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Functional Secrecy

Laura K. Donohue

*Georgetown University Law Center, lkdohue@law.georgetown.edu*

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FUNCTIONAL SECRECY
Laura K. Donohue*

The extent to which cloaking information advances the interests of democratic structures varies according to which of three purposes it serves: protecting confidential deliberation, preventing the release of factual information, or hindering access to law or legal processes. Its legitimacy depends on the extent to which it alters political structures and the allocation of power. This chapter, accordingly, offers a functional theory of secrecy, underscoring ways in which U.S. practice has comported with, or departed from, democratic norms.

It begins by noting that in the early stages of decision-making, secrecy may carry certain advantages. It can facilitate informed debate and allow individuals to change their views without losing face or opening themselves to charges of duplicity, thus helping to ensure that decisions are made on the merits. This is the domain of advice provided to the President, closed Congressional hearings, and juror deliberations. Obscuring deliberations, though, risks excluding information and stakeholders germane to the outcome. It thus requires broad thinking beforehand to ensure that the relevant information and interests will be taken into account. As the discussion approaches final resolution, moreover, the substance of the exchange may become probative, if not dispositive, of the final rule, policy, or decision. The impact of secrecy thereby moves from facilitating engagement to obfuscating the final determination. As it does so, the quality of the limitation shifts from deliberative-secrecy to information-secrecy or secret law, in which capacity it may undermine the effective operation of a liberal, democratic state.

Information-secrecy masks factual data that the government obtains or generates. It encompasses controls placed on material (e.g., classification, informal controls, and patent secrecy orders) as well as restrictions on government employees. Secrecy functions in this realm primarily to protect against threats to national security. Simultaneously, it may undermine representative government, masking official behavior from the electorate. Absent knowledge of how the executive wields its authority, moreover, neither facial nor as-applied challenges may be brought to limit government overreach. Civil litigation also may be severely constricted, resulting in the failure to rectify grievances. Public debate, civic engagement, and justice may thereby be undermined. Structure, too, may change as the power of the executive may expand vis-à-vis the other branches and citizens.

The last category centers on efforts to masque the law and legal processes. Static law, working law, and interpretive law and legal processes all matter. Secrecy in each context presents the most profound challenge to liberal democracy. It undermines the rule of law even as it augments the power of agencies deep within the executive branch. It brings into question the legality, and morality, of the rules themselves. Pari passu, adjudicatory secrecy masks the administration of justice. This is the domain of in camera, ex parte proceedings, restrictions on evidence, exclusion of the public from judicial proceedings, and attempted classification by the Executive of judicial decisions. State secrets assertions may suspend litigation altogether. This is a particularly insidious form of secrecy in a liberal, democratic regime—one that risks fundamental reorganization of the constitutional structure.

The chapter explores the history of how the United States has treated secrecy in each of these areas, noting the concerning trend toward greater secrecy. Growing Congressional secrecy in the first category presents a particularly worrisome development, while increasingly

* Professor of Law, Georgetown Law. Special thanks to Professors Bobby Chesney and Steve Vladeck for the invitation to join the colloquium and to the colloquium participants for an invigorating discussion of the material addressed in this chapter. I am indebted to the faculty at the University of Maryland School of Law for their thoughtful comments on the chapter. Professors Jen Daskal and Dakota Rudesill, and Judge Mike Mosman, kindly provided further critique. Mr. Jeremy McCabe provided invaluable assistance in obtaining many of the materials used in the exposition.
aggressive Executive actions in the second category—particularly in regard to material restrictions—does the same. The actions of all three branches in the third category present perhaps the most profound challenge to the state. The chapter concludes by proposing that the principal approach to drawing the line in each of these areas lies in considering the function that secrecy plays, the structural impact of concealment, and the consequent impact of the distribution of power among the political organs.

I. DELIBERATIVE SECRECY

The value of protecting deliberation from external view extends to antiquity. For Michel Foucault, the Greek concept of *parrhesia* (παρρησία), or truth-telling, lay at the heart of knowledge, power, and the self.¹ As a matter of political interaction, *parrhesia* presented in the course of democratic assembly and consultation with rulers. The latter often carried substantial risk: monarchs unable to accept criticism or contrary opinions could (and did) kill individuals for expressing their views.² Nevertheless, for advisors to be effective, they had to have the ability, and the courage, to tell the truth.³

The approach underscores twin goals: first is the importance of getting better ideas on the table; second is the recognition that candor builds trust. Individuals may be more willing to consider contrary arguments when they are put forward by individuals believed to be acting in good faith. But there are other advantages as well. Protecting deliberations may help to prevent outside parties and interest groups from exerting undue influence. Money and politics can skew decisionmaking in favor of those with more power, potentially undermining coming to a better conclusion. Secrecy allows individuals to play devil’s advocate, considering alternative (and potentially unpopular) views, without being concerned about negative publicity that may result from entertaining different ideas. Exploring alternative positions assumedly enables decisionmakers to reach better results. Additionally, protecting the deliberative sphere can create space for individuals to be persuaded by arguments that are put forward and, thus, to change their positions. By not becoming publicly identified with a stance on certain issues, decisionmakers may avoid the need to find a way to save face to reverse course, facilitating a better outcome. This argument evokes a deeply humanistic principle: it is only through full and frank discussion that one’s own ideas can evolve. Finally, as a structural matter, protecting the deliberative process may help to maintain separation of powers, allowing each branch to operate without interference from the other organs. This, in turn, may help to protect against overreach, thereby protecting individual liberty.

Important drawbacks, however, also present. Deliberative secrecy may preclude outside parties from contributing to the discussion with deleterious consequences for the quality of the decision as well as the legitimacy of the final rule or decision. Critical expertise may be ignored to the detriment of all. Where the discussion involves a negotiation, it may be harder to get buy-in to the final agreement if key stakeholders are neither at the table nor allowed to contribute in a meaningful way to the design. Voters may be confronted with merely a thumbs-up or a thumbs-down option, instead of having the opportunity to shape the final product. The less accessible decision-making is to the outside world, the more power those in the room accrue. What is decided behind closed doors, moreover, may exceed the purview set for the deliberative body. While this concern may be mitigated by requiring the final decision to be


² Id., at 57-58. See also Stephane Lefebvre, A BRIEF GENEALOGY OF STATE SECRECY, 31 WINDSOR Y.B. ACCESS JUST. 95, 97-98 (2013).

³ Id.
approved by an external arbiter, at that point, it may be too late to disentangle the various elements of the agreement. Further, once a decision is reached, it may be difficult to ascertain the intent behind the rule. While purposive arguments may be dismissed as non-conclusive, in some circumstances, they can be probative of final meaning.

Contemporary deliberative political processes reflects the tensions inherent in deliberative secrecy, seeking to extract value while mitigating accompanying risks. All three branches create space within which counselors, lawmakers, and jurors can be forthright. Certain Congressional hearings and private meetings between and among members of Congress remain cloaked from public view, even as executive privilege marks advice provided to the President. Juror deliberations are similarly privileged.

