opinion, as the issue on appeal was the sufficiency and reliability of the evidence.

Other Cases

The legality of surveillance under FISA is its own category of secret law. When the executive branch wishes to conduct electronic surveillance of a U.S. citizen or legal resident for foreign intelligence purposes, it must demonstrate probable cause to the FISA Court that the person is an agent of a foreign power. If criminal proceedings ensue, the defendant can challenge the FISA Court's order in regular court. However, in the 2014 case *United States v. Daoud*,⁴¹⁹ the Seventh Circuit Court of Appeals held that even defense attorneys with security clearances were not entitled to view the FISA surveillance materials. Instead, courts must conduct a closed hearing, without the defendant's participation, to determine the lawfulness of the surveillance — a process that generally will result in a sealed or redacted opinion. Indeed, the public opinion in *Daoud* was accompanied by a sealed opinion finding that the surveillance in that case was lawful.⁴²⁰

Other types of surveillance also result in secret law. In *United States v. Aref*,⁴²¹ for example, the defendant moved to discover and suppress evidence gathered by warrantless surveillance, which news reports

suggested may have played a role in his case.⁴²² Both the government’s response and the district court order denying the motion were sealed because they contained classified information, and the Second Circuit Court of Appeals upheld the sealing.⁴²³ In deciding to deny the defendant’s motion, the court could have considered a number of legal and factual questions. It is impossible, however, for the public to know even what issues the ruling resolved, let alone how it resolved them.

Secret law goes beyond detention and surveillance. In *Al Haramain Islamic Foundation, Inc. v. Department of Treasury*, an Islamic charity challenged the Department of Treasury’s use of classified evidence to designate the charity a “specially designated global terrorist” (SDGT), a label that resulted in the freezing of its assets. Although the Ninth Circuit Court of Appeals held that the government should have provided Al Haramain with an unclassified version of the evidence or taken some other step to mitigate any potential unfairness, it concluded that the error was harmless because Al Haramain could not have rebutted the evidence.⁴²⁴ The conclusion, however, was based in part on classified information that the court refrained from discussing or even summarizing. Accordingly, neither the plaintiff nor the public can understand how the court resolved the legal questions at issue — i.e., what constitutes “substantial evidence” to support a SDGT determination and what constitutes “harmless error” when a designee has been denied access to evidence.⁴²⁵

Even FOIA cases (ironically) generate secret law. In *New York Times v. Department of Justice*, the New York Times argued that executive officials had waived any privilege attaching to OLC opinions on targeted killing by making public statements about the lawfulness of the drone strike program. The Second Circuit held that the public statements did not waive the privilege, but it could not fully explain why: “In this case, it would be difficult to explain in detail why the context of the legal reasoning in [the OLC opinion] differs from the context of the public explanations given by senior Government officials eight years later without revealing matters that are [entitled] to protection.”⁴²⁶ The opinion thus sheds little light on the complex and important legal question being resolved by the court — namely, when the deliberative process privilege, as applied to an OLC opinion, may be deemed waived. Later in the same decision, in upholding redactions to the transcript of a closed hearing in the case, the court stated: “Our own ability to explain our rulings with respect to the redactions is also handicapped . . . [I]f redacted words touch on matters entitled to remain secret, we can state a conclusion, but little, if anything, else.”⁴²⁷

2. Classified Opinions of the Foreign Intelligence Surveillance Court

Despite the strong constitutional presumption in favor of public access to judicial proceedings, the FISA Court until recently operated almost entirely in secret. Although Congress in 2015 directed the executive branch to make the court’s decisions more transparent, this requirement is not absolute. Moreover, while the government has declassified and released dozens of FISA Court orders and opinions in recent years, newly obtained data show a large reserve of unpublished significant decisions.

A History of Secrecy

The FISA Court is a unique creature within the federal judiciary.⁴²⁸ Established by Congress in 1978 as part of the Foreign Intelligence Surveillance Act (FISA),⁴²⁹ the court’s original mandate was to review the government’s applications to collect “foreign intelligence” — information relating to

foreign affairs and external threats — in individual cases. Its judges, who are selected by the Chief Justice of the United States from the ranks of federal trial judges, generally hear from just one party: the government. Proceedings are closed and the court's decisions have historically been classified. The government may appeal any adverse ruling to the equally secretive three-judge Foreign Intelligence Surveillance Court of Review (FISCR). Most targets receive no notice of the surveillance, even after investigative activity has ceased.

At the time of the court's creation, many lawmakers saw constitutional problems in a court that operated in total secrecy and outside the normal “adversarial,” two-party process. Supporters of the legislation analogized FISA Court proceedings to magistrate judges' hearings on criminal search warrant applications, which also take place in secret and without the target's participation. Critics, however, noted an important difference: “Although it is true that judges have traditionally issued search warrants *ex parte*, they have done so as part of a criminal investigative process which... for the most part, leads to a trial, a traditional adversary proceeding.”⁴³⁰ Foreign intelligence investigations, by contrast, rarely culminate in criminal trials where the lawfulness of the search may be resolved publicly and in an adversarial setting. Nonetheless, the similarities to criminal search warrants provided sufficient comfort for lawmakers to endorse the secret court.

Thirty-five years later, Edward Snowden's disclosures showed that the role of the FISA Court had fundamentally changed. Beginning in 2004, President George W. Bush's administration sought the court's blessing for several warrantless surveillance programs it had undertaken immediately after 9/11, including the bulk collection of Americans' internet metadata, the bulk collection of Americans' phone records, and warrantless collection of phone calls and e-mails between foreign targets and Americans. The court approved the bulk metadata collection programs.⁴³¹ For a brief period, it also agreed to authorize the warrantless surveillance of content.⁴³² After a FISA Court judge refused to extend this authorization,⁴³³ Congress amended FISA to endorse such collection,⁴³⁴ and tasked the FISA Court with approving the program's general contours and procedures.

As a result, the FISA Court was no longer limited to resolving whether the facts of individual cases met the legal standard for issuance of a search order. Instead, the court began resolving novel, cutting-edge Fourth Amendment issues in the context of surveillance programs affecting tens of millions of Americans. And, until Snowden's disclosures, it did so almost entirely outside of the public eye, issuing just three published decisions before 2013. Only the congressional intelligence and judiciary committees were allowed some window into the court's proceedings, as Congress in 2004 required the Attorney General to provide the committees with copies of opinions “that include significant construction or interpretation of the provisions of [FISA].”⁴³⁵

Once some of these sweeping opinions were revealed, it became apparent that there was at times a tension between the analysis they contained and a plain reading of the law. The most infamous example relates to Section 215 of the Patriot Act, which at the time allowed the government to collect business records from companies if it could demonstrate to the FISA Court that the records were “relevant” to an authorized terrorism investigation. At the government's urging, the court interpreted this provision to allow the NSA's collection of nearly *every* American's phone records, on the theory that irrelevant records are fair game if relevant records are buried within them. No layperson (and few lawyers) could have been expected to derive this conclusion from the law's text. The court's ruling thus created a parallel regime of secret law that differed materially from the law on the books.⁴³⁶ As Senator Wyden stated in a 2011 speech on the Senate floor, “It's almost as if there were two Patriot Acts, and many members of Congress have not read the one that matters. Our constituents, of course, are totally in the dark.”⁴³⁷

The Post-Snowden Era

Snowden's disclosures and the public outcry they provoked forced greater openness in FISA Court rulings. The Office of the Director of National Intelligence (ODNI) worked with the Department of Justice to declassify and release more than 50 previously-issued opinions — some in response to FOIA requests or litigation, but many on the government's own initiative. The FISA Court publicly issued its subsequent rulings on the bulk collection program, which its judges had clearly written with an eye toward disclosure. Finally, in 2015, Congress enacted the USA Freedom Act, which requires the Director of National Intelligence (DNI) to conduct a declassification review of any FISA Court opinion that includes "a significant construction or interpretation of any provision of law," and to make such opinions public "to the greatest extent practicable."⁴³⁸

As a result of these developments, the FISA Court now maintains a public docket that lists an impressive number of public filings. Eighty-eight FISA Court orders and opinions have been made public since 2013, in contrast to the three surveillance-related decisions and two orders on procedural matters made public in the preceding 35 years.

The increased transparency in FISA Court opinions is a significant success story. However, it comes with two important caveats. First, the law still leaves ample room for secrecy. The USA Freedom Act vests the DNI and Attorney General with discretion to determine whether a FISA Court opinion includes a "significant [legal] construction or interpretation." There is no external check to prevent the executive branch from interpreting the term "significant" as creatively as it interpreted the term "relevant," or a host of other common-sense terms that the intelligence establishment has notoriously redefined.⁴³⁹ The statute also allows the DNI to satisfy the declassification requirement by issuing a redacted version of the opinion, or a summary that must include certain basic information only "to the extent consistent with national security." In theory, the DNI could issue an opinion with every sentence but one redacted, and still claim that he had satisfied the obligation to declassify. While the current administration appears to be following the spirit of the law as well as its letter, a future one could exploit these loopholes.

Second, declassification efforts under the USA Freedom Act have focused on rulings generated after the law's passage. Although ODNI and the Department of Justice are reviewing past opinions for declassification as well, declassification of these opinions is more time-consuming because they were not written in anticipation of public disclosure. There are limited resources available for this task, and the declassification of current opinions receives priority.⁴⁴⁰ Accordingly, there is a backlog of significant FISA Court opinions that have yet to be declassified and released.

Through FOIA requests and communications with the Department of Justice, the Brennan Center has obtained information that sheds light on the size of this backlog. The Brennan Center sought records relating to three statutory provisions, each of which requires the Attorney General to provide the intelligence and judiciary committees with certain information about significant legal interpretations of FISA. The first (50 U.S.C. § 1871(a)(4)), enacted at the end of 2004, requires the submission of semiannual reports that include summaries of significant legal interpretations (including those set forth in the government's briefs), along with copies of all significant court decisions. The second (50 U.S.C. §

1871(c)(1)), enacted in 2008, requires the submission of any significant opinion, along with associated pleadings, within 45 days of issuance. The third, also enacted in 2008, requires the submission of any significant opinions issued during the previous five-year period (dating back to mid-2003), along with associated pleadings, that were not already provided to the committees under the 2004 requirement.

The Department of Justice produced copies of all of the Attorney General's semi-annual reports up through June 2013.⁴⁴¹ Although the summaries of the legal opinions were heavily redacted, it is possible in most cases to determine how many significant legal interpretations were being reported.⁴⁴² The Department also produced a chart listing the documents provided to the congressional committees under the second and third reporting requirements described above. The chart was redacted in a manner that allowed a determination of the number of listed items.⁴⁴³ The results are as follows:

Time Period	Significant Legal Interpretations Listed in Semi-Annual Report	Opinions + Pleadings Submitted Under 50 U.S.C. § 1871(c)(1) <i>(should overlap with numbers in semi-annual report)</i>	Opinions + Pleadings Submitted Under 50 U.S.C. § 1871(c)(2) <i>(should be in addition to numbers from semi-annual report)</i>
2003 (second half)	N/A	N/A	23
2004			
2005	3		
2006	9		
2007	5		
2008 (first half)	3		
2008 (second half)	4	5	N/A
2009	3	4	
2010	3 or 4 (indeterminate)	7	
2011	3	4	
2012	3	3	
2013 (first half)	4	2	
2013 (second half)	Not produced	4	
2014 (through March)		2	

These numbers are striking given that the FISA Court's original mandate was simply to determine whether probable cause for surveillance existed in individual cases. Indeed, Judge James Robertson, who served on the FISA Court from 2002 to 2005 — before the court became regularly involved in mass surveillance programs — stated that he didn't recall any written opinions being issued, significant or otherwise, except for a 2002 opinion and appeal that were published.⁴⁴⁴

Although they give a sense of how dramatically the court's role has changed, neither the number of significant legal interpretations set forth in the semi-annual reports, nor the number of submissions made to Congress under 50 U.S.C. § 1871(c)(1) & (2), corresponds exactly with the number of significant court opinions. With respect to the semi-annual reports, a significant legal interpretation put forth in the government's briefs (and thus reported to Congress) may not be addressed by the

court, or it may be addressed in more than one opinion. With respect to the 50 U.S.C. § 1871(c)(1) & (2) productions, it is apparent from the unredacted entries on the chart that the various documents associated with a given court ruling may be provided to Congress at different times.

The Department of Justice accordingly agreed to go beyond the document production required under FOIA, and to provide the Brennan Center with an estimate of the number of significant opinions and orders reported to Congress that remain classified. According to the Department's estimate, 25-30 significant opinions or orders that were submitted to Congress up through the end of June 2013 remain classified. Of the significant opinions and orders submitted after June 2013 but before June 2015, "fewer than five" remain classified, and all of the significant orders and opinions from June 2015 to the present have been declassified and released (often with redactions) as required under the USA Freedom Act.⁴⁴⁵

These numbers appear consistent with the documents provided under FOIA and with the public record. For instance, the documents suggest a range of anywhere from 40 significant opinions (relying solely on the figures contained in the § 1871(a) reports) to 68 significant opinions (combining the totals from the semi-annual reports and the opinions provided under 50 U.S.C. § 1871(c)(2)) that were reported up through June 2013, with the actual number likely falling somewhere in the middle. The Brennan Center's own analysis of publicly released FISA Court opinions dating from mid-2003 to mid-2013 suggests that at most 19 of these opinions could plausibly be characterized as including a significant interpretation of the law.⁴⁴⁶ Adding those 19 released opinions to the 25-30 still-classified ones estimated by the Department would yield a number well within the range suggested by the documents.

In short, 25-30 significant FISA Court opinions and orders issued between mid-2003 and mid-2013 remain classified, according to the Justice Department's estimate, while at most 19 significant interpretations from that time period have been declassified and released. The number of significant pre-Snowden FISA Court opinions that have not been disclosed is thus greater than the number of such opinions that are now public. In all likelihood, these still-secret opinions continue to govern many aspects of the government's foreign intelligence surveillance.

The Privacy and Civil Liberties Oversight Board (PCLOB) — an independent five-member committee within the executive branch charged with overseeing the privacy and civil liberties aspects of counterterrorism policies — reports that the government is working to reduce this backlog (although, until now, its size was not publicly known).⁴⁴⁷ To the extent resource constraints are delaying the process, government officials and transparency advocates may wish to work together on ways to increase the resources available for declassification efforts.

In the meantime, members of the public should have the information necessary to assess the progress that is being made toward disclosure, to know when a decision has been made not to declassify or release an opinion (e.g., because the opinion is not deemed "significant"), and to understand how the post-USA Freedom system is working. The author of this report has proposed that the DNI release an index that lists each past and current FISA Court opinion by date of issuance, docket number, or other relevant identifier, and indicates the following information: whether the executive branch deems the

opinion “significant”; whether it has been publicly released, and when; and, if there has been no public release, whether it is currently undergoing declassification review, has already undergone declassification review and was not declassified, or has not been reviewed.⁴⁴⁸ The index would look something like this:

Opinion	Date	Significant?	Publicly released?	Status of Declassification Review (0 = ongoing; NR = no review; ND = completed, not declassified)
Docket No. Misc. 11-04	11/12/2011	Y	07/12/2015	
Docket No. BR 12-02	02/01/2012	N		NR
Docket No. PRTT 12-11	05/19/2012	Y		0

Such a measure would increase the transparency of the process, which in turn would help ensure and support increased transparency in the opinions themselves.

III. REFORMING SECRET LAW

The first two parts of this report showed that secret law undermines constitutional principles and is rarely necessary, yet it is strikingly common across all three branches of government in national security matters. What follows from these findings?