The systems that operate, however, are not binary. They recognize that discourse exists along a continuum, with the point at which a decision is reached embodying the formal construction or interpretation of the rule serving to guide behavior. At that point, the function of secrecy shifts from deliberative secrecy to secret law (see discussion in Part 3, infra). To the extent that what we might think of as proximate deliberation is relevant to understanding the final determination, then it exists, in some sense, as integral to the final rule.

Accordingly, each branch recognizes the importance of airing proximate deliberations to deepen public understanding. The Congressional Record publishes House and Senate debates. Committees, by and large, publish their hearing transcripts. The Federal Register, in turn, contains the notices of proposed rulemaking as well as tentative and final rules. Every final rule adopted and published in the Code of Federal Regulations (CFR) includes not just a summary of the rule and the legal authority for its issuance, but also a summary of the rule’s purpose and an analysis of public comments received. Executive Orders and Presidential Proclamations (which, absent extraordinary circumstances, are published in the CFR) include within them the authority under which they are issued as well as the reasoning leading to the rule. Federal courts, in turn, look to explanatory sources such as James Madison’s notes from the Constitutional Convention and the Federalist Papers to shed light on Constitutional provisions, or legislative histories to shape statutory interpretation. Appellate courts issue opinions that include the grounds on which their final determinations are made. The reasoning supporting the holding establishes binding precedent, even as extraneous reasoning—i.e., dicta—may be probative, if not dispositive, in subsequent cases.

The problem in the American context is that the evolution of deliberative privilege, particularly in regard to the legislature, is towards greater secrecy, with deleterious consequences for the structure of the state and representative government.

A. Legislative Privilege

The United States has a long history of protecting debate from public inspection, adopting protective measures during the Constitutional Convention and then extending similar protections to the legislature. Simultaneously, delegates underscored the importance of public deliberation and participation in the democratic process. A certain equilibrium emerged. But over the past few decades, Congressional secrecy has significantly increased, with an attendant impact on public understanding of the law and the ability of citizens to hold the executive accountable through the both the electoral process and the courts.

1. Constitutional Design

In May 1787, within days of meeting for the first time, delegates to what became the Constitutional Convention agreed to protect their deliberations from the “licentious publications of their proceedings” by vowing to keep them secret, masking their decision-
making from those not present—including, and particularly, the press.\textsuperscript{4} The rule they adopted forbade any duplication of journal entries. It also limited access to the journal only to members present, and it established “That nothing spoken in the House be printed, or otherwise published or communicated without leave.”\textsuperscript{5}

James Madison, whose scrupulous notes of the Convention provide much food for fodder, was one of the strongest proponents of secrecy. As he explained to Thomas Jefferson, it “was thought expedient in order to secure unbiased discussion within doors, and to prevent misconceptions & misconstructions without, to establish some rules of caution which will for no short time restrain even a confidential communication of our proceedings.”\textsuperscript{6} Jefferson did not welcome the rule, lamenting to John Adams, “I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & ignorance of the value of public discussions.”\textsuperscript{7} Others similarly objected, but the decision had strong support among delegates.\textsuperscript{8} George Mason saw it as “a necessary precaution to prevent misrepresentations or mistakes; there being a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly matured and arranged.”\textsuperscript{9} George Washington noted in his diary, “Attending in Convention and nothing being suffered to transpire no minutes of the proceedings has been, or will be inserted in this diary.”\textsuperscript{10}

The primary reason for the rule was to ensure that delegates were at liberty to discuss sensitive matters. Secrecy, Madison explained, would “secure the requisite freedom of discussion,” even as it would also “save both the Convention and the community from a

\textsuperscript{4} James Madison, Notes of the Constitutional Convention, Monday, May 28, 1787 (“Mr Butler moved that the house provide . . . against licentious publications of their proceedings . . . . Whereupon it was ordered that [the motion] be referred to the consideration of the Committee appointed to draw up the standing rules and that the Committee make report thereon.”). See also James Madison, Notes of the Constitutional Convention, Tuesday, May 29, 1787.

\textsuperscript{5} James Madison, Notes of the Constitutional Convention, Tuesday, May 29, 1787 (noting the additional rules: “That no copy be taken of any entry on the journal during the sitting of the House without leave of the House. That members only be permitted to inspect the journal. That nothing spoken in the House be printed, or otherwise published or communicated without leave.”). On July 25, 2787, the Convention approved a resolution to allow the Committee of Detail access to copies of the proceedings so that they could carry out their responsibilities. On the same day, a 6-5 vote went against allowing members of the Convention access to resolutions. John R. Vile, THE CONSTITUTIONAL CONVENTION OF 1787 693 (2005).

\textsuperscript{6} James Madison to Thomas Jefferson, June 6, 1787.

\textsuperscript{7} Thomas Jefferson to John Adams, Aug. 30, 1787.

\textsuperscript{8} See, e.g., Luther Martin to the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia, in 1787, Jan. 27, 1788 (“By another [rule], the doors were to be shut, and the whole proceedings were to be kept secret; and so far did this rule extend that we were thoroughly prevented from corresponding with gentlemen in the different states upon the subjects under our discussion – a circumstance, sir, which I confess I greatly regretted. I had no idea that all the wisdom, integrity and virtue of this State or of others, were centred in the Convention. I wished to have corresponded freely and confidentially with eminent characters in my own and other states – not implicitly to be dictated by them, but to give their sentiments due weight and consideration. So extremely solicitous were they that their proceedings should not transpire, that the members were prohibited even from taking copies of resolutions on which the Convention were deliberating, or extracts of any kind from the Journals, without formally moving for and obtain permission, by a vote of the Convention for that purpose.”).

\textsuperscript{9} George Mason to George Mason Jr., 1 June 1787, in RFC, 3:32-33.

\textsuperscript{10} 1 June 1787, in DGW, 5:164. But see George Washington to George Augustine Washington, 3 June 1787 in PGWCon, 5:219 (providing a broad overview of the discussions to his brother). See John R. Vile, THE CONSTITUTIONAL CONVENTION OF 1787 694 (“George Washington filled his diaries during his time with records of the weather and where he dined, but he included no substantive facts about the Convention. Delegates frequently cited the secrecy rule in corresponding with their friends. James Madison, the individual who kept the most extensive and accurate notes of Convention proceedings, was the last delegate who attended the Convention to die, and he specified that his notes would not be published until after his death.”); Tony Williams & Stephen F. Knott, Washington and Hamilton: The Alliance That Forged America 104-127 (2016); Richard Beeman, Plain Honest Men: The Making of the American Constitution 83-84 (2009).
thousand erroneous and perhaps mischievous reports.” Additional rationales supported a certain amount of discretion—not least, the fact that while their formal purview was to amend the Articles of Confederation, as a practical matter, the delegates created an entirely new government. Privileged exchange had other benefits as well. It allowed those present to propose ideas without fear of repercussion, encouraging more robust debate. It also prevented delegates from becoming tied to their initial positions, allowing them to be influenced by argument and reason. It protected the conversation from becoming unduly influenced by external groups. And it cloaked sausage-making from outside scrutiny, leaving the final product to be inspected on its own merits. Mason considered it “a necessary precaution to prevent misrepresentations or mistakes; there being a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly matured and arranged.” Jared Sparks, an early American historian, later related a conversation with Madison:

Opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime, the minds of the members were changing and much was to be gained by a yielding and accommodating spirit. Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to retain their ground, whereas by secret discussion, no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to argument. Mr. Madison thinks no Constitution would ever have been adopted by the Convention if the debates had been public.

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

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

11 James Madison to James Monroe, June 10, 1787 (“One of the earliest rules established by the Convention restrained the members from any disclosure whatever of its proceedings, a restraint which will not probably be removed for some time. I think the rule was a prudent one not only as it will effectually secure the requisite freedom of discussion, but as it will effectually secure the requisite freedom of discussion, but as it will save both the Convention and the Community from a thousand erroneous and perhaps mischievous reports.”).
12 Articles of Confederation, Article XII (“Nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).
13 George Mason to George Mason, Jr., June 1, 1787.
14 Farrand III, 479.
15 U.S. CONST., Art. I, §5 “(Each house shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).
Madisonian check, in conjunction with federalist pushback from the state legislatures, would help to demarcate the appropriate boundaries.\textsuperscript{16}

Directly elected by the people and ceded the responsibility of raising revenue, the House quickly adopted an open-door policy.\textsuperscript{17} The Senate, in contrast, initially followed the precedent set by the Continental Congress and the Constitutional Convention: it met in secret and looked down on the House for the populist displays that marked the public gallery.\textsuperscript{18} It gave its first employee, the doorkeeper, strict instructions to prevent either the public or members of the House of Representatives from gaining access to the chamber while the Senate was in session.\textsuperscript{19}

Pressure steadily increased on the Senate, though, to admit the public—particularly from state legislatures, who had elected members of the chamber. In 1794, Democratic-Republicans introduced a measure to allow for more openness.\textsuperscript{20} The proposed resolution cited the responsibility that representatives had to their constituents and to their states to make “all questions and debates” related to their legislative and judicial responsibilities public.\textsuperscript{21} North Carolina’s Alexander Martin explained that withholding such information undermined Senators’ accountability—the importance of which increased in proportion to the greater powers afforded the chamber.\textsuperscript{22} Publicity would allow for “abuse of power [and] mal-administration of office” to be “more easily detected and corrected”; it would prevent “jealousies, rising in the public mind from secret Legislation”; and it would instill greater confidence “in the National Government,” which was entrusted with securing and protecting the “lives, liberties, and properties” of the People.\textsuperscript{23} Accordingly, the resolution called for “a standing rule, that the doors of the Senate Chamber remain open while the Senate shall be sitting in a Legislative and Judiciary capacity, except on such occasions as in their judgment may require secrecy.”\textsuperscript{24}

Although the resolution was postponed,\textsuperscript{25} a dispute over whether Pennsylvania’s senator-elect (Albert Gallatin) met the constitutional citizenship requirements for office afforded Democratic-Republicans another opportunity to press for open proceedings. The Federalist majority, keen to avoid the bad press that may well follow a closed-door decision, acquiesced.\textsuperscript{26} Less than a fortnight later, the Senate agreed to open all of its deliberations to the public “so long as the Senate shall be engaged in their Legislative capacity, unless in such cases as may, in the opinion of the Senate, require secrecy.”\textsuperscript{27}

\textsuperscript{16} It was not until 1913 that the Seventeenth Amendment required the direct election of senators. Prior to that, state legislatures played a central role.

\textsuperscript{17} U.S. CONST., Art. I(7). See also JAMES MADISON, THE FEDERALIST 58 (extolling the House as holding “power over the purse”); THE FEDERALIST 52 (noting their shorter election and the House of Representatives’ “duty to the people”).


\textsuperscript{19} Id.

\textsuperscript{20} Clive Parry, Legislatures and Secrecy, 67 HARV. L. REV. 737, 743 (1954).


\textsuperscript{22} Id. at 33-34.

\textsuperscript{23} Id. at 34.

\textsuperscript{24} Id.

\textsuperscript{25} See also Annals of Congress, Jan. 17, 1794 at 34 (extending consideration of the Resolution until the following Wednesday); Annals of Congress, Jan. 22, 1794 at 37 (extending consideration of the Resolution for a fortnight); Annals of Congress, Feb. 5, 1794 at 40 (extending consideration of the Resolution for a fortnight); Annals of Congress, Feb. 19, 1794 at 45-46 (voting to take up the main question in the next session of Congress).

\textsuperscript{26} Annals of Congress, Feb. 11, 1794 at 42-43 (Resolving “That the doors of the Senate be opened, and continue open during the discussion upon the contested election of Albert Gallatin.”).

\textsuperscript{27} Annals of Congress, Feb. 20, 1794, at 47. The resolution, which passed 19-8, went into effect after the end of the First Session “and so soon as suitable galleries shall be provided for the Senate Chamber.” Id.
In addition to the Journal Clause, the Statement and Account Clause assumed representatives’ public accountability. The provision retained a similar discretion, although “all public Money” was to be included. The Constitution granted no discretion in terms of what must be accounted for, even as it preserved a liberty for Congress to determine the manner in which the information was presented and to keep its debates about how such money should be spent private.

2. Evolution of Norms

Over time, the standard evolved for the Senate and House to hold most of their deliberations in public, with special rules for exceptional circumstances. Professor Dakota Rudesill, who has undertaken groundbreaking research on the evolution of secrecy in Congress, observes that by 1800, open sessions were the default: “Thereafter the House and Senate retained rules allowing for secret or closed sessions to consider confidential information and presidential messages, treaties, and nominations,” but starting in the nineteenth century, “non-public proceedings were generally rare.” The pattern was “open full chamber sessions to debate and pass the law, with periodic full chamber closed sessions and regular closed committee work to consider non-public information.”

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

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

Although a presumption of openness accompanies Congressional deliberations, the practice of closed committee hearings has increased commensurate with the growth of the national security state and the establishment of its legislative counterparts. A certain amount of secrecy may be seen as a concomitant necessity in light of new and emerging threats, weapons, and technologies. Nevertheless, the democratic costs associated with cloaking legislative deliberations raises significant concerns.