It is tempting to recommend a flat prohibition against secret law. After all, as discussed in Part I.D, it should generally be possible to write legal opinions in a manner that allows the redaction of sensitive facts (such as the names of human intelligence sources) while leaving the legal analysis intact. It also is generally the case that rules and regulations do not betray the existence of specific operations. While there may be exceptions, endorsing the occasional non-disclosure of law may cause more harm than it avoids — both because the inch that this permission affords will inevitably become a mile, and (relatedly) because the cost to democratic governance and accountability outweighs the national security risk.

A flat prohibition may yet prove the best approach. But before reaching that conclusion, it is worth considering reforms that would sharply restrict the amount of secret law. There are several procedural and substantive requirements that could help limit secret law to cases in which the risk to national security might indeed outweigh the countervailing considerations. The bulk of these reforms, discussed below, could be implemented by revising the executive order that governs classification.

A. Who Decides?

A critical threshold question is who should have the authority to decide that an authoritative legal interpretation or requirement should not be published. On this matter, some lessons may be gleaned from the process by which members of the public may request and obtain declassification of agency records, known as “Mandatory Declassification Review” (MDR).

Under MDR, any member of the public may request that an agency review the classification status of a particular record. The process is time-consuming, and requesters cannot simultaneously pursue both MDR and FOIA requests. Nonetheless, there is a remarkably high rate of success, with agencies determining in roughly 90 percent of cases that some or all of the information can be declassified and released.⁴⁴⁹ Even more strikingly, when agency denials of MDR requests are appealed to the Inter-agency Security Classification Appeals Panel (ISCAP) — a group of senior-level officials appointed by the Secretaries of State and Defense, the Attorney General, the Director of National Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs — the appeal historically has had a success rate of 75 percent.⁴⁵⁰

Why is ISCAP more willing to declassify documents than the individual agencies it represents? Prominent government transparency advocate Steven Aftergood posits a likely reason:

All member agencies within the ISCAP share a commitment to genuine national security secrecy, i.e., the use of classification authority to protect legitimate secrets, and they have affirmed such secrecy whenever they encountered it. . . . But even though all of the member agencies may also practice their own illegitimate bureaucratic and political

forms of secrecy, they evidently have no self-interest at stake in the bureaucratic or political uses of secrecy by other individual agencies. It turns out that they also have no patience for these activities. No federal judge or other external oversight body has been as ruthlessly effective in overturning unjustified classification actions as the ISCAP.⁴⁵¹

The inter-agency approach might prove similarly useful in restraining secret law, but it should be employed at the point of initial decision making, rather than at the MDR appeal stage. Even if members of the public were aware of secret laws and could therefore seek declassification under MDR, the process can take months or years. That is too long for improperly classified laws to remain secret. While it would be impracticable for a small body like ISCAP to make *every* classification decision, classification of the law presumably constitutes only a small portion of such decisions, and that portion would be much smaller still if the reforms set forth here were adopted.

Initial decision making by an inter-agency body would not be necessary in all cases. An agency seeking to shield a purely administrative rule, one that has no effects on the rights or interests of any segment of the public, should be able to do so without going outside the agency. Also, if an agency seeks to redact certain factual information from a legal opinion — such as names of targets, human sources, or witnesses; times, dates, or locations of operations; or the like — an intra-agency process should suffice.⁴⁵² However, for any other legal requirement or interpretation that any government body seeks to keep secret, that entity should have to submit the document to an inter-agency body along the lines of ISCAP, or to ISCAP itself.

This system would have two benefits. First, as noted above, it would subject proposed secrecy in the law to the more skeptical scrutiny of peer agencies. Second, it would erect a procedural hurdle to the enactment of secret law. The hurdle would not be so great as to interfere with the government's lawmaking functions. It would, however, be enough of a barrier to make officials give careful consideration to the necessity of keeping particular legal instruments secret.

B. The Standard for Secrecy

The substantive standard for keeping law secret should be more demanding than the current standard for classification, under which authorized officials may classify information if “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.”⁴⁵³

There are two reasons why the standard should be bolstered. First, as discussed in Part I.C.2, the Constitution tolerates less secrecy for the law than for other types of government information. That suggests that the bar for withholding the law should be higher. Second, even if it were appropriate to apply the same standard to all categories of government information, the epidemic of overclassification mentioned in Part II.B.3 suggests that the current classification standard affords too much discretion to classifying officials. The words “reasonably,” “damage,” and “national security,” for instance, are all susceptible to a wide range of interpretations.

Government entities proposing to shield rules or legal interpretations that have the force of law should have to show that disclosure is highly likely to result, either directly or indirectly, in loss of life, serious bodily harm, or significant economic or property damage. They should be required to document this assessment and to submit the documentation to ISCAP in those cases where ISCAP is the decision maker.

This standard has several advantages. It would be familiar to many national security officials, because it is a variant of legal standards that waive certain restrictions on the use or sharing of information about Americans acquired through foreign intelligence surveillance if the information “indicates a threat of death or serious bodily harm to any person”⁴⁵⁴ or “pertain[s] to an imminent threat of serious harm to life or property.”⁴⁵⁵ It would allow secrecy where disclosure would *indirectly* cause harm, accounting for the reality that terrorist attacks and other such incidents are often the culmination of a series of events. But it would not leave room for unchecked speculation, as the more attenuated the resulting harm becomes, the harder it would be to conclude that the harm is “highly likely.” Moreover, the requirement that the ultimate harm be a serious one represents a more faithful interpretation of the term “national security.”

This higher standard for secret law, like the other reforms proposed here, should be incorporated into a revised executive order on classification. In addition, the president should direct intelligence agencies not to rely on laws that permit (but do not require) the withholding of information about their activities as a basis for shielding rules or interpretations that carry the force of law.

C. Categories of Impermissible Secret Law

There are certain categories of secret law that should never be permitted, either because there is no national security harm that could plausibly result from disclosure or because the damage to democratic self-governance and the rule of law is simply too great. For instance, Professor Rudesill posits an “Anti-Kafka Principle” that laws cannot be secret if they impose affirmative duties or criminal penalties on members of the public.⁴⁵⁶

Another category for which secrecy should be off-limits is pure legal analysis. Paragraphs of a legal opinion that analyze past case law or derive general principles from legislative histories, for instance, are never appropriate candidates for secrecy, because there is no conceivable chain of events by which they could cause harm.

A third such category is legal interpretations that attempt to free the executive branch from the constraints of statutory law — the prototypical example being the OLC’s conclusions that the laws prohibiting torture and warrantless surveillance did not apply to the president when acting as commander in chief, in part because they would be unconstitutional if they did. When the executive branch or a court operating in secret decides that the government does not have to follow the law, there are overriding rule-of-law and separation-of-powers concerns in having that fact be made public.

With respect to this third category, Rudesill has proposed a principle, which he calls the “Public Law Supremacy Rule,” to the effect that “[a]ny conflicts between secret law and public law would be avoided or resolved in favor of public law.”⁴⁵⁷ This principle is sound in theory. In practice, however, the drafters of legal opinions rarely acknowledge a conflict between their own interpretation and the statute itself. Instead, they conclude that the statute is inapplicable or they construe it to mean something other than its plain text. To operationalize the goal behind Rudesill’s principle, it is necessary to specify the categories of legal conclusions that signal a likely attempt to exempt the executive branch from the law.

The OLC Reporting Act of 2008,⁴⁵⁸ which the Senate Judiciary Committee approved but which the full Senate never considered, captured several of these. The bill would have required OLC to report to Congress when issuing interpretations that:

- conclude that a statutory provision is unconstitutional or would be unconstitutional in a particular application;
- adopt a particular interpretation of a statutory provision in order to avoid constitutional concerns arising under article II of the Constitution or separation of powers principles; or
- conclude that a statute has been superseded by a subsequently enacted statute, where there is no express language in the later statute stating an intent to supersede the earlier one.

Secrecy should not be available for authoritative legal interpretations that fall within one or more of these categories.

A separate but related category of law for which secrecy is inappropriate is interpretations that stretch the meaning of statutory terms. In approving the bulk collection of Americans’ phone records, for instance, the FISA Court did not find that the NSA was exempt from the limitations of Section 215, or that those limitations would be unconstitutional if they prevented bulk collection. Instead, the Court interpreted the requirement of “relevance” in a manner that was unprecedented and inconsistent with any common sense understanding of the term. Such opinions result in a situation where the published law actually misleads the public as to the rules governing official conduct. As with secret interpretations that allow the executive branch to ignore the law, this state of affairs is fundamentally inconsistent with the rule of law and the principle of self-governance.

Rudesill’s “Public Law Supremacy Rule” aims to reach these situations as well: it holds that “majority understanding of the relevant law’s intent and purpose . . . must not be evaded by ‘aggressive,’ surprising, or government power-expanding legal interpretations” in secret.⁴⁵⁹ Orin Kerr, a professor of law at the George Washington University Law School, proposes a similar “Rule of Lenity,” under which “ambiguity in the powers granted to the executive branch in the sections of the United States Code on national security surveillance should trigger a narrow judicial interpretation in favor of the individual and against the State.”⁴⁶⁰ Once again, these rules are theoretically sound, but the terms “aggressive,” “surprising,” and “ambiguity” are subjective enough to leave room for mischief in their application. A more objective (and thus effective) rule would prohibit secret legal interpretations if they are contrary to the weight of the public case law or if there is no public case law supporting them.

The above rules would not prevent the executive or judicial branches from opining on the constitutionality of statutes, or from attempting to broaden the meaning of certain statutory terms. They would simply change the method of doing so. Either the authors of such interpretations would be required to issue them publicly (with factual information such as names of targets redacted), or executive officials would have the option of seeking a change in the statutory law so that it more closely matched their own interpretation.

D. Enabling Independent Oversight

Executive branch self-policing is inconsistent with the checks and balances that are at the heart of our Constitution. In the context of secret law, it is also unnecessary. There is no reason to believe that the courts or Congress will be less careful with classified information than the executive branch. Indeed, the experience of the FISA Court confirms that judges and their staffs may be trusted with highly classified information. In contrast to the routine practice of executive officials leaking classified information to reporters to shape news stories,⁴⁶¹ there has never been a known leak by the FISA Court and its staff. Leaks by members of Congress or legislative staff also appear to be significantly less in number than leaks by executive actors.⁴⁶²

If a decision is made (either within an agency or by an ISCAP-like body) to withhold a rule or authoritative interpretation from the public, it immediately should be provided to the relevant committees of Congress; those committees should promptly notify all other members of their respective chambers and make it readily available for their review. Moreover, if the government is a party to litigation in which the subject matter of a secret rule or interpretation is at issue, it should be required to bring the rule or interpretation to the court's notice through *ex parte* filings (i.e., filings with the court that are not shared with the other party). The court may then determine whether the secrecy is legally justified and whether disclosure to the other party is necessary for resolution of the lawsuit.

Finally, secret laws should be shared with independent or quasi-independent executive branch oversight bodies.⁴⁶³ Agency-generated secret law should promptly be provided to the issuing agency's Office of the Inspector General; these offices are housed within agencies, but many of them maintain a substantial degree of independence by virtue of the authorities given them and their dual reporting function (i.e., reporting to Congress as well as to their agency head). In addition, any secret rule or interpretation that touches on counterterrorism should be forwarded to the Privacy and Civil Liberties Oversight Board.

E. Time Limits

The current executive order governing classification includes the salutary rule that “[n]o information may remain classified indefinitely.”⁴⁶⁴ Every classified document must contain a date on which it should be declassified. In practice, however, agencies rarely conduct a declassification review until the information has been classified for 25 years, at which point such review becomes mandatory.⁴⁶⁵

The permissible time period for secret law should be much shorter. As with the substantive standard for review, a different rule is appropriate for laws than for other types of government information because the constitutional and practical implications of secrecy are greater.

Rudesill argues in favor of a sunset for secret laws: a relatively short period (he suggests four years) after which the secrecy determination would have to be made afresh.⁴⁶⁶ A sunset provision alone, however, may not be sufficient. As Emily Berman, a professor at the University of Houston Law Center, observes, sunsets in national security legislation rarely prompt the intended reevaluation process; instead, reauthorization tends to be automatic. (Congress's reform of the Patriot Act in 2015 was a rare exception.) Moreover, national security sunsets can have the paradoxical effect of making legislators more willing to enact controversial laws in the first place, because the sunset gives the illusion that the measure is only temporary.⁴⁶⁷

A four-year sunset should therefore be accompanied by two measures that would help avoid automatic renewals and a resulting body of indefinitely secret law. First, the standard for renewal should be higher than for the initial secrecy determination. One way to accomplish this would be to require the inter-agency body that signs off on secrecy decisions to approve renewals unanimously, rather than by majority vote. Second, the number of renewals should be limited to two, placing an effective 12-year limit on the secrecy of any law (while still permitting the redaction of names of human sources and similar factual information). This number is necessarily somewhat arbitrary. However, if indefinite secrecy is to be prohibited, a cut-off must be chosen, and 12 years for legal authorities is reasonable in light of the 25 years provided for other types of government information.

F. Index of Secret Laws

Even if Americans are not able to consent to the substance of secret laws, they must be able to consent to their secrecy. Without such consent, it cannot be fairly said that Americans are exercising self-governance in the large and growing area of government that the national security establishment comprises. Moreover, without information about how much law is being kept secret, the public cannot assess whether the government is discharging its responsibility to ensure that secret law remains the rare exception to the rule.

As noted above in Part II.C.2, the author of this report has previously recommended that the government make public an index of FISA Court decisions that includes the classification status of each one — a recommendation echoed by Rudesill's call for the issuance of “bell ringers” (i.e., public notices) whenever a secret law is issued.⁴⁶⁸ A similar index should exist for all forms of secret law. The index should be regularly updated and should contain, at a minimum, the date of issuance and the general subject matter of the rule or opinion, as well as any other information that can be made public.

One advantage to this system is that it would enable members of the public to submit FOIA requests for secret laws. This, in turn, would enable judicial review. If the government invoked Exemption 1 on the

ground that the information was “properly classified,” judges would review the secrecy determination to ensure that it accorded with the classification standards and procedures proposed above. Without this vehicle for judicial review, there would likely be many cases in which the judiciary was functionally unavailable as a check.

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Together, these recommendations represent a possible path forward on the problem of secret law. But their success is not guaranteed. The official penchant for secrecy has deep roots in human nature,⁴⁶⁹ and policies that allow some secrecy are likely to be stretched. Accordingly, the approach above, if implemented, should be considered an experiment. Indexes of secret rules and opinions should be closely watched and compared to the numbers of published rules and opinions issued by the same entities. There is no magic number for how much secrecy is too much, but if secrecy begins to become commonplace rather than exceptional, the approach should be revisited. The limits should be tightened, and if they still fail to provide adequate constraints, secret law should be prohibited outright.

CONCLUSION

The United States Constitution embodies an implied commitment, largely honored throughout most of our nation's history, to the transparency of the law. Today, that commitment is in jeopardy. Significant pockets of secret law have grown up around the national security establishment, which has ballooned since 9/11. Legal rules that have critical, sometimes life-and-death implications for Americans — including when U.S. citizens may be targeted with lethal force, who may be detained indefinitely as an “enemy combatant,” and the precise standard for conducting electronic surveillance of phone calls and e-mails — are redacted or withheld. Intelligence agencies, in particular, operate under a slim set of public rules and a much larger body of unpublished ones.

We pay a high price for this system. History has shown time and again that secret law is bad law. Without public input and broad intra-government sharing, the quality of rulemaking suffers, and the systems designed to correct legal mistakes cannot function. Moreover, the public cannot hold the government accountable for violations of the law, rendering those violations all the more likely. Americans cannot shape the laws that govern our rights and interests through the democratic process. And we are denied a full understanding of the values and norms that are embedded in our laws and help to define the country's identity.

These costs are for the most part unjustified. National security has always required some level of secrecy in the details of operations. The law is different. In the case of regulations and similar instruments, these establish general rules for conduct — not plans for specific operations. As for legal opinions that apply the law to facts, these can be written in a manner that minimizes the entanglement of law and fact. The aspirational goal should be the elimination of secret law; while we may be unable to reach that goal, we can surely come much closer than we are today. It is time to bring to a close the modern era of secret law.

ENDNOTES

- 1 FRANZ KAFKA, *PARABLES AND PARADOXES* 155 (1961).
- 2 Christopher Kutz, *Secret Law and the Value of Publicity*, 22 *RATIO JURIS* 197, 211 (2009).
- 3 *Torres v. Immigration and Naturalization Serv.*, 144 F.3d 472, 474 (7th Cir. 1998).
- 4 KENNETH CULP DAVIS, *ADMIN. LAW TREATISE* § 3A, 137 (1970).
- 5 See Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 *AM. J. COMP. L.* 67, 72 (2006) (describing the history of American common law as “the consensus that: (1) the best evidence of the common law is found in the decisions of the courts; (2) adjudged cases become precedents for future cases resting on analogous facts; (3) judges are bound to follow these decisions, unless it can be shown that the law was misunderstood; because (4) the community has a right to regulate their actions and contracts by law; so that, (5) when a rule has been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon clear manifestation of error.”) (citations omitted) (internal quotation marks omitted).
- 6 5 U.S.C. § 553; see also *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 37-38 (D.C. Cir. 1974) (“A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . A general statement of policy, on the other hand, does not establish a binding norm.”) (citation omitted) (internal quotation marks omitted).
- 7 In fact, two overlapping lines of inquiry have emerged from the courts’ decisions. The first focuses on the effects of agency action: has the agency imposed any rights or obligations, or has it genuinely left decision makers free to exercise discretion? See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). The second focuses on the agency’s expressed intentions, and examines (1) the agency’s own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999). The common thread in these two lines of inquiry is the question of binding effect.
- 8 *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (citations omitted).
- 9 5 U.S.C. § 552(a)(1).
- 10 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (citations omitted) (internal quotation marks omitted).
- 11 5 U.S.C. § 552(a)(1)(D).
- 12 5 U.S.C. § 551(4) (emphasis added).
- 13 See, e.g., William T. Mayton, *The Legislative Resolution of the Rule Making Versus Adjudication Problem in Agency Law Making*, 1980 *DUKE L.J.* 103, 109-10 (1980); *AM. BAR ASS’N, A GUIDE TO FEDERAL AGENCY ADJUDICATION* 6 & n.30 (Michael Asimow ed., 2003).
- 14 David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 339 (2010).
- 15 *Id.* at 336.
- 16 JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 181-82 (2007).
- 17 Charlie Savage, *How Four Federal Lawyers Paved the Way to Kill Osama bin Laden*, *N.Y. TIMES* (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0.
- 18 *Id.*

- 19 Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1050 (2008).
- 20 HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 163-64 (1990); *see also* Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1478 n.126 (2010) (“If concerns about classified information preclude full public release of some [OLC] opinions, limited congressional reporting in closed session could still be possible.”).
- 21 Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320-22 (2006).
- 22 Pozen, *supra* note 14, at 324.
- 23 JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 91-92 (2012).
- 24 Dakota Rudesill, *Coming to Terms With Secret Law*, 7 HARV. NAT’L SEC. J. 241 (2016).
- 25 *Cuneiform Law*, ENCYCLOPÆDIA BRITANNICA (2016), *available at* <https://www.britannica.com/topic/cuneiform-law> (accessed Sept. 9, 2016).
- 26 Kutz, *supra* note 2, at 202.
- 27 *Code Napoléon*, Preliminary title, art. 1, *translated in* DAVID MITCHELL AIRD & KELLY EDMOND, THE CIVIL LAWS OF FRANCE TO THE PRESENT TIME SUPPLEMENTED BY NOTES ILLUSTRATIVE OF THE ANALOGY BETWEEN THE RULES OF THE CODE NAPOLEON AND THE LEADING PRINCIPLES OF THE ROMAN LAW 21 (1875).
- 28 Kutz, *supra* note 2, at 199.
- 29 1 WILLIAM BLACKSTONE, COMMENTARIES *45.
- 30 Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651 (1958).
- 31 *See generally* INT’L AND AREA STUDIES, UNIV. OF CAL. AT BERKELEY, THE SOVIET SOBRANIE OF LAWS: PROBLEMS OF CODIFICATION AND NON-PUBLICATION (Richard Buxbaum & Kathryn Hendley eds., 1991).
- 32 Every student of secret law owes a debt of gratitude to Harold Relyea, a specialist in American national government with the Library of Congress Congressional Research Service, for his seminal 1988 article setting forth much of the history discussed in this section. *See* Harold C. Relyea, *The Coming of Secret Law*, 5 GOV’T INFO. Q. 97 (1988).
- 33 Even during the American Revolution, the concept of public access to government information was already widespread. The 1776 Pennsylvania Constitution, for example, included the phrase: “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” PA. CONST. of 1776, § 35. For more on this early history, *see* David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 129-31 (1977); Relyea, *supra* note 32, at 97-103; U.S. GOV’T PRINTING OFFICE, KEEPING AMERICA INFORMED 3 (2011) [hereinafter GPO HISTORY], *available at* <http://www.gpo.gov/fdsys/pkg/GPO-KEEPINGAMERICAINFORMED/pdf/GPO-KEEPINGAMERICAINFORMED.pdf>.
- 34 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 260 (Max Farrand ed., 1937).
- 35 THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).
- 36 Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68 (1789).
- 37 FREDERICK A.O. SCHWARZ, JR., DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY 20-21 (2015); Martin E. Halstuk, *Policy of Secrecy — Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know*, 1794-98, 7 COMM. L. & POL’Y 51, 59 (2002).

38 SCHWARZ, *supra* note 37, at 22. A senator defied the ban and leaked the treaty to an editor, who published its contents.

39 Act Concerning an Act to Enable the President of the United States . . . to Take Possession of the Country Lying East of the River Perdido . . . and the Declaration Accompanying the Same, March 3, 1811, 3 Stat. 472 (1811); *see also* Rudesill, *supra* note 24, at 256-57.

40 3 Stat. 471 (1818).

41 Act of Mar. 2, 1799, ch. 30, 1 Stat. 725.

42 Act of Mar. 3, 1795, ch. 50, 1 Stat. 443. In addition, in order to ensure that officials at all levels and in all branches of government were familiar with the law, Congress mandated that “‘600 copies of the acts of Congress and 700 copies of the journals’ should be printed” and distributed to officials in the legislative, executive, and judicial branches of both the federal and state governments. U.S. GOV’T PRINTING OFFICE, 100 GPO YEARS, 1861-1961, at 9 (2010), *available at* https://www.gpo.gov/pdfs/about/GPO_100Years.pdf [hereinafter 100 GPO YEARS]; GPO HISTORY, *supra* note 33, at 4.

43 *See* GPO HISTORY, *supra* note 33, at 3-7; *see also* 100 GPO YEARS, *supra* note 42, at 14-27.

44 *See* GPO HISTORY, *supra* note 33, at 3-7; *see also* 100 GPO YEARS, *supra* note 42, at 24-27.

45 Relyea, *supra* note 32, at 99.

46 J. Res. 25, 36th Cong. (1860).

47 Relyea, *supra* note 32, at 100.

48 Printing Act of 1895, ch. 23, 28 Stat. 601 (1895) (codified as amended at 44 U.S.C. § 101).

49 J. Res. 35, 34th Cong. (1857); *see also* GPO HISTORY, *supra* note 33, at 21-23; 100 GPO YEARS, *supra* note 42, at 89.

50 Relyea, *supra* note 32, at 103.

51 *Id.* at 102.

52 3 Stat. 376 (1817).

53 Rudesill, *supra* note 24, at 300; Relyea, *supra* note 32, at 102-03.

54 Harold C. Relyea, *The Federal Register: Origins, Formulation, Realization, Heritage*, 28 GOV’T INFO. Q. 295, 296-97 (2011).

55 *See id.*; Erwin. N. Griswold, *Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204-05 (1934).

56 *See* United States v. Smith, 292 U.S. 633 (1934) (dismissing appeal based on nonexistent regulation); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 412 (1935) (finding that a portion of the case centered on a “provision which did not exist”).

57 Federal Register Act of 1935, Pub. L. No. 74-220, 49 Stat. 500 (1935) (current version at 44 U.S.C. § 1501-1511).

58 Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 927-29 (2014).

59 Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59).

60 Freedom of Information Act (FOIA), Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552).

61 KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 5:18, at 364 (2d ed. 1978).

62 Relyea, *supra* note 32, at 112.

63 *Id.* at 106; *see also* SCHWARZ, *supra* note 37, at 36-37; Sudha Setty, *The Rise of National Security Secrets*, 44

- CONN. L. REV. 1563, 1567-68 (2012).
- 64 National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947).
- 65 Relyea, *supra* note 32, at 106.
- 66 Exec. Order No. 10290, 16 Fed. Reg. 9795, 9795 (Sept. 24, 1951).
- 67 Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 22, 1940); *see also* KEVIN R. KOSAR, CONG. RESEARCH SERV., 97-771, SECURITY CLASSIFICATION POLICY AND PROCEDURE: E.O. 12958 AS AMENDED 3 (2009), *available at* <http://fas.org/sgp/crs/secrecy/97-771.pdf>; ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 4 (2011).
- 68 Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 241 (2008).
- 69 *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., ORDER CODE 98-611 GOV, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 8-12 (2008), *available at* <https://www.fas.org/sgp/crs/misc/98-611.pdf>.
- 70 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified in scattered sections of 8, 18, 47, 50 U.S.C.).
- 71 *See* Relyea, *supra* note 32, at 111.
- 72 *See generally* DANA PRIEST & WILLIAM ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE (2011) (chronicling the post-9/11 growth of the national security establishment).
- 73 *See infra* Part II.B.1.
- 74 *See infra* Part II.B.5.
- 75 *See infra* Part II.A.1.
- 76 *See infra* Part II.C.2.
- 77 *See infra* Part II.C.1.
- 78 LON L. FULLER, THE MORALITY OF LAW 98 (rev. ed. 1969).
- 79 Thomas Aquinas, *Summa Theologica*, Question 90, art. 4, *available in* SAINT THOMAS AQUINAS, THE TREATISE ON LAW 145 (R.J. Henle, S.J., ed. & trans., Notre Dame Univ. Press 1993) (1485).
- 80 THOMAS HOBBS, LEVIATHAN 240 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).
- 81 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 126 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1795).
- 82 The other principles are generality, prospectivity, clarity, consistency, feasibility, constancy, and congruence. FULLER, *supra* note 78, at 33-39.
- 83 *Id.* at 51.
- 84 *Id.* at 51. Fuller did warn that the concept of “law” need not be construed to encompass “any official act of a legislative body.” He gave two examples. The first is a law designating the chickadee to be the official state bird — presumably too trivial a matter to trigger law’s necessary accoutrements. The second, however, is “a legislative appropriation . . . made to finance research into some new military weapon.” Here, Fuller describes the non-publication of such a measure “unfortunate,” but states, “[T]here are times when we must bow to grim necessity.” *Id.* at 91-92. True or not, this is not really an argument that such a measure falls short of being “law”; nor, unfortunately, does Fuller explore the moral, philosophical, or practical consequences of exempting this type of legislation from the requirement of promulgation.
- 85 FULLER, *supra* note 78, at 33-35; *see also* Kutz, *supra* note 2, at 211 (“[T]he problem of secrecy reveals something about the way in which publicity functions not just as a condition of law’s efficacy, but as an essential normative component, part of what makes law law.”); *but see* H.L.A. HART, THE CONCEPT OF LAW 22 (2d ed. 1994) (“In the absence of special rules to the contrary, laws are validly made even if those

affected are left to find out for themselves what laws have been made and who are affected thereby.”).

86 Rudesill, *supra* note 24, at 311.

87 Kutz, *supra* note 2, at 212.

88 U.S. CONST. art. I, § 5, cl. 3.

89 U.S. CONST. art. I, § 9, cl. 7. For a recent article on the import of this clause, see Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 LOY. U. CHI. L.J. 1 (2015).

90 *Field v. Clark*, 143 U.S. 649, 670-71 (1892).

91 Pozen, *supra* note 14, at 293.

92 See Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 916 (2006) (“The individual provisions in the U.S. Constitution say little about government secrecy or public access. If constitutional law reaches either one, it is due to a reasoning of a different kind. The arguments are structural and institutional, involving the proper relationship between citizen and government and a reliable system for resolving tension between openness and efficacy.”).

93 *United States v. Nixon*, 418 U.S. 683, 711 (1974).

94 See *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[The president’s] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant.”).

95 See Samaha, *supra* note 92, at 948-53 (discussing the inconsistency of relying on structural considerations to recognize secrecy privileges but not transparency obligations).

96 See *infra* Part II.B.2.

97 *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980); *Aftergood v. CIA*, 355 F.Supp.2d 557 (D.D.C. 2005). There were two grounds for the holdings in these cases: first, that the plaintiffs lacked standing to challenge the constitutionality of secret intelligence budgets; and second, that the history of the Statement and Account clause suggested that it was not intended to apply to matters involving military secrets or foreign relations (notwithstanding the seemingly unambiguous language of the clause).

98 Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976).

99 See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 140-41 n.40 (2006) (compiling list of scholarly articles on the “right to know”).

100 Emerson, *supra* note 98, at 2.

101 Mary M. Cheh, *Symposium: National Security and Civil Liberties: Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 720-21 (1984); see also Samaha, *supra* note 92, at 917-18 (“Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty.”).

102 *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978).

103 *Id.* at 14-15.

104 *Id.* at 15.

105 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980) (citation omitted) (internal quotation marks omitted).

106 *Id.* at 587 (Brennan, J., concurring).

107 *Id.*

108 *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604-06 (1982).

109 *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring).

110 *Id.*

111 *See, e.g.*, *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 207 n.3 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 n.11 (6th Cir. 2002); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1176-79 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 800-02 (11th Cir. 1983).

112 *See* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 118 (2004) (discussing how courts have handled “experience” prong in light of “the relative modernity of most administrative proceedings”).

113 *See id.* at 118 & nn.130-34; *see also* Samaha, *supra* note 92, at 944-45 & nn.163-64.

114 *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (citation omitted) (internal quotation marks omitted); *see also* Pozen, *supra* note 14, at 319-20 (“The Court’s long silence on information-access rights, and its confinement of these rights to the context of judicial proceedings, caution against divining any broader lessons from the opinions.”).

115 *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982).

116 *See supra* Part I.C.1.

117 *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Indeed, the Court has taken an extremely broad view of the scope of this power, holding that congressional inquiry may be appropriate even where no legislation is contemplated. *See Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) (Congress need not contemplate legislation in order to conduct oversight, but may use oversight power for its “informing function” and to expose wrongdoing); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 509 (1975) (“To be a valid legislative inquiry there need be no predictable end result.”).