28 U.S. CONST., Art. I, §9 (“[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).
30 Id., at 255.
31 House of Representatives, Rule XVII (9).
32 See, e.g., Dec. 27, 1825 (relations with Indian tribes); May 27, 1830 (trade with Great Britain); June 20, 1979 (the Panama Canal); Feb. 25, 1980 (Cuban foreign relations); July 19, 1983 (U.S. relations with paramilitaries in Nicaragua); and March 13, 2008 (FISA).
33 Standing Senate Rules XXI, XXIX, and XXXI.
34 Senate Rules for Impeachment Trials, Rules XX and XXIV.
The Senate Select Committee on Intelligence (SSCI) and the House Permanent Committee on Intelligence (HPSCI) routinely close their hearings and refuse to release even redacted transcripts or summaries of the proceedings. The numbers are getting steadily worse. Outside of nominations, during the 114th Congress, in 2016, SSCI shuttered nearly every hearing, holding 48 secret sessions and only three open discussions. In other words, SSCI barred the public from approximately 94% of its deliberations. The 115th Congress did little better: in 2017, there were only 10 open hearings and 75 closed ones, with the result that 88% of SSCI’s hearings were closed to the public. The following year, the number of open hearings halved to only five, with another 49 closed sessions—nearly 91% of the hearings being closed. The trend got worse in the 116th Congress: in 2019, there was only 1 open hearing, in contrast to 53 closed ones, with the result that 98% of all of SSCI’s hearings were closed. In 2020, SSCI again only had 1 open hearing, with 36 closed sessions. Ironically, the only open hearing addressed: “Declassification Policy and Prospects for Reform”—which, apparently, are not so good: the first few months of the 117th Congress witnessed just one open hearing in contrast to 10 closed discussions.

Like its Senate counterpart, the HPSCI conducts most of its hearings behind closed doors. And it is not just the intelligence committees that are closing their hearings to the public. The percentage of closed hearings, outside of nominations, for the Senate Armed Services Committee is telling: from 24% of all hearings being closed to the public in 2017, the percentage has increased every year: to 26% in 2018, 32% in 2019, and 37% in 2020.

To the extent that what is at issue relates to free and open discussion removed from final determination, the decision to close hearings may result in members being able to consider measures more honestly and to ask hard questions. But in the process, public education on such matters is lost. For SSCI, even the topics addressed by the committee are cloaked from view. Instead, the public record merely reads: “Closed Briefing: Intelligence Matters”.

To the extent that these hearings, moreover, function as a form of public oversight, and not merely discussion of how best to craft future legislation, it becomes nearly impossible to hold Representatives responsible for how diligently they are performing their duties or representing their constituents. No more can the public understand how the executive is interpreting and implementing the law—or hold it responsible through either voting or litigation. The cost is borne further in democratic engagement and potentially, once information is finally aired, in the political legitimacy of institutions that have been operating in unexpected ways outside the public gaze. To the extent that Congressional activity involves oversight, moreover, the question of secrecy may leave the realm of deliberation and enter into other categories: namely, data secrecy and masking the law. Here, as a normative matter, the decision to block public access is based on much weaker grounds.

B. Executive Deliberation

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

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36 See U.S. Senate Select Committee on Intelligence, https://www.intelligence.senate.gov/.
37 Outside of nominations, from January 2021 through the end of March 2021, SSCI held 10 closed hearings as compared to just one open hearing. See id.
38 In 2016, for instance, HPSCI held more than twice as many closed hearings as open ones (with nine hearings closed and four open). U.S. House of Representatives Permanent Select Committee on Intelligence, https://intelligence.house.gov/calendar/default.aspx?EventTypeID=215&Page=2. In 2017, it again held nine closed hearings with just six hearings open to the public. Id.
39 See U.S. Senate Committee on Armed Services, https://www.armed-services.senate.gov/hearings.
One of the first questions of executive privilege in the newly-constituted government arose in the celebrated case of *Marbury v. Madison*.\(^{40}\) Charles Lee, Marbury’s attorney, subpoenaed Levi Lincoln, who, while acting Secretary of State, had been in the room with Thomas Jefferson when they found the undelivered commissions. Jacob Wagner, Jefferson’s temporary secretary (pending Meriwether Lewis’s arrival), had neglected to enter the commissions into the record book, making Lincoln’s testimony critical.\(^{41}\) Lincoln, however, refused to answer on grounds of executive privilege: he stated “that he was not bound, and ought not to answer, as to any facts that came officially to his knowledge while acting as secretary of state.”\(^{42}\)

Once the questions were written and provided to him, Lincoln offered a rationale beyond the mere provision of candid advice to the President. As reported by Cranch, “1. He did not think himself bound to disclose his official transactions while acting as secretary of state; and 2d. He ought not to be compelled to answer any thing which might tend to criminate himself.”\(^{43}\) Lee argued in response that “the duties of a secretary of state were two-fold.” On the one hand, he had a duty to act “as a public ministerial officer of the United States, totally independent of the President.”\(^{44}\) In this capacity, “any facts which came officially to his knowledge . . . he was as much bound to answer as a marshal, a collector, or any other ministerial officer.”\(^{45}\) In his second role, he acted as an agent of the President. Here, he was “bound to obey his orders, and accountable to him for his conduct.”\(^{46}\) In this capacity, “any facts which came officially to his knowledge . . . he was not bound to answer.”\(^{47}\) Lincoln again objected, saying that “it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge.”\(^{48}\) While he might have a duty to the court, he also had a duty to the executive.

Chief Justice Marshall’s took the position that while deliberative secrecy was a valid exercise of executive power, and the Fifth Amendment prevented self-incrimination, nothing Lincoln had been asked to disclose could be considered confidential. To the contrary, it was “a fact which all the world have a right to know.”\(^{49}\) Lincoln capitulated.\(^{50}\)

The case underscored the distinction between factual information and confidential political and legal discussions that lead to decision points. While the former fell outside of executive privilege, the latter fell well within the long-recognized principle that full and frank consideration of matters before the President required some level of private discretion. The fact that Lincoln had seen that the commissions had been signed by the President John Adams

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\(^{40}\) *Marbury v. Madison*, 5 U.S. 1 Cranch 137 (1803).

\(^{41}\) It appears that Wagner informed Jefferson about the commissions, prompting the President to remove acting Secretary of State John Marshall and appoint Levi Lincoln in his place.

\(^{42}\) 5 U.S. 1 Cranch 143 (1803) (“Mr. Lincoln, attorney general, having been summoned and now called, objected to answering. . . . On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.”).

\(^{43}\) 5 U.S. 1 Cranch, 144 (1803).

\(^{44}\) *Id.*

\(^{45}\) *Id.*

\(^{46}\) *Id.*

\(^{47}\) *Id.* He was not required to answer anything that might incriminate himself, as protected by the Fifth Amendment.

\(^{48}\) *Id.*

\(^{49}\) 5 U.S. 1 Cranch, 144-145 (1803) (“If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know.”)

\(^{50}\) 5 U.S. 1 Cranch 145 (1803).
and marked with the seal of the United States did not fall within executive privilege. Nor was it beyond his purview to testify whether, to his knowledge, any of the commissions had actually been delivered.

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

Nevertheless, there are limits as to what falls within the deliberative process. In United States v. Nixon, the Supreme Court determined that the President cannot appeal to executive privilege as a shield against criminal prosecution. In the time that has since elapsed, as a general rule, the courts tend to consider statements of facts as outside the privilege, while opinions, recommendations, and advice provided within the Executive Branch within it. The assertion is deeply context-dependent, so the courts treat each on a claim-by-claim basis.

Assuming that protection of the liberal, democratic government is the aim of the state, the type of information at stake matters. As addressed in Parts 2 and 3, below, information-secrecy, as well as deliberative secrecy that nears the final determination and is thereby probative of the meaning of the final rule or determination, raises separate concerns that impact separation of powers. To the extent that executive privilege impairs accountability (to the public or to Congress), or the ability of the judiciary to fulfill its important constitutional functions, it crosses an important boundary.

C. Judicial Matters

There are myriad ways in which the judiciary, too, recognizes the importance of deliberative secrecy. Grand juries proceed behind closed doors to ensure the free flow of discussion. Outside of narrow circumstances, grand jurors, interpreters, court reporters, operators of recording devices, anyone transcribing recorded testimony, attorneys for the government, and any other individuals to whom disclosure is made are forbidden from disclosing any matter to come before the grand jury. Grand jurors’ votes can never be disclosed. In both criminal and civil cases, petit juries do not undertake their discussions in open court.

Nor is the public allowed to observe judges’ conferences at an appellate level. The Supreme Court, too, meets behind closed doors and communications in chambers are protected from public scrutiny. It is only where the decision approaches the establishment of law, in the opinions themselves, that insight into the various competing considerations is made available.

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54 532 U.S. 1.
58 Rule 6(e)(3)(A).
In contrast to proceedings in chambers, while deliberative privilege protects certain documents from discovery,\(^{59}\) although some exceptions apply (see CIPA discussion, infra), documents submitted to the court are, for the most part, open. As a matter of deliberative secrecy, that makes sense, as the parties in a case are not direct advisors to the judiciary. Instead, they are interested entities pursuing certain claims. They therefore fall outside the deliberative domain. As with the legislature and the executive, to the extent that secrecy advances the interest of ensuring full discussion within the judiciary, such secrecy may well support (instead of undermining) liberal, democratic values and facilitate fundamental principles of fairness at issue in litigation. But, as addressed in Part 3, as the discussion approaches a final judgment, the function of secrecy shifts to one that yields harmful results.

II. INFORMATION SECRECY

Another way in which secrecy may act within the legal system is to prevent certain types of (factual) information from coming to light. A distinction can be drawn between such data and what the Supreme Court terms “working law.” Although information-control systems may be applied to both, the function that secrecy plays in regard to each is essentially different.\(^{60}\) This section focuses on the former, considering two primary ways information in the United States is hidden from public view: material controls and restrictions on government employees. Both operate across all three branches of government.

While deliberative secrecy, as noted in Part 1 of this chapter, is increasingly marking congressional debate and deliberations, it is in regard to the Executive Branch’s actions that we see the greatest concerns arising about information secrecy. Over the past few decades, we have witnessed ever more aggressive efforts to prevent citizens from having insight into how the government is wielding its power. The impact is felt in the structure of the state as well as the protection of individual rights.

A. Material Controls

The principal means by which the executive branch exercises control over information is by limiting access to data that the government generates or holds. The concept of masking (at least some) information from the public inheres in sovereignty. States will, from time to time, need to keep certain information hidden to mitigate vulnerabilities.

It is with national security and foreign intelligence in mind that Congress, from the beginning, expected and allowed for the executive to engage in expenditures outside the public eye. In July 1790, the legislature passed An Act providing the means of intercourse between the United States and foreign nations, authorizing the President to draw up to $40,000 annually from the Treasury, “for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed.”\(^{61}\) Capping the annual salaries, Congress required that the President “account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify.”\(^{62}\) In 1793, the Second Congress went on to pass a law stating, “That in all cases, where any sum or sums of money have issued, or shall hereafter issue, from the treasury, for the purposes of

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\(^{60}\) See discussion, infra, Part 3.


intercourse or treaty, with foreign nations,” the President would decide whether to release the amounts assigned or to certify the total of such expenditures.63

These statutes acknowledged a sphere of secrecy. The executive, however, did not cabin itself to expenditures. In the twentieth century, the government went on to adopt a classification regime, to institute informal controls, and to take steps to prevent certain scientific and technical knowledge from becoming public.

This section considers classified and controlled unclassified information and patent secrecy orders, positing that, to the extent that they enable the executive to protect national security, they further the interests of the state. But to the extent that they interfere with public understanding of how the executive is wielding its constitutional and statutory authorities, or how the executive impacts the separation and balance of powers, they impact the progress of civil and criminal litigation as well as the state structure itself.

1. Classified and Controlled Unclassified Information

The current classification system arose prior to World War II.64 In 1946, it split into two realms: National Security Information (NSI) as classified by executive order, and Restricted Data (RD), as defined in the Atomic Energy Acts.

In the former category, nine primary executive orders and two subsidiary ones have been introduced since that time to control the dissemination of NSI.65 Under Executive Order 13,256, which currently controls NSI, classification can only be applied to matters related to (a) military plans, weapons systems and operations; (b) foreign governments; (c) intelligence operations; (d) foreign relations; (e) scientific, technological, or economic matters related to national security; (f) nuclear materials or facilities; (g) critical infrastructure; or (h) weapons of mass destruction.66 Not every member of the intelligence community (IC) has the authority in the first instance to classify materials.67 Original classification authorities (OCAs) alone

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

64 Exec. Order 8381, Mar. 22, 1940.


66 Exec. Order 13256, §1.4.

67 The IC includes two independent agencies (the Office of the Director of National Intelligence and the Central Intelligence Agency), eight Department of Defense elements (the Defense Intelligence Agency, the NSA, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and each of the services’ intelligence components—the Army, Navy, Air force, and Marine Corps), and seven additional departments and agencies (the Department of Energy’s Office of Intelligence and Counter-Intelligence, the Department of Homeland Security’s Office of Intelligence and Analysis and U.S. Coast Guard Intelligence; the Department of Justice’s Federal Bureau of Investigation and the Drug Enforcement Agency’s Office of National Security Intelligence; the Department of State’s Bureau of Intelligence and Research; and the Department of the...
can do so. As of FY 2016, there were 2,215 OCAs (up from 2,199 in FY 2015), who made nearly 40,000 original classification decisions.68 Another 55 million derivative classifications followed—a number that underscores a frequently-voiced concern that the IC has a tendency to overclassify information.69

The Atomic Energy Act of 1946 (and later 1954) classified nuclear discoveries from birth—even if funded and carried out by private citizens.70 The statute continued the comprehensive restrictions that had existed during the Manhattan project, labeling all information concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy RD.71 Starting in 1954, Congress added a new category of Formerly Restricted Data (FRD)—i.e., classified information removed from RD designation following a Department of Energy (DOE)/Department of Defense (DOD) joint determination that it relates primarily to atomic weapons and can be safeguarded similar to NSI.72

Outside of NSI and RD, an unclassified regime controls public access to government information. In 2010, President Obama issued an executive order establishing Controlled Unclassified Information (CUI) as a replacement for Sensitive But Unclassified (SBU) and other markings.73 CUI serves as a catch-all for matters related to citizens’ privacy, security, proprietary business information, and law enforcement investigations.74 The specific types of information included vary widely—ranging from agency data provided to law enforcement for investigations, to military records provided to former service members to facilitate benefits claims. It may include medical data central to responding to diseases and epidemics, or demographic data helpful to researchers developing new technologies.