118 U.S. CONST. art. III, § 2.

119 *United States v. Nixon*, 418 U.S. 683, 707 (1974).

120 Originally, the Constitution directed state legislatures to choose senators. U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment subsequently reassigned that responsibility to the people of each state. U.S. CONST. amend. XVII.

121 U.S. CONST. art. I, § 2, cl. 1.

122 U.S. CONST. art. IV, § 4.

123 Pozen, *supra* note 14, at 295-96.

124 *Id.* at 300.

125 Professor Pozen, for instance, argues convincingly that the Constitution disfavors “deep secrecy” — programs or policies whose very existence is a closely held secret — while allowing some level of secrecy about the substance of policies or programs, as long as their existence is known to at least some degree. *Id.* at 305-07.

126 Heidi Kitrosser, “Macro-Transparency” as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1165, 1173-78 (2007). Consistent with Professor Kitrosser’s analysis, Professor Pozen has noted that the Constitution has several provisions suggesting a norm of openness, but that “[t]he design of the Constitution points to the executive branch as a privileged domain of clandestine action.” Pozen, *supra* note 14, at 301. On the latter point, he concludes: “Textual clues such as the discrepancy

- in the Article I and II vesting clauses, historical clues such as the Framers' concern to strengthen the central government and to enable unilateral action in times of emergency, and structural clues such as the allocation of treaty- and war-making powers to the body in government best able to keep secrets, converge to suggest a constitutional principle authorizing occasional executive branch secrecy." *Id.* at 302.
- 127 Michael A. Sall, *Classified Opinions: Habeas at Guantánamo and the Creation of Secret Law*, 101 GEO. L.J. 1147, 1166 (2013) ("It is considerably more difficult for the public to convince Congress to change a law to which neither the public nor Congress has open access."); *see also* Rudesill, *supra* note 24, at 323 ("Transparency and notice regarding the law allow the people to exercise law/policy choice (law/policy improvement through selection and modification of alternatives) . . .").
- 128 David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154, 192 (Robert E. Goodin, ed., 1998). Luban himself sees some room for secret law, as long as the public is aware that the law exists and therefore has consented to it despite its secrecy. *See id.* at 189, 195-96.
- 129 Act of Feb. 27, 2010, Pub. L. No. 111-141, 124 Stat. 37 (2010) (codified as amended at 50 U.S.C. §§ 1805, 1861-1862); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011) (codified as amended at 50 U.S.C. §§ 1805, 1861-1862).
- 130 Mike DeBonis, *Congress turns away from post-9/11 law, retooling U.S. surveillance powers*, WASH. POST (June 2, 2015), https://www.washingtonpost.com/politics/senate-moves-ahead-with-retooling-of-us-surveillance-powers/2015/06/02/28f5e1ce-092d-11e5-a7ad-b430fc1d3f5c_story.html.
- 131 This can happen, not only through legal challenges in the courts, but through the democratic process. As Professor Rudesill notes, transparency in the law allows for "choice of public officials (detection, correction through removal, and therefore deterrence of error, incompetence, and abuse of authority by public officials)." Rudesill, *supra* note 24, at 323-24.
- 132 Samaha, *supra* note 92, at 917-18 ("Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty").
- 133 *See* Claire Grant, *Secret Laws*, 25 *RATIO JURIS* 301, 314 (2012) ("Ignorance of law . . . aggravates the risk of oppression by means of law."); *see also* Rudesill, *supra* note 24, at 317 (secret law may be viewed as "a mere recording of a potentially ephemeral guideline by an entity that is a law unto itself").
- 134 *See* *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) ("The purpose of the notice-and-comment procedure is both to allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude toward its own rules. The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.") (citation omitted) (internal quotation marks omitted); Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 *MICH. L. REV.* 221, 222 (1972) ("[Public] participation helps to elicit from those who are in the best position to provide it, the information necessary for intelligent action by the agency making rules. A single agency's accumulated knowledge and expertise are rarely sufficient to provide all the data upon which rule-making decisions should be based. Even if it has the relevant factual information, an agency's view may be so myopic that outside feed-in is necessary to put the information properly in perspective and to give it meaning.").
- 135 *See* Bonfield, *supra* note 134, at 223 ("[S]ome agencies may not be trusted to vindicate the public interest without outside input because they may have been captured by those whose interests they regulate or represent."); Rudesill, *supra* note 24, at 311 ("Secrecy risks preservation and even amplification of groupthink and other biases among secret-holders whose perceptions are unchallenged.").
- 136 *See, e.g.*, Marty Lederman, *The Kris Paper, and the Problematic FISC Opinion on the Section 215 "Metadata" Collection Program*, JUST SEC. (Oct. 1, 2013), <https://www.justsecurity.org/1337/kris-paper-legality-section-215-metadata-collection/>.
- 137 GOLDSMITH, *supra* note 16, at 10.

- 138 Morrison, *supra* note 20, at 1483.
- 139 See *Authorized Judgeships*, UNITED STATES COURTS, <http://www.uscourts.gov/judges-judgeships/authorized-judgeships> (last visited Sept. 1, 2016).
- 140 *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008); see also Claire Kain-Miller, *Secret Court Ruling Put Tech Companies in Data Bind*, N.Y. TIMES (June 13, 2013), http://www.nytimes.com/2013/06/14/technology/secret-court-ruling-put-tech-companies-in-data-bind.html?login=email&pagewanted=all&_r=2&&mtrref=go.redirectingat.com&gwt=pay.
- 141 See generally ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT (2015), available at https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf.
- 142 USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279-81 (codified at 50 U.S.C. § 1803).
- 143 This phenomenon has been referred to as “doctrinal entrenchment.” Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2195 (2015) (“Because secrecy reduces judges’ incentives and ability to make good precedent, the risk of entrenching bad precedent is unusually high in the context of the FISA courts.”).
- 144 *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 88, 91 (2008) (testimony of Bradford Berenson, Partner, Sidley Austin LLP); *id.* at 3-4 (statement of Sen. Sam Brownback, Member, S. Comm. on the Judiciary).
- 145 As Professor Fuller observed, secret law “is most likely to arise in modern societies with respect to unpublished administrative directions. Often these are regarded in quite good faith by those who issue them as affecting only matters of internal organization. But since the procedures followed by an administrative agency, even in its ‘internal’ actions, may seriously affect the rights and interests of the citizen, these unpublished, or ‘secret,’ regulations are often a subject for complaint.” Fuller, *supra* note 30, at 651.
- 146 Rudesill posits that secret law and secret fact are importantly different because “[t]here is a stronger constitutional norm against secret law than against secret fact, reflecting . . . the publicity principle’s lower tolerance for secret law than for secret fact.” Rudesill, *supra* note 24, at 250; see also *id.* at 310-19 (elaborating on secret law, secret facts, and the publicity principle).
- 147 Kutz, *supra* note 2, at 213.
- 148 Relatedly, Jeremy Bentham has stated: “To the subject-citizen [the law will] . . . serve as a *code of instruction, moral, and intellectual* together.” Jeremy Bentham, *Codification Proposal*, in 4 THE WORKS OF JEREMY BENTHAM 535, 539 (John Bowring ed., Russell & Russell, Inc. 1962) (1838-43).
- 149 Kutz, *supra* note 2, at 200.
- 150 *Id.* at 214.
- 151 *Id.* at 213-14.
- 152 Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SECURITY L. & POL’Y 507, 517 (2012).
- 153 ACLU v. CIA, 109 F. Supp. 3d 220, 236 (D.D.C. 2015). In another case, a district court judge opined, “I see no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves classified.” N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013), *aff’d in part, rev’d in part*, 752 F.3d 123 (2d Cir. 2014), *aff’d in part, rev’d in part and remanded*, 756 F.3d 100 (2d Cir. 2014). Yet none of the three cases the judge cited to support this statement actually upheld the classification of pure legal analysis. See Brief for Plaintiffs-Appellants at 27 n.16, N.Y. Times

- Co. v. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014) (No. 13—422 (L), 13—445(CON), *available at* https://www.aclu.org/files/assets/nyt_ca2_appeal_-_filed.pdf).
- 154 N.Y. Times Co. v. U.S. Dep't of Justice, 752 F.3d 123, 140 (2d Cir. 2014), *revised and superseded*, 756 F.3d 100 (2d Cir. 2014), *amended*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014), *reh'g granted*, 756 F.3d 97 (2d Cir. 2014).
- 155 *Id.*; *see also* N.Y. Times Co. v. U.S. Dep't of Justice, 806 F.3d 682, 687 (2d Cir. 2015) (holding without discussion that “[w]hether or not ‘working law,’ the documents are classified and thus protected under Exemption 1 . . .”).
- 156 *See* Letter from Sen. Ron Wyden to Att’y Gen. Eric Holder (Mar. 26, 2010), *available at* <https://www.wyden.senate.gov/download/?id=F03A9C63-C4BB-4FEB-94E1-5E1DA17CDBD3&download=1> (noting and addressing the government’s argument for non-disclosure).
- 157 *Oversight and Reauthorization of the FISA Amendments Act: The Balance between National Security, Privacy, and Civil Liberties: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 4-9 (2016) (testimony of Hon. Matthew G. Olsen, President, IronNet Cybersecurity), *available at* <https://www.judiciary.senate.gov/imo/media/doc/05-10-16%20Olsen%20Testimony.pdf>.
- 158 OFFICE OF MGMT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, Statement of Administration Policy: HR 2048 — USA FREEDOM Act (May 12, 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2048h_20150512.pdf.
- 159 *Hodgens v. Hodgens* (1837), *quoted in* FRED SHAPIRO & JACOB EPSTEIN, *THE YALE BOOK OF QUOTATIONS* 614 (2006).
- 160 *See* Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 239, 294 (2014) (“In an altered status quo, where the executive knows that restrictions on its power will not only be formalized but will be made public, then the executive may become even less likely to seek out the OLC on matters that may constrain presidential power.”).
- 161 Margo Schlanger, *Intelligence Legalism and the National Security Agency’s Civil Liberties Gap*, 6 HARV. NAT’L SECURITY J. 112, 120-33 (2015).
- 162 Josh Gerstein, *Official: FOIA worries dampen requests for formal legal opinions*, POLITICO (Nov. 5, 2015, 3:05 PM), <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567>.
- 163 *PIECES OF INTELLIGENCE: THE EXISTENTIAL POETRY OF DONALD H. RUMSFELD 2* (Hart Seely, ed., 2003).
- 164 Professor David Pozen uses the term “deep secrets” to describe undisclosed programs, as distinguished from publicly known programs the details of which are secret. *See* Pozen, *supra* note 14.
- 165 Fuller, *supra* note 30, at 651.
- 166 Relyea, *supra* note 32, at 111; Rudesill, *supra* note 24, at 261.
- 167 *See, e.g.*, Intelligence Authorization Act for Fiscal Year 2014, § 102, Pub. L. No. 113-126, 128 Stat. 1390, 1392 (codified as amended at 50 U.S.C.A. § 3126).
- 168 *See, e.g.*, Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654, 1654A-245 (2000) (codified at 1 U.S.C. § 112 note); Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 108 Stat. 2599, 2622 (1994) (codified at 10 U.S.C. § 1074 note); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2482 (1992) (current version at 10 U.S.C. § 101); Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, 105 Stat. 1150, 1178 (1991) (codified at 10 U.S.C. § 1073 note).
- 169 Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, 117 Stat. 1054, 1102 (2003) (codified at 16 U.S.C. § 410aaa-56, 431).

- 170 Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951, 1005 (2004) (codified at 10 U.S.C. §2533a note) (\$1.8 billion); Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2733 (2005) (codified at 10 U.S.C. note prec. § 2601) (\$3 billion).
- 171 Greg Miller, *Lawmakers seek to stymie plan to shift control of drone campaign from CIA to Pentagon*, WASH. POST (Jan. 15, 2014), https://www.washingtonpost.com/world/national-security/lawmakers-seek-to-stymie-plan-to-shift-control-of-drone-campaign-from-cia-to-pentagon/2014/01/15/c0096b18-7e0e-11e3-9556-4a4bf7bcbd84_story.html. This practice is not new; the Boland Amendment, “prohibiting U.S. covert actions for the purpose of overthrowing the Sandinista regime in Nicaragua . . . was initially enacted in 1982 as a provision in the ‘secret annex’ to the FY 1983 intelligence authorization act.” Relyea, *supra* note 32, at 111.
- 172 See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, Statement of Administration Policy for H.R. 2701, Intelligence Authorization Act for Fiscal Year 2010, at 2 (July 8, 2009), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr2701r_20090708.pdf (“Section 356 would incorporate by reference all reporting requirements in the classified annex into the act, thereby making them a requirement in law. The Administration objects to the passage of such substantive secret provisions of law.”).
- 173 Letter from Peter R. Orszag, Director, Exec. Office of the President, Office of Mgmt. & Budget, to Dianne Feinstein, Chairwoman, U.S. S. Select Comm. on Intelligence, Regarding S. 1494 and H.R. 2701, The Intelligence Acts for Fiscal Year 2010, at 6 (March 15, 2010), *available at* <https://fas.org/irp/news/2010/03/omb031610.pdf>.
- 174 The House and Senate do vote to approve conference committee reports, which are issued by special committees convened to resolve differences between bills enacted by the two chambers.
- 175 See Rudesill, *supra* note 24, at 272-73.
- 176 *Id.* at 271-72.
- 177 *Id.* at 277-78.
- 178 *Id.* at 277.
- 179 *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”); see also *Japan Whaling Assn. v. Am. Cetacean Soc.*, 478 U.S. 221, 223-34 (1986); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987).
- 180 See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting).
- 181 See, e.g., Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992); John Paul Stevens, *Law Without History?*, N.Y. REVIEW OF BOOKS, Oct. 23, 2014 (*available at* <http://www.nybooks.com/articles/2014/10/23/law-without-history/>).
- 182 David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1715-16 (2010).
- 183 *Zuni*, 550 U.S. at 106 (Stevens, J., concurring).
- 184 *Garcia v. United States*, 469 U.S. 70, 76 (1984).
- 185 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1006 (2015).
- 186 *Id.* at 1005.
- 187 See, e.g., 160 CONG. REC. H9307,9609 (daily ed. Dec. 11, 2014) (Explanatory Statement Regarding the Consolidated and Further Continuing Appropriations Act for 2015).