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

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69 See, e.g., Dana Priest & William M. Arkin, A Hidden World, Growing Beyond Control, WASH. POST (July 19, 2010), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/; Scott Shane, No Morsel Too Miniscule for All-consuming N.S.A., N.Y. TIMES (Nov. 2, 2013); etc. But note that part of the reason for this broad use of classification relates to the expansion in the types of activities conducted by the intelligence agencies since 9/11 and the correspondingly large number of employees and extensive resources being made available. Simultaneously, the proliferation of new technologies allows for the rapid replication and derivative classification of data.
71 AEA 1954, §11(y). See also Exec. Order 13526, §6.2(a) (acknowledging RD).
72 The alteration gave DOD a role in FRD declassification and allowed military personnel to access nuclear information with DOD clearances. It also made it possible for industry to develop nuclear power.
73 Exec. Order 13,556, Nov. 4, 2010 (Controlled Unclassified Information). See also 32 CFR part 202. SBU incorporated designations such as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), and Critical Infrastructure Information (CII), which proliferated following the 9/11 attacks.
74 CUI applies to certain, approved categories and subcategories of information established by ISOO. The executive branch provides general descriptions for each category, a basis for controls, special markings, and guidance on training and handling procedures. See, e.g., Assessing Security Requirements for Controlled Unclassified Information, NIST Special Publication 800-171A, June 2018; Information Security Oversight Office, Controlled Unclassified Information: Implementation & Recommendations, Oct. 2017, at 4.
charges levied against them. These suits can be challenged in terms of whether they actually provide for sufficient discovery to mount a defense. The court is placed in the position of determining whether secrecy is undermining the administration of justice.

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

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

A similar phenomenon marks contractor use of state secrets as an affirmative defense, prompting U.S. intervention and dismissal of the suit at a pleadings stage. The numbers are growing: between 2001 and 2009, the government asserted state secrets in more than one hundred cases, even as the doctrine’s shadow fell over dozens of others. Since then, there have been more than 200 cases involving claims that the suit cannot continue without revealing sensitive information.

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

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

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

2. Patent Secrecy Orders

Patent secrecy orders also act to restrict public access to information, making it particularly difficult for inventors to recoup damages or to mount effective constitutional as-

83 Id.
84 In Restis v. United Against Nuclear Iran, for instance, a Greek citizen, Victor Restis, who owns and manages Enterprises Shipping and Trading, complained that United Against Nuclear Iran (UANI) and its CEO Mark Wallace (a former representative of the U.S. Mission to the United Nations) had engaged in defamation and various other torts. Victor Restis v. American Coalition against Nuclear Iran, Case No. 13-cv-5032 (2013), Amended Complaint for Defamation and other Tort Claims, ¶1, ¶3; ¶103 ff (defamation); ¶112 ff (tortious interference with prospective economic advantage); ¶119 ff (tortious interference with contract); ¶125 ff (intentional infliction of emotional distress); ¶132 ff (negligent interference with prospective economic advantage); ¶138 ff (prima facie tort against all defendants). He accused them of using press releases, letters to government officials, advertisements, Facebook postings, and Tweets to prevent private entities from providing support to Iran. Victor Restis v. American Coalition against Nuclear Iran, Case No. 13-cv-5032 (2013), Amended Complaint for Defamation and other Tort Claims, ¶4; ¶6. It did not specify the nature of the information at stake, contending that neither could any information related to the suit safely be made public, nor could Plaintiffs’ counsel be given access (e.g., through a CIPA-like clearance procedure). Govt. Opp. Mem. L. 2. In March 2015, the court dismissed the suit, with the result that the government never had to account for the accusations against it. Restis v. United Against Nuclear Iran, 1:13-cv-05032 (Mar. 23, 2015) (2d Cir.).
86 S. Res. 400 §10.
89 Id. at Rule 13 (labelling it “executive session material”).
90 Id. at Rule 14(d), (f), (g), (i), (l); House Rule X(11)(g).
applied challenges. Like the classification regime, such restrictions date back to the mid-twentieth century.

The 1951 Invention Secrecy Act empowers the Commissioner of Patents to order that an invention be kept secret, neither published nor patented, where such disclosure “might . . . be detrimental to the national security.”[^91] The government does not have to have an interest in adopting the invention.[^92] It merely must conclude that the invention may harm U.S. national security. Once the commissioner institutes an order, it becomes a criminal offense to tell anyone about the invention without authorization. The statute allows inventors to seek compensation, but neither the order’s existence nor speculative damage are sufficient to support compensation claims.[^93] The inventor must provide concrete evidence to demonstrate actual damage.[^94]

The number of secrecy orders is steadily increasing. In 2012, there were 5,327 orders in place.[^95] In 2015, there were 5,579.[^96] This trend continued: by the end of FY 2018 (September 30, 2018), 5,792 orders were in effect—the highest number in decades.[^97] Although many of the orders apply to inventions developed with government assistance, a significant number are placed on independent inventors, who neither work with, nor are funded by, the United States. In 2016, for instance, of the 121 new secrecy orders, 49 applied to private inventors.[^98]

Despite the issues raised by these secrecy orders for First Amendment speech rights and Fifth Amendment takings prohibitions, few legal challenges have come forward to determine the constitutionality of the statute, and none have succeeded.[^99] It is difficult to establish damages claims when a patent has not been granted. The first time the Court addressed this question was in 1982.[^100] In response to James Constant’s assertion that the secrecy order prevented him from marketing the invention, the Court stated:

> These conjectural and speculative claims must be rejected in toto. Apart from plaintiff’s own conclusory ipse dixit testimony, the record is devoid of any probative evidence tending to show that the companies alleged to be potential “customers” were interested in plaintiff’s unsolicited proposals, or that the secrecy orders interfered with plaintiff’s attempts to sell his system to these various companies.[][^101]

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

[^94]: Constant v. United States, 617 F.2d 239, 244 (Ct. Cl. 1980); Lear Siegler, Inc. v. United States, 225 Ct. Cl. 663, 665 (1980).
[^95]: Invention Secrecy Activity as reported by the Patent & Trademark Office, Federation of American Scientists, at https://fas.org/sgp/othergov/invention/stats.html.
[^96]: Id. The intervening years saw an increase to 5,445 in 2013 and 5,520 in 2014. Id.
[^100]: Constant I, 223 Ct. Cl. 148; Constant v. United States, 1 Cl. Ct. 600 (1982) [hereinafter “Constant II”]. See also Linick v. United States, citing to Constant I and II.
[^101]: Constant I.
**Constant I**, as it has come to be called, is a remarkable decision not least because inventors have no access to the commissioner’s rationale and hence cannot use this rationale to challenge the designation. In a classified domain, evidence of whether the invention actually harms national security—or has been usurped by the government for its own use—is difficult to obtain. The courts, moreover, have interpreted the statute narrowly, insofar as damages can be awarded. The claim must arise from placement of the order, or because the government uses the invention improperly (demonstration of which, in light of the potential use of classification, may be extremely difficult to obtain). Courts exclude nonmonetary damages and, at times, interest. Full-time USG employees may not seek damages. In addition, courts reject efforts to recoup attorneys’ fees, making even successful litigation more costly.

One of the most recent cases, in 2014, was brought for failure to compensate inventors for a John/Jane Doe order placed on their invention, unjust enrichment, as well as for the constitutional failings of the statute. The invention in question related to an improved countermeasure for aircraft being attacked by infrared heat-seeking missiles. Once again, the claim failed—this time, because the order had been lifted in the interim, making the case moot.

**B. Employee Controls**

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

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

103 See, e.g., Weiss v. U.S., 37 Fed. Appx. 518 (Fed. Cir. 2002) (insufficient evidence for damages because of failure to file patent applications in foreign countries); Haynes v. U.S., 178 F.3d 1307 (Fed. Cir. 1998) (insufficient evidence for damages because of failure to demonstrate potential or existing market); Linick v. U.S., 104 Fed. Cl. 319, 79 A.L.R. Fed. 2d 709 (2012), summarily aff’d, 2013 WL 2991148 (Fed. Cir. 2013) (trajectory correctible munitions patent holder failed to show technology was of real interest to any customer, despite the government having imposed secrecy orders on three patent applications); Constant v. U.S., 1 Cl. Ct. 600, 216 U.S.P.Q. 505 (1982), judgment summarily aff’d, 714 F.2d 162 (Fed. Cir. 1983) (insufficient evidence of actual damages when patent application placed under an order for 15 months and patentee prohibited from discussing the invention with certain classes of people); Lear Siegler, Inc., Electronic Instrumentation Division, 225 Ct. Cl. 663, 214 U.S.P.Q. 239, 1980 WL 13202 (1980) (insufficient proof of injury and damages). But see Damnjanovic v. United States Department of Air Force, 135 F.Supp. 3d 601 (E.D. Mich. 2015) (successful claim that inventors were unable to sell or market their invention, that they lost profits and were prohibited from foreign filing rights, and that the government failed to provide compensation).


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

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

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

Unless employees speak out, classification may prevent even gross violations of the law from coming to light. The discussion of the enhanced interrogation techniques relied extensively on government workers coming forward. The social and legal barriers to making such information public may be substantial: individuals must decide to break ranks with their agencies—a proposition difficult enough when procedures for reporting certain behavior have been established. The decision may be compounded when classified documents have determined that the behavior in question comports with doctrine, as it did in relation to the NSA’s use of section 215 to collect telephony metadata. Preventing employees from speaking on matters about which they are well-informed ends up harming the public democratic debate surrounding certain authorities. Even where employees may not reveal classified data, part of the importance of letting them participate in the debate rests on their insights—wisdom developed because of their close familiarity with how the law operates.

When employees’ speech is tightly controlled, there is no one to counter the “official” position put forward by policymakers. Nor is there anyone with direct knowledge of programs and operations who can question the “lessons learned” for future policy decisions. Outside the public eye, there is no public pressure on the bureaucracy to act in a certain way, nor pressure from the bureaucracy on those making the decisions. Consequently, the public dialogue—and strength of the law—suffers. So when Vice President Dick Cheney states that interrogation

111 The argument for the latter is that without an agreement in place, each agency would need to seek to enjoin publication. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (CA4), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (CA4), cert. denied, 409 U.S. 1063 (1972).
works, or senior IC officials say that torture led to actionable intelligence, the public is not in a strong position to counter them in light of all potentially available evidence. It is an assertion based on experience. By preventing others with the same experience (or with more experience, because of their placement in the bureaucracy) from commenting, restrictions on government employees allow assertions to go unchallenged.

Further distortion that occurs when only those who agree with top policymakers are allowed to contribute to the conversation. There is evidence to suggest, for instance, that pre-publication review is only enforced against those critical of government. As one scholar has explained, “[D]isputes over redactions in a work favorable to an agency are almost nonexistent,” with only one case on record. Another consideration relates to power. Karl Marx, Max Weber, Michel Foucault, and others critiqued secrecy because of its intimate connection with disproportionate power. Marx argued that bureaucracy “is a magic circle from which no one can escape. Its hierarchy is the hierarchy of knowledge.” In the search for power, control of information proves paramount. Weber saw the bureaucratic state as the quintessential surveillance entity wherein access to, and control of, information provides those in power with the “mechanisms of repression.” Secrecy, “the things one declines to say or is forbidden to name,” presents less of an “absolute limit of discourse” and more of an element that functions alongside power: “There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourse.”

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

118 Kevin Casey, Note, Till Death do us Part: Prepublication Review in the Intelligence Community, 115 COLUM. L REV. 417, 445-449 (2015) (“The experiences of authors undergoing prepublication review suggest that review decisions may depend on whether the author is critical or supportive of the agency.”).
119 Id.
120 Id.
123 Michel Foucault, The History of Sexuality, Vol. 1.
124 Yet this appears to be what the government did in relation to Professor Jack Goldsmith’s book, The Terror Presidency. See, e.g., Jack Goldsmith & Oona Hathaway, More Problems with Prepublication, LAWFARE, Dec. 28, 2015, https://www.lawfareblog.com/more-problems-prepublication-review (reporting that they had been required to append a statement to an op-ed in which no classified information appeared that the publication did not reflect official DOD policy).
125 Id.
126 Id.
against SSCI staff members in the midst of the committee’s enquiry into torture, the agency increases its power over the legislature.127

A further concern is that allowing the government to quell employees’ speech erodes important Constitutional protections. Rights suffer. The First Amendment is not by any means unlimited.128 When the issue is critique of government action in relation to “matters of public concern,” the Court weighs the employee’s interests against the interests of the State.129 Where it is not a matter of public concern, the Courts grant wider latitude to the executive.130 The problem with this balancing test is twofold: first, national security is a particularly strong government interest, making allowance of employee speech in the most highly guarded sphere of the state the least likely to pass judicial muster. Second, deference tends to reach into the deliberative privilege, confusing the distinction between the two.