- 188 See Steven Aftergood, *ODNI: Annexes to Intelligence Bills Are Not “Secret Law,”* SECRECY NEWS (May 18, 2015), <http://fas.org/blogs/secrecy/2015/05/not-secret-law/>.
- 189 Richard J. McKinney & Ellen A. Sweet, *Federal Legislative History Research: A Practitioner’s Guide to Compiling the Documents and Sifting for Legislative Intent*, LAW LIBRARIANS’ SOC’Y OF WASH., D.C., INC. 21 (May, 2006), <http://www.llsdc.org/assets/sourcebook/fed-leg-hist.pdf>.
- 190 See S. REP. NO. 114-8, at 23 (2015); H.R. REP. NO. 113-717, at 8-10 (2014); S. REP. NO. 113-7, at 28 (2013); H.R. REP. NO. 113-310, at 6-8 (2013); H.R. REP. NO. 112-733, at 4-5 (2012); H.R. REP. NO. 112-560, at 6-7 (2012); H.R. REP. NO. 112-353, at 5-6 (2011); H.R. REP. NO. 112-134, at 24-25 (2011).
- 191 PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 7 (2014), *available at* <https://www.pclob.gov/library/702-Report.pdf>.
- 192 In 2015, two non-governmental organizations, Third Way and R Street, wrote to the chairs and ranking members of the Senate and House intelligence committees asking them to “declassify[] the transcripts of your respective committees’ discussions” of Section 702. The letter stated: “The members of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence were privy to far more information than was the broader membership of either chamber. Behind closed doors, the members of your committees, serving as proxies for their colleagues, have already raised and debated many of the issues that will undoubtedly resurface in the coming months. Given broad public concern over Section 702 surveillance, all members could benefit from knowing what their colleagues thought during the negotiations and drafting. Further, as courts consider challenges to Section 702, legislative intent will bear on judicial interpretation of the scope of intelligence programs.” Letter from Mike Eoyang, Vice President for National Security, Third Way, and Mike Godwin, General Counsel and Innovation Policy Director, R Street, to Richard Burr, Chairman, Devin Nunes, Chairman, Dianne Feinstein, Ranking Member, S. Select Comm. on Intelligence, and Adam Schiff, Ranking Member, H. Comm. on Intelligence (October 6, 2015), *available at* <http://www.thirdway.org/newsroom/press-releases/third-way-and-r-street-urge-congress-to-declassify-records-from-committee-negotiations-of-electronic-surveillance-legislation>. At time of writing, there has been no response to this letter.
- 193 *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).
- 194 *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).
- 195 As Professor Peter Shane states, “The Framers of our Constitution did not share [presidentialists’] sense of executive branch superiority for making policy decisions.” Shane, *supra* note 152, at 518.
- 196 See generally RELYEA, *supra* note 69.
- 197 *Id.* at 2.
- 198 44 U.S.C. § 1505(a)(1).
- 199 44 U.S.C. § 1505(a)(2).
- 200 RELYEA, *supra* note 69, at 8-12.
- 201 *Ctr. for Effective Gov’t v. U.S. Dep’t of State*, 7 F.Supp.3d 16, 19 n.3 (D.D.C. 2013) (citations omitted) (internal quotation marks omitted).
- 202 Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000); see also *Ctr. for Effective Gov’t*, 7 F.Supp.3d at 19 n.3 (“The government continues to embrace [the] interpretation that presidential directives can have the force of law.”) (citation omitted) (internal quotation marks omitted).
- 203 EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 27: U.S. COMMERCIAL REMOTE SENSING POLICY/NSPD-27 (2003), *available at* <http://fas.org/irp/offdocs/nspd/remsens.html>.
- 204 EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-59 AND HOMELAND SECURITY PRESIDENTIAL DIRECTIVE/HSPD-24 (2008), *available at* <http://fas.org/irp/offdocs/>

nspd/nspd-59.html.

- 205 EXEC. OFFICE OF THE PRESIDENT, PRESIDENTIAL POLICY DIRECTIVE/PPD-19 (2012), *available at* <http://fas.org/irp/offdocs/ppd/ppd-19.pdf>.
- 206 EXEC. OFFICE OF THE PRESIDENT, PRESIDENTIAL POLICY DIRECTIVE/PPD-30 (2015), *available at* <http://fas.org/irp/offdocs/ppd/ppd-30.html>.
- 207 EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY DECISION DIRECTIVE ON CUBA AND CENTRAL AMERICA/NSDD-17 (1982), *available at* <http://fas.org/irp/offdocs/nsdd/nsdd-17.pdf>; *see also* Relyea, *supra* note 32, at 110.
- 208 EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY DECISION DIRECTIVE 110: GRENADA: CONTINGENCY PLANNING/NSDD-110 (1983), *available at* <http://fas.org/irp/offdocs/nsdd/nsdd-110.htm>.
- 209 *Implementation of the New Start Treaty, and Related Matters: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 43 (2012) (questions submitted by Sen. Richard G. Lugar to Rose Gottemoeller, Acting Under Sec. for Arms Control and Int'l Sec., U.S. Dep't of State).
- 210 Ron Rosenbaum, *Who Will Rule Us After the Next 9/11?*, SLATE (Oct. 19, 2007), http://www.slate.com/articles/life/the_spectator/2007/10/who_will_rule_us_after_the_next_911.html.
- 211 U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-92-72, NATIONAL SECURITY: THE USE OF PRESIDENTIAL DIRECTIVES TO MAKE AND IMPLEMENT U.S. POLICY 3 (1992).
- 212 *Id.* at 2; *see also* Steven Aftergood, *Keeping Secrets from Congress*, SECRECY NEWS (Feb. 5, 2013), http://fas.org/blogs/secrecy/2013/02/keeping_secrets/ (discussing the executive branch's withholding of presidential directives and legal opinions from Congress).
- 213 S. REP. NO. 94-922, at 16 (1976).
- 214 *See* EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY DECISION DIRECTIVE/NSDD-84 (1983), *available at* <http://fas.org/irp/offdocs/nsdd/nsdd-84.pdf>; *see also* OFFICE OF TECH. ASSESSMENT, U.S. CONG., OTA-TM-H-15, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION 36 (1983).
- 215 Relyea, *supra* note 32, at 109.
- 216 Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html.
- 217 *See* Office of Info. Pol'y, Dep't of Justice, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), *available at* https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.
- 218 *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F.Supp.3d 16, 21 (D.D.C. 2013).
- 219 *Id.* at 28 (emphasis omitted).
- 220 *Id.* at 29.
- 221 *Ctr. for Nat'l Sec. Studies v. Immigration and Naturalization Serv.*, No. 87-2068, 1990 WL 236133 at *3 (D.D.C. Dec. 19, 1990); *Halperin v. Nat'l Sec. Council*, 452 F. Supp. 47, 52 (D.D.C. 1978).
- 222 *Elec. Privacy Info. Ctr. v. NSA*, 988 F. Supp.2d 1, 13 n.9 (D.D.C. 2013).
- 223 President George W. Bush issued 67 National Security Presidential Directives (NSPDs) and 25 Homeland Security Presidential Directives (HSPDs). Eleven directives, however, were issued as both NSPDs and HSPDs, so the total, de-duplicated number is 81.

- 224 See Presidential Directives and Executive Orders, FEDERATION OF AMERICAN SCIENTISTS INTELLIGENCE RESOURCE PROGRAM, <http://fas.org/irp/offdocs/direct.htm> (last visited Aug. 19, 2016); Relyea, *supra* note 32, at 107-08.
- 225 Thomas S. Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33, 42 (2003).
- 226 These numbers are in slow but constant flux as historical documents are declassified. The chart relies on the release status as of July 20, 2016, as indicated on the Federation of American Scientists' website.
- 227 VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2014).
- 228 STAFF OF H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957).
- 229 *Id.*
- 230 See, e.g., Executive Order from President Lincoln to Major-General H.W. Walleck, Commanding in the Department of Missouri (December 1861), in 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 99 ("General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of *habeas corpus* within the limits of the military division under your command and to exercise martial law as you find it necessary, in your discretion, to secure the public safety and the authority of the United States.")
- 231 Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).
- 232 Exec. Order No. 13674, 79 Fed. Reg. 45671 (July 31, 2014).
- 233 44 U.S.C. § 1505(a)(1).
- 234 Executive Orders Disposition Tables Index, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/disposition.html> (last visited August 19, 2016).
- 235 Tim Hanrahan, *Sen. Whitehouse's Statement on Justice Dept.'s Legal Opinions*, WALL ST. J., WASH. WIRE BLOG (Dec. 7, 2007, 8:18 p.m.), <http://blogs.wsj.com/washwire/2007/12/07/sen-whitehouses-statement-on-justice-depts-legal-opinions/>.
- 236 FULLER, *supra* note 78, at 38-39.
- 237 Executive Order Integrity Act of 2008, S. 3405, 110th Cong. (2008).
- 238 See 28 U.S.C. §§ 511-513; 28 C.F.R. § 0.25.
- 239 Edwards v. Carter, 580 F.2d 1055, 1103 n.42 (D.C. Cir. 1978).
- 240 Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1320 (2000).
- 241 *Id.* at 1318; see also Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007) ("OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the attorney general or the President (an exceedingly rare occurrence)."); OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 15 (July 29, 2009) ("OLC opinions are binding on the Executive Branch.").
- 242 Gerstein, *supra* note 162 (quoting Principal Deputy Assistant Attorney General Karl Remón Thompson). Not surprisingly, the government's position in FOIA litigation is somewhat different; in that context, the Justice Department denies that informal, oral advice is necessarily binding on officials. See Memorandum in Support of Defendants' Motion to Dismiss at 21-22, Citizens for Responsibility and Ethics in Wash. v. Dep't of Justice, No. 1:13-cv-1291 (D.D.C. Nov. 13, 2013), available at <https://fas.org/irp/agency/doj/>

olc/111313-opp.pdf.

- 243 See, e.g., Office and Duties of Attorney General, 6 Op. Att’y Gen. 326, 334 (1854) (“[T]he action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases where his decision is in practice final and conclusive”); Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 217 (2013) (“[O]pinions on the meaning and applicability of the law issued by the Attorney General . . . and those of the OLC, have historically been quasi-judicial in approach and determinative within the Executive Branch.”).
- 244 Morrison, *supra* note 20, at 1451 (“[B]ecause many of the issues addressed by OLC are unlikely ever to come before a court in justiciable form, OLC’s opinions often represent the final word in those areas unless later overruled by OLC itself, the Attorney General, or the President.”); see also Memorandum from David Barron, Acting Assistant Att’y Gen., Dep’t of Justice for Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) (hereinafter Barron Memorandum), *available at* <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (noting that OLC opinions generally address “issues of first impression that are unlikely to be resolved by the courts,” and accordingly, they often constitute “the final word on the controlling law”). This is particularly true with respect to opinions addressing national security matters, in which the secrecy of government action often prevents people from seeking redress in the courts.
- 245 John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993).
- 246 Note, The Immunity-Confering Power of the Office of Legal Counsel, 121 HARV. L. REV. 2086, 2086 (2008) (quoting Attorney General Michael Mukasey).
- 247 GOLDSMITH, *supra* note 16, at 96 (quoting a senior Justice Department prosecutor).
- 248 Jan Crawford Greenburg et al., *Sources: Top Bush Advisors Approved ‘Enhanced Interrogation,’* ABC NEWS (Apr. 9, 2008), <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256>; see also Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAGAZINE, Sept. 9, 2007, at 43, *available at* http://www.nytimes.com/2007/09/09/magazine/09rosen.html?_r=0 (quoting Jack Goldsmith as referring to OLC opinions as “free get-out-of-jail cards” and “advance pardon[s]”).
- 249 GOLDSMITH, *supra* note 16, at 33.
- 250 Morrison, *supra* note 20, at 1455.
- 251 Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515 (1993).
- 252 *Id.* at 515.
- 253 Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.
- 254 See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Dep’t of Justice, for Alberto R. Gonzalez, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *available at* <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Dep’t of Justice, for John Rizzo, Acting General Counsel, Central Intelligence Agency, on Interrogation of al Qaeda Operative (Aug. 1, 2002), *available at* <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>; Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Dep’t of Justice, to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102ltr.html>; Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Dep’t of Justice, for William J. Haynes II, General Counsel, Dep’t of Defense, Regarding Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), *available at* <https://www.aclu.org/files/>

- pdfs/safefree/yoo_army_torture_memo.pdf; *see also* DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009).
- 255 *See* Priest & Smith, *supra* note 252.
- 256 *See id.*
- 257 OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 10-13 (2009); GOLDSMITH, *supra* note 16, at 182.
- 258 *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of J. William Leonard, Former Director, Information Security Oversight Office).
- 259 The Justice Department's Office of Professional Responsibility found that two of the memos' authors committed professional misconduct; a senior Department official overruled this finding, but agreed that one of the authors allowed his "loyalty to his own ideology and convictions [to] cloud[] his view of his obligation to his client." Memorandum from David Margolis, Associate Deputy Att'y Gen., to Eric Holder, Att'y Gen., Re: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 67 (Jan. 15, 2010); *see also* OFFICE OF PROF'L RESPONSIBILITY, *supra* note 241, at 110-14.
- 260 GOLDSMITH, *supra* note 16, at 181.
- 261 *See* KAREN GREENBERG, *ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE* 111-16 (2016).
- 262 5 U.S.C. § 552(a)(1)(D).
- 263 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).
- 264 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (citation omitted) (internal quotation marks omitted).
- 265 *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, *9 (D.C. Cir. 2014).
- 266 Barron Memorandum, *supra* note 244, at 2.
- 267 *Coastal States*, 617 F.2d at 860.
- 268 Koh, *supra* note 251, at 516.
- 269 Morrison, *supra* note 20, at 1481.
- 270 Barron Memorandum, *supra* note 244, at 2.
- 271 Morrison, *supra* note 20, at 1464-65.
- 272 Johnsen, *supra* note 241, at 1577.
- 273 The Supreme Court articulated this general principle in *NLRB v. Sears*, 421 U.S. 132 (1975), and it has been applied by lower courts to require disclosure of OLC opinions, most notably in *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005).
- 274 *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 116 (2nd Cir. 2014).
- 275 *N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 687 (2nd Cir. 2015); *but see* Part I.D, *supra*.
- 276 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862-63 (D.C. Cir. 1980).
- 277 *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997) ("[A]ttorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public.").
- 278 Morrison, *supra* note 20, at 1493 ("OLC's legal advice is itself a source of law (by which I mean binding rules) within the Executive branch. That fundamentally distinguishes OLC's advice from other private

- and public lawyers' advice to their clients, which is not typically viewed as a source of law in itself.”).
- 279 Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); *see also* Schlefer v. United States, 702
F.2d 233, 244 (D.C. Cir. 1983); Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997).
- 280 Koh, *supra* note 251, at 516.
- 281 Morrison, *supra* note 20, at 1457.
- 282 *Id.* at 1476-79.
- 283 Daniel Schuman & Adeeb Sahar, *39% of Legal Counsel Opinions Kept from the Public*, SUNLIGHT
FOUNDATION BLOG (Aug. 15, 2012, 10:00 AM), [https://sunlightfoundation.com/blog/2012/08/15/39-](https://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/)
[of-office-of-legal-counsel-opinions-kept-from-the-public/](https://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/).
- 284 Ryan J. Reilly, *Obama Justice Department Won't Disclose Number of Classified OLC Opinions*, HUFFINGTON
POST POLITICS (Feb. 25, 2013), [http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-](http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions_n_2759878.html)
[opinions_n_2759878.html](http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions_n_2759878.html).
- 285 *See* Dep't of Justice, Office of Legal Counsel, Chronological Index: 1974-Present Classified Daybooks
(Updated 6/24/14) (released to Brennan Center for Justice in response to FOIA request), *available at* [https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20Daybook%20Entries.](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20Daybook%20Entries.pdf)
pdf; Dep't of Justice, Office of Legal Counsel, [REDACTED] (Excerpts from Classified Daybooks released
to Brennan Center for Justice in response to FOIA request), *available at* [https://www.brennancenter.org/](https://www.brennancenter.org/sites/default/files/Excerpts%20from%20Classified%20Daybook.pdf)
[sites/default/files/Excerpts%20from%20Classified%20Daybook.pdf](https://www.brennancenter.org/sites/default/files/Excerpts%20from%20Classified%20Daybook.pdf); *see also* Telephone Conversation
with Melissa Golden, Lead Paralegal and FOIA Specialist, Office of Legal Counsel (Sept. 1, 2015) (notes
on file with the author). The Brennan Center does not have the information to evaluate whether OLC
staff in fact uses the classified daybook as intended and keeps it fully accurate and updated.
- 286 *See* Dep't of Justice, Office of Legal Counsel, Untitled Lists of Opinions, Classified as TS/SCI (released
to Brennan Center for Justice in response to FOIA request), *available at* [https://www.brennancenter.org/](https://www.brennancenter.org/sites/default/files/Untitled%20Lists%20of%20Opinions%2C%20Classified%20as%20TS-SCI.pdf)
[sites/default/files/Untitled%20Lists%20of%20Opinions%2C%20Classified%20as%20TS-SCI.pdf](https://www.brennancenter.org/sites/default/files/Untitled%20Lists%20of%20Opinions%2C%20Classified%20as%20TS-SCI.pdf).
- 287 *See* Dep't of Justice, Office of Legal Counsel, Index of Classified OLC Opinions and Other Signed
Memoranda Conveying Legal Advice to Other Executive Branch Officers or Entities Concerning
[REDACTED] (released to Brennan Center for Justice in response to FOIA request), *available at* [https://](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Opinions%20and%20Other%20Signed%20Memoranda%20Conveying%20Legal%20Advice%20to%20Other%20Executive%20Branch%20Officers%20or%20Entities%20Concerning%20%5BRedacted%5D.pdf)
[www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Opinions%20](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Opinions%20and%20Other%20Signed%20Memoranda%20Conveying%20Legal%20Advice%20to%20Other%20Executive%20Branch%20Officers%20or%20Entities%20Concerning%20%5BRedacted%5D.pdf)
[and%20Other%20Signed%20Memoranda%20Conveying%20Legal%20Advice%20to%20Other%20](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Opinions%20and%20Other%20Signed%20Memoranda%20Conveying%20Legal%20Advice%20to%20Other%20Executive%20Branch%20Officers%20or%20Entities%20Concerning%20%5BRedacted%5D.pdf)
[Executive%20Branch%20Officers%20or%20Entities%20Concerning%20%5BRedacted%5D.pdf](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Opinions%20and%20Other%20Signed%20Memoranda%20Conveying%20Legal%20Advice%20to%20Other%20Executive%20Branch%20Officers%20or%20Entities%20Concerning%20%5BRedacted%5D.pdf);
Dep't of Justice, Office of Legal Counsel, Index of Classified Legal Advice Related to [REDACTED]
(released to Brennan Center for Justice in response to FOIA request), *available at* [https://www.](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Legal%20Advice%20Related%20to%20Redacted%20Oct.%202011%2C%202009.pdf)
[brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Legal%20Advice%20](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Legal%20Advice%20Related%20to%20Redacted%20Oct.%202011%2C%202009.pdf)
[Related%20to%20Redacted%20Oct.%202011%2C%202009.pdf](https://www.brennancenter.org/sites/default/files/Index%20of%20Classified%20OLC%20Legal%20Advice%20Related%20to%20Redacted%20Oct.%202011%2C%202009.pdf).
- 288 E-mails from John E. Bies, Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to
author (Oct. 7, 2016, 15:08 EST & Oct. 15, 2016, 9:46 EST) (on file with author).
- 289 Morrison, *supra* note 20, at 1470.
- 290 Dep't of Justice, Office of Legal Counsel, Lists of Office of Legal Counsel Opinions, 1998-2013 (released
to Brennan Center for Justice in response to FOIA request), *available at* [https://www.brennancenter.](https://www.brennancenter.org/sites/default/files/List%20of%20Unclassified%20OLC%20Opinions%2C%201998-2013.pdf)
[org/sites/default/files/List%20of%20Unclassified%20OLC%20Opinions%2C%201998-2013.pdf](https://www.brennancenter.org/sites/default/files/List%20of%20Unclassified%20OLC%20Opinions%2C%201998-2013.pdf). The
number of unclassified opinions issued for the earlier years is not publicly available. Although the Brennan
Center submitted FOIA requests for records reflecting the number of unclassified opinions from 1989 to
the present, OLC produced lists of unclassified opinions dating only from 1998 to 2013.
- 291 Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*,
83 MINN. LAW. REV. 1127, 1129 n.5 (1999).
- 292 Stephen Aftergood, *Leak of White Paper Boosts Intelligence Oversight*, SECRECY NEWS (Feb. 11, 2013),
http://fas.org/blogs/secrecy/2013/02/leak_boosts/; American Civil Liberties Union, *Six Questions for*

Evaluating a Justice Department Memo Authorizing the Killing of a U.S. Citizen Away from the Battlefield 1 (2013), https://www.aclu.org/sites/default/files/assets/140513_drone_memo_final.pdf.

- 293 Walker, *supra* note 185, at 1008.
- 294 Jamison E. Colburn, *Agency Interpretations*, 82 TEMP. L. REV. 657, 657 (2009).
- 295 Walker, *supra* note 185, at 1000-01.
- 296 5 U.S.C. § 552(a)(1)(D).
- 297 5 U.S.C. § 552(a)(2)(B).
- 298 *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 713 (D.C. Cir. 1971); *see also* *Schwartz v. IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (“The purpose of this limitation is to prevent bodies of ‘secret law’ from being built up and applied by government agencies.”).
- 299 Interestingly, national security considerations are not the only factor driving secret law in agencies. Just as Congress often delegates lawmaking to agency regulation, agencies may delegate important details or questions of interpretation to subsequent agency guidance, which is effectively incorporated into the regulation even though it is not given the status of a rule. A federal appeals court explained the process as follows: “The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).
- 300 5 U.S.C. § 552(b)(1).
- 301 For example, until Snowden’s disclosures, all of the procedures for targeting and minimization under Section 702 of FISA were classified, and many are classified still. *See Statement by the Office of the Director of National Intelligence and the Department of Justice on the Declassification of Documents Related to Section 702 of the Foreign Intelligence Surveillance Act*, IC ON THE RECORD (Sept. 29, 2015), <https://icontherecord.tumblr.com/post/130138039058/statement-by-the-office-of-the-director-of> (“Because these targeting procedures explain in depth how the Intelligence Community decides whether to target a person, the specifics of these targeting procedures are classified.”).
- 302 *See supra* Part I.D.
- 303 *See* GOITEIN & SHAPIRO, *supra* note 67, at 4-6.
- 304 Samaha, *supra* note 92, at 973.
- 305 5 U.S.C. § 552(b)(3)(A).
- 306 *The Freedom of Information Act*, 5 U.S.C. §552, CENTRAL INTELLIGENCE AGENCY, <http://www.foia.cia.gov/freedom-information-act-5-usc-%C2%A7552> (last visited Aug. 24, 2016).
- 307 50 U.S.C. § 3605(a) (emphasis added).
- 308 50 U.S.C. § 3141-3146.
- 309 50 U.S.C. § 3024(i)(1).
- 310 Access by Historical Researchers and Certain Former Government Personnel; Correction, 76 Fed. Reg. 64,237 (Oct. 18, 2011) (to be codified at 32 C.F.R. pt. 1909); Information Security Regulations, 76 Fed. Reg. 62630 (Oct. 11, 2011) (to be codified at 32 C.F.R. pt. 1902); Access by Historical Researchers and Certain Former Government Personnel, 76 Fed. Reg. 59,034 (Sept. 23, 2011) (to be codified at 32 C.F.R. pt. 1909); Classification Challenge Regulations, 76 Fed. Reg. 59,031 (Sept. 23, 2011) (to be codified at 32

C.F.R. pt. 1907); Mandatory Declassification Review, 76 Fed. Reg. 59,032 (Sept. 23, 2011) (to be codified at 32 C.F.R. pt. 1908); FOIA Processing Fees, 72 Fed. Reg. 39,315 (July 18, 2007) (to be codified at 32 C.F.R. pt. 1900); Debarment and Suspension Procedures, 69 Fed. Reg. 63,064 (Oct. 29, 2004) (to be codified at 32 C.F.R. pt. 1910); Security Protective Service, 63 Fed. Reg. 44,785 (Aug. 21, 1998) (to be codified at 32 C.F.R. pt. 1903); Freedom of Information Act; Privacy Act; and Executive Order 12958; Implementation, 60 Fed. Reg. 32,479 (June 16, 1997) (to be codified at 32 C.F.R. pts. 1900, 1901, 1907, 1908, & 1909); *see also Central Intelligence Agency*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/central-intelligence-agency> (last visited Aug. 24, 2016).

311 Privacy Act; Implementation, 69 Fed. Reg. 62,407 (Oct. 12, 2004) (to be codified at 32 C.F.R. pt. 322); Privacy Act; Implementation, 68 Fed. Reg. 28,756 (Apr. 21, 2003) (to be codified at 32 C.F.R. pt. 322); *see also National Security Service/Central Security Service*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/national-security-agency-central-security-service> (last visited Aug. 24, 2016).

312 Mandatory Declassification Review Program, 81 Fed. Reg. 24,019 (Apr. 25, 2016) (to be codified at 32 C.F.R. pt. 1704); Mandatory Declassification Review Program, 81 Fed. Reg. 23,604 (Apr. 22, 2016) (to be codified at 32 C.F.R. pt. 1704); Mandatory Declassification Review Program, 81 Fed. Reg. 97,68 (Feb. 26, 2016) (to be codified at 32 C.F.R. pt. 1704); Privacy Act Systems of Records, 80 Fed. Reg. 63,427 (Oct. 20, 2015) (to be codified at 32 C.F.R. pt. 1701); Designation of National Security Positions in the Competitive Service, and Related Matters, 80 Fed. Reg. 32,244 (June 5, 2015) (to be codified at 5 C.F.R. ch. IV); Privacy Act of 1974: Implementation, 76 Fed. Reg. 67,599 (Nov. 2, 2011) (to be codified at 32 C.F.R. 1701); Privacy Act Systems of Records, 75 Fed. Reg. 57,163 (Sept. 20, 2010) (to be codified at 32 C.F.R. pt. 1701); Regulations Governing the Production of Office of the Director of National Intelligence Information or Material in Proceedings Before Federal, State, Local or Other Government Entity of Competent Jurisdiction, 74 Fed. Reg. 11,480 (Mar. 18, 2009) (to be codified at 32 C.F.R. pt. 1703); Procedures Governing the Acceptance of Service of Process Upon the Office of the Director of National Intelligence and Its Employees in Their Official, Individual or Combined Official and Individual Capabilities, 74 Fed. Reg. 11,478 (Mar. 18, 2009) (to be codified at 32 C.F.R. pt. 1702); Privacy Act Regulations, 73 Fed. Reg. 16,531 (Mar. 28, 2008) (to be codified at 32 C.F.R. pt. 1701); Freedom of Information Act Regulation, 72 Fed. Reg. 54,895 (Aug. 16, 2007) (to be codified at 32 C.F.R. ch. XVII); *see also National Intelligence, Office of the National Director*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/national-intelligence-office-of-the-national-director> (last visited Aug. 24, 2016); National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047 (Nov. 20, 2014) (to be codified at 28 C.F.R. pt. 25); Implementation of the Private Security Officer Employment Authorization Act of 2004, 71 Fed. Reg. 16,90 (Jan. 11, 2006) (to be codified at 28 C.F.R. pt. 105); Privacy Act of 1974: Implementation, 70 Fed. Reg. 72,199 (Dec. 2, 2005) (to be codified at 28 C.F.R. pt. 16); National Instant Criminal Background Check System Regulation, 69 Fed. Reg. 43,892 (July 23, 2004) (to be codified at 28 C.F.R. pt. 25); Privacy Act of 1974: Implementation, 68 Fed. Reg. 14,140 (Mar. 24, 2003) (28 C.F.R. pt. 16) (to be codified at 28 C.F.R. pt. 16); Fee for Production of Identification Record, 60 Fed. Reg. 38 (Jan. 3, 1995) (to be codified at 28 C.F.R. pt. 16); *see also Federal Bureau of Investigation*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/federal-bureau-of-investigation> (last visited Aug. 24, 2016).

By comparison, during the same time period, the Environmental Protection Agency published 12,592 final rules; the Commerce Department published 7,466; the Coast Guard published 7,320; the National Oceanic and Atmospheric Administration published 6,155; the Department of Health and Human Services published 4,496; the Food and Drug Administration published 2,929; the Department of Energy published 1,107; the U.S. Postal Service published 573; the Department of Education published 428; the U.S. Customs and Border Patrol published 239; the Drug Enforcement Administration published 207; the Bureau of Alcohol, Tobacco, Firearms, and Explosives published 163; and the Bureau of Prisons published 129. *See* <https://www.federalregister.gov/agencies> (last visited Sept. 19, 2016) (numbers available by selecting agency and then selecting “Limit search to documents of type Rule”).

313 Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 632 (2010). The FBI’s Domestic

Investigations and Operations Guide (DIOG), which includes a greater level of detail on the rules and authorities governing domestic operations, is still largely non-public. In response to FOIA requests, the FBI has released highly redacted versions, frequently justifying the redactions on the ground that disclosing its guidelines would risk “circumvention of the law.” 5 U.S.C. § 552(b)(7).

- 314 MICHAEL B. MUKASEY, DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS, § I.D.3, *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2008/10/03/guidelines.pdf>.
- 315 For instance, the Guidelines authorize the FBI to conduct mail covers and polygraph examinations (*id.* § V.A); task informants and engage in indefinite physical surveillance when conducting “assessments” — a preliminary level of investigation in which there is no factual predicate to suspect criminal activity (*id.* § II.A.4); attend public meetings, including those of religious and political organizations (*id.* §§ II.A.4.a, II.B.4.a.iii, II.B.4.b.ii, VII.L); engage in specified instances of “otherwise illegal activity” in the course of an undercover operation (*id.* § V.C); and conduct investigations or provide assistance at the request of foreign law enforcement, intelligence, or security agencies (*id.* § III.D.1).
- 316 One scholar refers to rules that are made in public but developed in secret as “opaque rulemaking,” and observes: “The United States government has a bifurcated administrative state. There is an ordinary administrative state, in which agencies must solicit and consider public comments before issuing rules with the force of law. And there is a national security administrative state, in which agencies may choose to issue the same sort of rules without first publishing them and without soliciting or receiving public comments, while some rules may be kept entirely secret.” Knowles, *supra* note 58, at 888, 892. Since 1994, the NSA has published two proposed rules for comment in the Federal Register; the CIA has published four; ODNI (created in 2005) has published eleven; and the FBI has published six. *See* <https://www.federalregister.gov/agencies> (last visited Sept. 19, 2016) (numbers available by selecting agency and then selecting “Limit search to documents of type Proposed Rule”). Like the published final rules, these generally do not relate to the core substantive activities of the agencies. *See supra* text accompanying notes 311-12.
- 317 *See supra* Part I.C.3; *see also* Bonfield, *supra* note 134, at 285 (“Public participation procedures were not intended to inform the public; rather, they were intended to educate the agency.”).
- 318 Shane, *supra* note 152, at 508. An example of an ill-conceived regulation that dodged full notice-and-comment is the “Special Call-In Registration Program” established by the Department of Justice almost a year after 9/11. This program required men from certain countries who were residing inside the United States to register and be fingerprinted. While the Department did provide notice and an opportunity to comment on the outlines of the program, it withheld the portion that designated the countries whose citizens would be required to register. *Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 40,581, 40,582 (June 13, 2002) (proposed rule). Several months later, it revealed the twenty-five countries it had designated, almost all of which were majority-Muslim nations. *See Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 52,584, 52,589 (Aug. 12, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); *Registration of Certain Nonimmigrant Aliens from Designated Countries*, 67 Fed. Reg. 77,136 (Dec. 16, 2002). Largely because it was perceived to target particular religious and ethnic communities wholesale, the program and its implementation drew criticism and protests, and the Department abandoned it after less than a year. *See* Knowles, *supra* note 58, at 892-94.
- 319 Intelligence agencies have provided no public justification for dispensing with notice and comment in cases where the final rule is made public. It is possible they are relying on the “military or foreign affairs function” exemption to the notice and comment requirement. 5 U.S.C. § 553(a). The legislative history of this provision indicates that it was intended to apply fairly narrowly. *See* Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 141-42 (1985); H.R. REP. NO. 79-1980, at 2-3, 23, 27 (1946); S. REP. NO. 79-752, at 13, 16 (1945). Nonetheless, the executive branch has taken an “exceptionally sweeping” view of its scope. Jeffrey R. Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT’L L. REV. 389, 396 (1999). A decade after the APA’s enactment, the Department of Defense opined: “In a fundamental sense, all regulations and directives of

the Department are incident to its essentially military function of national defense.” H.COMM. ON GOV’T OPERATIONS, 85TH CONG., SURVEY AND STUDY OF ADMINISTRATION, ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES 278 (Comm. Print 1957). Alternatively, intelligence agencies might forego notice and comment because they consider their rules, which generally do not impose obligations on members of the public, to be “matter[s] relating to agency management” or “rules of agency organization, procedure, or practice,” and therefore exempt. 5 U.S.C. § 553(a)(2), (b)(3)(A). However, as one law professor testified before Congress: “[A]lmost any rule may be put in the form of an instruction directed to subordinates even though its effect and purpose is to regulate private activities . . . [A] regulation may seem to be for mere housekeeping or procedural purposes and yet, in effect, govern the substantive rights of parties.” *Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. 493, 685 (1964) (statement of Professor Carl McFarland, University of Virginia Law School). Courts have thus refused to apply the “internal rule” exceptions to a rule that “substantially affects outside parties” – as a rule governing an intelligence program would likely do – even if it is directed solely to agency personnel. *See, e.g., Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011). In short, intelligence agencies’ legal basis for dispensing with notice and comment for published rules and directives is unclear.

- 320 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 101: INTELLIGENCE COMMUNITY POLICY SYSTEM, § E.1 (June 12, 2009), *available at* https://www.dni.gov/files/documents/ICD/ICD_101.pdf. https://www.dni.gov/files/documents/ICD/ICD_101.pdf.
- 321 *Id.* at § E.1.a.
- 322 *Id.* at § E.1.b.
- 323 *Id.* at § E.1.c.
- 324 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 107: CIVIL LIBERTIES AND PRIVACY (Aug. 31, 2012), *available at* <https://www.dni.gov/files/documents/ICD/ICD%20107%20Civil%20Liberties%20and%20Privacy.pdf>.
- 325 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 119: MEDIA CONTACTS (Mar. 20, 2014), *available at* <https://www.dni.gov/files/documents/ICD/ICD%20119.pdf>.
- 326 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 191: DUTY TO WARN (July 21, 2015), *available at* https://www.dni.gov/files/documents/ICD/ICD_191.pdf.
- 327 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 403: FOREIGN DISCLOSURE AND RELEASE OF CLASSIFIED NATIONAL INTELLIGENCE (Mar. 13, 2013), *available at* <https://www.dni.gov/files/documents/ICD/ICD403.pdf>.
- 328 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE NUMBER 501.1: EXEMPTION OF INFORMATION FROM DISCOVERY (May 26, 2009), *available at* https://www.dni.gov/files/documents/ICPG/icpg_501_1.pdf.
- 329 E-mail from Robin D. Maresco, Deputy Director, Policy, Office of the Dir. of Nat’l Intelligence, to author (Aug. 1, 2016, 14:07 EST) (on file with author).
- 330 For instance, ICD 701, an unclassified directive concerning unauthorized disclosures of classified information, was issued in 2007 but not released until requested under FOIA in 2010. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 701: SECURITY POLICY DIRECTIVE FOR UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION (Mar. 14, 2007), *available at* <https://fas.org/irp/dni/icd/icd-701.pdf>. ICD 304, an unclassified directive concerning human intelligence, was released in full in 2008, then withdrawn and released with redactions in 2014. *See* Steven Aftergood, *ODNI Seeks to Obscure CIA Role in Human Intelligence*, *SECURITY NEWS* (Apr. 28, 2014), <http://fas.org/blogs/secrecy/2014/04/odni-humint/>.
- 331 OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *supra* note 320, at § E.1.c.
- 332 President Woodrow Wilson, Address Delivered to Joint Session of Congress (Jan. 8, 1918), *available at*

http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points.

333 U.S. CONST. art. VI.

334 1 U.S.C. § 112a(a).

335 Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 150 (2009).

336 *Id.* at 149.

337 Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, § 503, 86 Stat. 489, 496 (1972) (codified as amended at 22 U.S.C. § 2291(a)(2)).

338 Agreement on the Safety of Drugs and Medical Devices, U.S.-P.R.C., Dec. 11, 2007, Temp. State Dep't No. 08-13, 2007 U.S.T. LEXIS 55; *see also* Hathaway, *supra* note 335, at 218 (noting that “the line between international and domestic law is increasingly blurry”).

339 *See* Frederic L. Kirgis, *International Agreements and U.S. Law*, 2 INSIGHTS 5, AM. SOC'Y OF INT'L LAW (May 27, 1997), *available at* <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>.

340 Hathaway, *supra* note 335, at 156.

341 Specifically, the Secretary of State may decide not to publish certain categories of agreements if “the public interest in such agreements is insufficient to justify their publication, because (A) as of the date of enactment of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, the agreements are no longer in force; (B) the agreements do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals; (C) in view of the limited or specialized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means; or (D) the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States.” 1 U.S.C. § 112a(b)(2).

342 1 U.S.C. § 112a(b)(2)(D) & (3).

343 1 U.S.C. § 112b(a).

344 *Id.*

345 1 U.S.C. § 112b(d)(1).

346 Hathaway, *supra* note 335, at 222.

347 *Id.* at 244.

348 *Id.*

349 *See, e.g.*, U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2013 (2013), *available at* <http://www.state.gov/documents/organization/218912.pdf>.

350 CONG. RESEARCH SERV., S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 226-27 (Comm. Print 2001), *available at* <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>.

351 Kutz, *supra* note 2, at 207.

352 Hathaway, *supra* note 335, at 252 & n.333.

353 1 U.S.C. § 112b(d).

354 *See generally* U.S. Dep't of State, Indices of International Agreements submitted in fulfillment of the requirements of 1 U.S.C. 112b(d) (listed by country) (July 6, 2016) (released to Brennan Center for Justice in FOIA Case #F-2014-02323), *available at* <https://www.brennancenter.org/sites/default/files/Case%20Act%20Indices%202004%20to%202014.pdf>; *id.* at 30-45 (2014 reporting year, Doc. # C06004993); *id.* at 46-61 (2013 reporting year, Doc. # C06004994); *id.* at 62-75 (2012 reporting year, Doc. # C06004996); *id.*

at 76-92 (2011 reporting year, Doc. # C06004997); *id.* at 93-108 (2010 reporting year, Doc. # C06004998); *id.* at 109-25 (2009 reporting year, Doc. # C06004999); *id.* at 126-52 (2008 reporting year, Doc. # C06005001); *id.* at 153-71 (2007 reporting year, Doc. # C06005002); *id.* at 172-94 (2006 reporting year, Doc. # C06005005); *id.* at 11-29 (2005 reporting year, Doc. # C05997747); *id.* at 1-10 (2004 reporting year, Doc. # C05997746). It is not clear how many of the agreements were not published for national security reasons, as opposed to the other permissible grounds for non-publication. *See supra* note 341. In the indexes for all years except 2012 and 2014, every substantive entry is redacted, and the State Department cites Exemption 1 — which shields properly classified information from disclosure — as the basis for withholding. However, for the 2012 and 2014 indexes, only a very small number of entries were redacted based on an Exemption 1 claim. The stark difference in the classification rate for the 2012/2014 indexes is perplexing, but might suggest that the blanket Exemption 1 claim for all the other indexes may be improper.

355 *See generally Texts of International Agreements to Which the U.S. is a Party (TIAS)*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/tias/> (last visited Aug. 25, 2016). For any given year, the TIAS includes agreements that went into effect during that year, while the indexes provided to Congress under 1 U.S.C. § 112b(d) include some agreements that went into effect before the reporting year. This difference should not significantly affect the overall percentage of agreements that were unpublished during the eleven years of reporting, but the year-to-year percentages in the table are likely to be imprecise; they are provided to give a general sense of the variation over the years.

356 *About the Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last updated Jan. 12, 2016); *About the Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Feb. 6, 2015).

357 8 CFR § 1003.10(a).

358 Michelle Toh, *Inside the Many, Many Problems of the Immigration Court System*, FUSION (May 26, 2015, 6:44 AM), <http://fusion.net/story/138952/inside-the-many-many-problems-of-the-immigration-court-system/>; Sharon Cohen, *Immigration Court: Troubled System, Long Waits*, IMMIGRATION COURT OBSERVATION PROJECT (Apr. 7, 2011), <https://nycicop.wordpress.com/2011/04/07/immigration-court-troubled-system-long-waits/>.

359 *See generally* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

360 *See* Cohen, *supra* note 358.

361 8 C.F.R. § 1003.37; Mathilde Cohen, *When Judges Have Reasons Not To Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 547 (2015).

362 8 C.F.R. § 1240.9; OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 66 (2016).

363 OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 11-12 (2016).

364 8 C.F.R. §§ 1003.27, 1240.10(b). This is not true of asylum proceedings, however, which generally are confidential in order to protect the applicants from retaliation by their governments. 8 C.F.R. §§ 1208.6, 1240.11(c)(3)(i).

365 Jacqueline Stevens, *Lawless Courts*, THE NATION (Oct. 20, 2010), <https://www.thenation.com/article/lawless-courts/>; Jacqueline Stevens, *Secret Courts Exploit Immigrants*, THE NATION (June 29, 2009), <https://www.thenation.com/article/secret-courts-exploit-immigrants/>.

366 8 C.F.R. § 1003.1(e)(4).

367 8 C.F.R. § 1003.1(f).

368 8 C.F.R. § 1003.1(g).

369 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of

Decisions as Precedents, 73 Fed. Reg. 34,654, 34,663 (June 18, 2008) (creating new 8 CFR § 1003.1(g)(3)). The proposed criteria were as follows: “This rule encourages publication of opinions which meet certain criteria, such as whether: (1) The case involves a substantial issue of first impression; (2) the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases; (3) whether the decision announces a new rule of law, or modifies or clarifies a rule of law or prior precedent; (4) whether the case resolves a conflict in decisions by immigration judges, the Board, or the federal courts; (5) whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws and regulations; and (6) whether the case warrants publication in light of other factors that give it general public interest.”

- 370 See *Attorney General and BIA Precedent Decisions*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/ag-bia-decisions> (last updated Feb. 19, 2016).
- 371 See 8 U.S.C. § 1225(c) (allowing the use of secret evidence in expedited removal proceedings for arriving aliens); 8 U.S.C. § 1229a(b)(4)(B) (allowing the use of secret evidence in considering an alien’s application for discretionary relief from removal).
- 372 See, e.g., Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287 (2008); Matthew R. Hall, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, 35 CORNELL INT’L L. J. 515 (2002); D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INT. L.J. 25 (2000/2001); *Secret Evidence Repeal Act of 1999: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 63-75 (2000) (statement of David Cole, Professor, Georgetown Univ. Law Ctr.).
- 373 Memorandum from Thomas G. Snow, Acting Chief Immigration Judge, to All Immigration Judges, Administrators, Attorney Advisors, Judicial Law Clerks, and Court Staff, “Operating Policies and Procedures Memorandum 09-01: Classified Information in Immigration Court Proceedings” (Feb. 5, 2009) (*available at* <https://www.justice.gov/sites/default/files/eoir/legacy/2009/02/11/09-01.pdf>).
- 374 Memorandum from David L. Neal, Chairman, Board of Immigration Appeals, to All Board Staff and Contractors Regarding Classified National Security Information Document Control 15 (Apr. 22, 2014) (BIA 14-02).
- 375 Memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), *available at* <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.
- 376 Brief of Solicitor General in Opposition to Petition for Writ of Certiorari at 5, *N.J. Media Grp., Inc. v. Ashcroft*, *cert. denied*, 123 S. Ct. 2215 (May 27, 2003) (No. 02-1289).
- 377 For instance, Section 411 of the Patriot Act barred entry for individuals or representatives of groups whose public pronouncements are deemed by the Secretary of State to undermine U.S. efforts to reduce or eliminate terrorist activities, while Section 412 mandated the potentially indefinite detention of aliens suspected to be engaged in activity endangering national security. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, §§ 411, 412, 115 Stat. 272, 345-52 (2001).
- 378 *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
- 379 *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002).
- 380 8 C.F.R. § 1003.46(a).
- 381 8 C.F.R. § 1003.46(f)(1)-(2).
- 382 *Detroit Free Press*, 303 F.3d at 707.
- 383 8 C.F.R. § 1003.46(h).
- 384 There is a fourth way in which the immigration system could create secret law. In 1996, Congress authorized the use of “Alien Terrorist Removal Courts” (ATRCs) to remove from the country non-citizens (including legal permanent residents) alleged by the Attorney General to be terrorists. The legislation allowed the

government to withhold evidence from the alien if disclosure would endanger national security. 8 U.S.C. §§ 1531-37 (2000). This specialized tribunal has never been used, however, see Jonathan H. Yu, *Combating Terrorism with the Alien Terrorist Removal Court*, 5 AM. U. NAT'L SECURITY L. BRIEF 1, 1 (2015), and so it is not addressed in this report.

- 385 Neither the Department of Justice nor the Department of Homeland Security issues statistics on how many immigration cases involve classified evidence. However, a general sense of the frequency may be gleaned from episodic public disclosures and anecdotal reports. In 1998, *The New York Times* reported that there were 25 cases pending at the time involving secret evidence, and cited a claim by the Immigration and Naturalization Service (INS) that secret evidence had been used in 50 cases since 1992. Ronald Smothers, *U.S. Bars or Expels Suspect Immigrants on Secret Evidence*, N.Y. TIMES, Aug. 15, 1998, available at <http://www.nytimes.com/1998/08/15/us/us-bars-or-expels-suspect-immigrants-on-secret-evidence.html>. In congressional testimony that same year, INS General Counsel Paul Virtue indicated that secret evidence was used in close to 20 immigration court proceedings annually. *National Security Considerations in Asylum Applications: A Case Study of Six Iraqis: Hearing Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 105 Cong. 6 (1998) (statement of Paul W. Virtue, Gen. Counsel, Immigration and Naturalization Serv.). Two years later, *The New York Times* reported: "Secret evidence has been used to jail about 100 foreigners and resident aliens in the last decade, the Immigration and Naturalization Service says." Tim Weiner, *Congress Reviewing Use of Evidence Kept Secret*, N.Y. TIMES, May 23, 2000, available at <http://www.nytimes.com/2000/05/23/us/congress-reviewing-use-of-evidence-kept-secret.html>. It is likely that the rate of usage of secret evidence increased after 9/11, as immigration proceedings became a favored tool for dealing with suspected terrorists. See Ramji-Nogales, *supra* note 372, at 288 n.3.
- 386 Office of the Chief Immigration Judge, Immigration Court Cases Where DOJ Has Directed Special Security Procedures (Apr. 23, 2003) (released to Brennan Center for Justice in response to FOIA request), available at <https://www.brennancenter.org/sites/default/files/Immigration%20Court%20Cases%20Where%20DOJ%20Has%20Directed%20Special%20Security%20Procedures%20Charts.pdf>.
- 387 Dep't of Homeland Sec. Immigration and Customs Enforcement, CRU Special Interest Cases (Grouped by Release Type) (Nov. 26, 2003) (released to Brennan Center for Justice in response to FOIA request), available at <https://www.brennancenter.org/sites/default/files/ICE%20Chart%20of%20Special%20Interest%20Cases.pdf>.
- 388 U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OPLA CASE MANAGEMENT SYSTEM DHS/ICE/PIA-036, at 14 (2013), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-ocms-june2013.pdf>.
- 389 Exec. Office of Immigration Review, Protective Order Cases (dated Jan. 23, 2015 & Dec. 1, 2014) (released to Brennan Center for Justice in response to FOIA request), available at <https://www.brennancenter.org/sites/default/files/Protective%20Order%20Cases%20Chart%20Jan.%2023%2C%202015.pdf>.
- 390 *Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.").
- 391 *Gannett Co. v. DePasquale*, 443 U.S. 368, 412 (1979) (Blackmun, J., concurring in part and dissenting in part).
- 392 *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966).
- 393 *Craig v. Harney*, 331 U.S. 367, 374 (1947).
- 394 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (emphasis in original).
- 395 Sall, *supra* note 127, at 1150.

- 396 *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 14 (2002) (statement of Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit).
- 397 ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 1 (2010), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/sealing_guide.pdf/\\$file/sealing_guide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealing_guide.pdf/$file/sealing_guide.pdf).
- 398 FED. JUDICIAL CTR., SEALED CASES IN FEDERAL COURTS 4, 17 (2009), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\\$file/sealcafc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc.pdf).
- 399 *Id.* at 21. A study by U.S. Magistrate Judge Stephen Smith provides further illumination. Correcting for some of the methodological shortcomings in the FJC study, Judge Smith determined that 42 percent of the orders issued by magistrate judges and by district judges in “miscellaneous” cases (which include wiretap applications) were sealed in 2006. A majority of these, he determined, were orders on applications to conduct electronic surveillance under the Electronic Communications Privacy Act. Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA’s Secret Docket*, 6 HARV. L. & POL’Y REV. 313, 319-22 (2012).
- 400 *Boumediene v. Bush*, 553 U.S. 723, 799 (2008); Sall, *supra* note 127, at 1150.
- 401 10 U.S.C. 801 note § 1005(e).
- 402 Andy Worthington, *Guantanamo Habeas Results: The Definitive List*, ANDY WORTHINGTON, <http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list/> (last visited Aug. 29, 2016).
- 403 Sall, *supra* note 127, at 1149.
- 404 BEN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING 11 (Brookings ed., 2012) (noting that the authors are “mindful of the fact that even the declassified opinions often contain potentially significant redactions that encumber any effort to understand them completely”).
- 405 *Bensayah v. Obama*, 610 F.3d 718, 725-26 (D.C. Cir. 2010).
- 406 Sall, *supra* note 127, at 1159.
- 407 *Ameziane v. Obama*, 620 F.3d 1, 4 (D.C. Cir. 2010) (slip opinion that shows quantity of redacted information available at [https://pacer.cadc.uscourts.gov/internet/opinions.nsf/9AF9C7EA2F4465C0852578070071A26B/\\$file/09-5236-1270270.pdf](https://pacer.cadc.uscourts.gov/internet/opinions.nsf/9AF9C7EA2F4465C0852578070071A26B/$file/09-5236-1270270.pdf)). In this instance, the secrecy was temporary, as the court issued an unredacted version of the opinion two and a half years later. *See Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012) (unredacted slip opinion for comparison available at [https://ccrjustice.org/sites/default/files/assets/2010-10-05%20UNREDACTED%20Ameziane%20DC%20Circuit%20Opinion%20\(Unsealed\).pdf](https://ccrjustice.org/sites/default/files/assets/2010-10-05%20UNREDACTED%20Ameziane%20DC%20Circuit%20Opinion%20(Unsealed).pdf)).
- 408 *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009).
- 409 *Id.* at 31.
- 410 Adam Liptak, *The “Fill in the Blanks” Court Game of Indefinite Detention*, N.Y. TIMES (Dec. 12, 2011), http://www.nytimes.com/2011/12/13/us/the-fill-in-the-blanks-court-game-of-indefinite-detention.html?_r=0.
- 411 Sall, *supra* note 127, at 1163.
- 412 *Id.*
- 413 *Abdah v. Obama*, No. 04-1254 (D.D.C. Mar. 16, 2010) was the first version; *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010), *rev’d sub nom.* *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011) is the official public version.
- 414 Sall, *supra* note 127, at 1148.

415 See Krista Kjellman Schmidt, *Key Deletions in the Uthman Trial Court Opinions*, PROPUBLICA (Oct. 8, 2010, 10:59 AM), <https://www.propublica.org/special/key-deletions-in-the-uthman-trial-court-opinions> (identifying information redacted in the revised opinion).

416 See Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality*, PROPUBLICA (Apr. 25, 2011, 7:34 AM), <https://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality>.

417 Sall, *supra* note 127, at 1158.

418 *Id.*; see also *Al Alwi v. Bush*, 593 F. Supp. 2d (D.D.C. 2008) (unclassified version); redacted version cited in *Al Alwi v. Obama*, 653 F.3d 11, 14 n.2 (D.C. Cir. 2011) (citing *Al Alwi v. Bush*, No. 05-2223, 2009 U.S. Dist. LEXIS 131297, J.A. Vol. III at 1794 (D.D.C. Jan. 9, 2009)).

419 *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014).

420 *United States v. Daoud*, 761 F.3d 678 (7th Cir. 2014). Although in theory, a court may determine during the course of a closed hearing that consultation with defense counsel is necessary, in practice such consultation has never occurred.

421 *United States v. Aref*, 533 F.3d 72 (2nd Cir. 2008).

422 *United States v. Aref et al.* (*Upholding public's right to access "secret" documents used in criminal prosecutions*), N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1051> (last visited Aug. 29, 2016).

423 *Aref*, 533 F.3d at 82.

424 *Al Haramain Islamic Found., Inc. v. Dep't of Treasury*, 660 F.3d 1019, 1032-38, 1041-43 (9th Cir. 2011), *amended on denial of reh'g*, 686 F.3d 965 (9th Cir. 2012).

425 See Sall, *supra* note 127, at 1149.

426 *N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 686 (2nd Cir. 2015).

427 *Id.* at 689.

428 For more on the history and evolution of the FISA Court, see GOITEIN & PATEL, *supra* note 141.

429 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of 8, 18, 47, 50 U.S.C.).

430 *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 224 (1978) (statement of Hon. Laurence Silberman, U.S. Ambassador to Yugoslavia).

431 [REDACTED], No. PR/TT [REDACTED], at (FISA Ct. REDACTED), *available at* <https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf> (approving bulk collection of internet metadata); *In Re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things From [REDACTED], No. BR 06-05 (FISA Ct. Aug. 18, 2006), *available at* https://www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf (approving bulk collection of phone metadata).

432 *In re* Various Known and Unknown Agents of [REDACTED] Presumed United States Persons, at 7 (FISA Ct. Jan. 10, 2007), *available at* <http://www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%20-%2012-11%20-%20Redacted.pdf>.

433 *In Re* [REDACTED], at 20 (FISA Ct. Apr. 3, 2007), *available at* <http://www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-%20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf>.

434 Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (expired 2008); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2435 (2008).

435 50 U.S.C. § 1871(a)(5).

- 436 Executive officials exacerbated the problem by publicly describing Section 215 in a way that tracked the text of the law rather than the FISA Court's secret interpretation. In a September 2011 letter, Senators Wyden and Udall wrote to Attorney General Holder to criticize Justice Department officials for making these misleading public statements. The letter stated, "[W]hen the government relies on significant interpretations of public statutes that are kept secret from the American public, the government is effectively relying on secret law." Letter from Sen. Ron Wyden & Sen. Mark Udall to Att'y Gen. Eric Holder 1-2 (Sept. 21, 2011) (*available at* <https://www.wyden.senate.gov/download/?id=a3670ed3-9f65-4740-b72e-061c7de83f75&download>).
- 437 157 CONG. REC. S3386 (daily ed. May 26, 2011) (statement of Sen. Wyden).
- 438 USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 402, 129 Stat. 268, 281 (codified at 50 U.S.C. § 1872).
- 439 See AMOS TOH, FAIZA PATEL & ELIZABETH GOITEIN, BRENNAN CTR FOR JUSTICE, OVERSEAS SURVEILLANCE IN AN INTERCONNECTED WORLD 15-18 (2016), *available at* https://www.brennancenter.org/sites/default/files/publications/Overseas_Surveillance_in_an_Interconnected_World.pdf (discussing intelligence agencies' varying and counterintuitive definitions of the term "collect").
- 440 PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., RECOMMENDATIONS ASSESSMENT REPORT 8-9 (2016), *available at* https://pclub.gov/library/Recommendations_Assessment_Report_20160205.pdf.
- 441 Dep't of Justice, Office of Legal Counsel, Semi-Annual Reports Under the Surveillance Act of 1978, as Amended by Section 6002 of the Intelligence Reform and Terrorism Prevention Act of 2004, dated December 2005 (at 1-5); June 2006 (at 6-10); Dec. 2006 (at 11-16); June 2007 (at 17-23); Dec. 2007 (at 24-29); June 2008 (at 30-33); Dec. 2008 (at 34-41); June 2009 (at 42-47); Dec. 2009 (at 48-50); June 2010 (at 51-53); Dec. 2010 (at 54-56); June 2011 (at 57-59); Dec. 2011 (at 60-62); June 2012 (at 63-66); Dec. 2012 (at 67-70); June 2013 (at 71-73); Dec. 2013 (at 74-77) (released to Brennan Center for Justice in response to FOIA request), *available at* <https://www.brennancenter.org/sites/default/files/AG%20FISA%20Reports%20Dec%202005-Dec%202013.pdf>. Because the relevant FOIA requests were submitted by the Brennan Center in early 2014, most of the documents the Center received were generated before that date.
- 442 Where the redactions left some uncertainty on this point, the Brennan Center was able to obtain clarification in all but one instance through correspondence with the National Security Division's FOIA staff (on file with the author). Each of the reports also includes a section that mentions the significant opinions provided to the committees, but this section does not enable a complete count, as it occasionally refers to "opinions which were previously provided" without enumerating them.
- 443 Dep't of Justice, National Sec. Div., 1871 Documents Produced to Congress (updated Mar. 21, 2014) (released to Brennan Center for Justice in response to FOIA request), *available at* <https://www.brennancenter.org/sites/default/files/NSD%20Chart%20of%20documents%20produced%20to%20Congress.pdf>.
- 444 James Robertson, Former U.S. District Judge, Statement at Privacy and Civil Liberties Oversight Board Public Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act 90 (July 9, 2013) (transcript available at <http://www.pclub.gov/library/20130709-Transcript.pdf>).
- 445 E-mails from Stuart Evans, Deputy Assistant Att'y Gen., Nat'l Sec. Div., Dep't of Justice, to author (Oct. 11, 2016, 12:43 EST & Oct. 11, 2016, 17:09 EST) (on file with author).
- 446 The Brennan Center has compiled a chart of public FISA Court opinions, including their dates of issuance and public release, subject matter, and the way in which they became public. See FISA Court Opinions Index, BRENNAN CTR. FOR JUSTICE (2016), *available at* <https://www.brennancenter.org/sites/default/files/FISC%20Opinions%20Index%208.5.16.pdf>. The decisions issued between mid-2003 and mid-2013 that could plausibly be characterized as including significant legal analyses or novel applications of the law include: the July 14, 2004 (likely date) Opinion and Order; the Apr. 3, 2007 Order and Memorandum

Opinion; the Aug. 2, 2007 Order and Memorandum Opinion; the Dec. 11, 2007 Memorandum Opinion; the Aug. 22, 2008 Opinion; the Aug. 27, 2008 Order; the Dec. 12, 2008 Supplemental Opinion; the Mar. 2, 2009 Order; the May 29, 2009 (likely date) Supplemental Order; the June 22, 2009 Order; the Oct. 30, 2009 (likely date) Supplemental Order; the Nov. 5, 2009 Supplemental Opinion and Order; the July 2010 (likely date) Memorandum Opinion; the Nov. 23, 2010 Supplemental Order; the Oct. 3, 2011 Memorandum Opinion; the Nov. 30, 2011 Memorandum Opinion; the Sept. 25, 2012 Memorandum Opinion; the Feb. 19, 2013 Opinion; and the Jun. 12, 2013 Opinion and Order.

- 447 PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., *supra* note 440, at 9.
- 448 Elizabeth Goitein, *There's No Reason to Hide the Amount of Secret Law*, JUST SEC. (June 30, 2015), <https://www.justsecurity.org/24306/no-reason-hide-amount-secret-law/>.
- 449 INFO. SEC. OVERSIGHT OFFICE, 2015 REPORT TO THE PRESIDENT 14 (2016), *available at* <https://www.archives.gov/isoo/reports/2015-annual-report.pdf>.
- 450 *Id.* at 28.
- 451 Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 408-09 (2009).
- 452 There may be additional, similarly narrow categories that should be added to that list.
- 453 Exec. Order No. 13526 § 1.1(4), 75 Fed. Reg. 707, 707 (Dec. 29, 2010).
- 454 18 U.S.C. § 1801(h)(4).
- 455 Office of Legal Counsel, Exhibit B, Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978 as Amended, at §5(4) (July 10, 2015) (released as redacted by Office of the Dir. of Nat'l Intelligence, Aug. 11, 2016), *available at* https://www.dni.gov/files/documents/2015NSAMinimizationProcedures_Redacted.pdf.
- 456 Rudesill, *supra* note 24, at 342-43.
- 457 *Id.* at 338-39.
- 458 OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008).
- 459 Rudesill, *supra* note 24, at 340.
- 460 Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1513 (2014).
- 461 *See generally* David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).
- 462 *See* Mark Lawrence, *Executive Branch Leads the Leakers*, WASH. POST, July 28, 1987, *available at* <https://www.washingtonpost.com/archive/politics/1987/07/28/executive-branch-leads-the-leakers/2af746a6-7e7b-4efc-ac85-3cc3d2cb5ed6/>.
- 463 Rudesill proposes the creation of a three-branch, non-partisan cadre of attorneys with “super user” clearance, meaning that they would be authorized to have access to all secret law. *See* Rudesill, *supra* note 24, at 358-59. Such a measure could usefully be added to (but not substituted for) the inter-branch disclosures proposed here.
- 464 Exec. Order No. 13,526, § 1.5(d).
- 465 *Id.* § 3.3. Although the executive order states that documents will be automatically declassified at 25 years regardless of whether they have been reviewed, agencies are routinely exempted from this requirement, and there is in practice an extensive review procedure. *See* Nate Jones, *Government Declassification Watchdog: End Wasteful Equity Re-Reviews; End “Pass/Fail” Shortcut; Prioritize High Interest Document Sets*, UNREDACTED (Jan. 20, 2015), <https://nsarchive.wordpress.com/2015/01/20/government-declassification-watchdog-end-wasteful-equity-re-reviews-end-passfail-shortcut-prioritize-high-interest-document-sets/>.

466 Rudesill, *supra* note 24, at 351-53.

467 See generally Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L.R. 1777 (2013).

468 Rudesill, *supra* note 24, at 344.

469 See GOITEIN & SHAPIRO, *supra* note 67, at 21-22.

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