In 2015, Professors Jack Goldsmith and Oona Hathaway published an op-ed in the Washington Post, underscoring the myriad problems with pre-publication review.131 Not only do the criteria go beyond what is required to identify and protect classified information, but reviewers can broadly interpret their mandates, leading to a chilling effect. In the interim, the review process takes longer than indicated, leaving authors with no recourse.132 The risk is that reviewers, by being selective about what they do or do not allow, and how long they delay publication (e.g., until just after a Congressional vote), can shape the dialogue according to their political interests.

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

Courts consider pre-publication review to be constitutional. In the first case to reach the courts, United States v. Marchetti, an employee signed two secrecy agreements: one when he joined the CIA and another when he left it.133 He went on to publish a novel and a number of articles, prompting the agency to seek an injunction. The District Court ruled that Marchetti had to submit anything related to his classified work at the agency at least thirty days prior to publication. In light of the 1947 National Security Act requirement that the CIA protect its sources and methods, the Fourth Circuit found that “a system of prior restraint against disclosure by employees and former employees of classified info obtained during the course of employment” was reasonable.134 What was unreasonable was the exit contract, which prevented publication of even unclassified information.

The problem with the Court’s standard can be summed up in the legal principle of nemo iudex in causa sua. By classifying more information—a decision that unreviewable by any but the OCA—the CIA can expand its power to prevent almost anything from coming to light.

127 Add cites: Diane Feinstein statement to Congress; IG Report later noting false choices.
134 Id.
The Court only partially addressed this concern, noting that if information was already “in the public domain,” then Marchetti could republish it. But even this theory has been roundly attacked by executive branch on the grounds that allowing such publication could confirm potentially classified material. The Court added two requirements: the CIA had an obligation to “act promptly to approve or disapprove any material” and, in the event that the author disagreed with the pre-publication decision, he could seek judicial review. But such review explicitly excluded the original classification decision.

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

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

III. SECRET LAW AND LEGAL PROCESSES

The most dangerous form of secrecy in a liberal, democratic state relates to secret law (i.e., rules requiring obedience) and legal processes. Three types of laws come to the fore. Static law, primarily consisting of statutes, differs in important respects from working law, which puts the law into practice, and interpretive law, which determines whether an executive action

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135 Id.
138 National Security Directive No. 84 (Mar. 11, 1983)(“(a) All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access. (b) All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a nondisclosure agreement as a condition of access to SCI and other classified information. All such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information.”).
comports with either the legislative framing or the dictates of the constitution. To the extent that secrecy prevents such decisions and rules in each category from entering the public domain, it presents a profound challenge to the legitimacy of the legal system.

Equally antithetical to liberal democracy and the constitutional structure of the United States is the effort to masque legal process. Some forms of secrecy that operate in the judicial realm, such as deliberative secrecy (e.g., in grand and petit jury discussions) and information secrecy (e.g., in suppression of factual information at trial), we have already discussed. Adjudicatory secrecy, in contrast, presents in the context of areas such as spectator exclusion or in camera, ex parte hearings. Adjudicatory secrecy also marks certain quasi-judicial functions assumed by the executive that have a direct impact on citizens rights. As with secret law, preventing the public from access in this area presents a particularly strong challenge to the foundation of liberal, democratic government.

A. Static Law

Static law incorporates legislative products, amongst which classified transcripts, annexes, reports, appendices, appropriations, and supplements increasingly obfuscate the law.\textsuperscript{144} Rudesill details how these forms of secrecy present in a Congressional context, where secret law in the national security realm is increasingly becoming the norm.

As Rudesill explains, since 1979, SSCI and HPSCI have overseen the annual Intelligence Authorization Act (IAA).\textsuperscript{145} This legislation, which governs the National Intelligence Program, typically has a short section of Public Law text giving legal force to a detailed classified addendum.\textsuperscript{146} The same year that the intelligence committees began legislating via classified addenda in the IAA, the Appropriations Committees started writing classified annexes and referencing them in the unclassified reports associated with the annual DOD Appropriations Act (DODAA).\textsuperscript{147} This statute provides funding for DOD activities ranging from operations related to the Global War on Terrorism and drug-interdiction and counter-drug activities, to military operation and maintenance and research and development.\textsuperscript{148} Since 1983, the Armed Services Committees have also attached classified addenda to the the National Defense Authorization Act (NDAA), which provides the framework for the Defense Department.\textsuperscript{149} Starting with fiscal year 1990 the Public Law text of the NDAA began giving legal force to the classified addenda, with the DODAA following suit the subsequent year.\textsuperscript{150}

Proponents of these devices argue that are the only way to regulate sensitive national security programs.\textsuperscript{151} But by making them secret, Congress has consistently prevented the public from understanding the letter of the law as well as the structure and scope of the national security infrastructure.

It could be argued in response that classified addenda are mere commentary and not technically part of a statute. As a constitutional matter, they do not undergo bicameralism and

\textsuperscript{144} Three different types of committee, three separate annual bills, and multiple kinds of legislative materials are involved. Congressional practice, moreover, peregrinates. The bottom line is that as of fiscal year 1979, the IAA had both public law provisions and classified addenda; since the same year, the DODAAs have had just classified addenda; and from fiscal year 1983 the NDAAAs had classified addenda. Starting in 1990-91, both the DODAA and NDAAAs started incorporating Public Law provisions giving the addenda legal force.

\textsuperscript{145} Rudesill, at 261.

\textsuperscript{146} Id. See, e.g., Intelligence Authorization Act of 2016, Sec. 102, Classified Schedule of Authorizations.

\textsuperscript{147} Id.


\textsuperscript{149} Id., at 262.

\textsuperscript{150} Id., at 373-74.

\textsuperscript{151} Id.
presentment. The President may not even have access to the classified addenda. Yet Congress and the executive branch agree that the Public Law provisions referencing provisions in the classified addenda do give those classified provisions legal force. In five of the seven years prior to Rudesill’s analysis, the NDAAs included explicit incorporation language. DOD Appropriations Acts prohibit the agency from moving money among the accounts in a manner that departs from the allocations in the classified addenda.

Reports that accompany the bills for signature in the Oval Office, moreover, takes a similar stance: of 32 IAAs since 1979, most have been accompanied by unclassified last-in-time reports which emphasize that the classified Schedule should be considered part of the statutory text, or that the annex should be considered part of the authoritative document. Courts, for their part, look to legislative history to understand the intent behind the introduction of statutes to probe the full meaning of the written text.

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

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

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

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

Id., at 276.

Id.

Id., at 273-274.

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

Some effort has been made within the Executive branch to halt the practice of using classified annexes. The Office of Management and Budget objected to “the continuing Congressional practice of enacting secret law.” Id., citing Letter from Peter R. Orszag, Director, Executive Office of the President, Office of Management and Budget, Exec Office of the President, to Dianne Feinstein, Chairwoman, U.S. Senate Select Committee on Intelligence, Regarding S. 1494 & H.R. 2701, The Intelligence Acts For Fiscal Year 2010 (March 15, 2010), at 6, https://fas.org/irp/news/2010/03/omb031610.pdf; Statement of Administration Policy on H.R. 2586, National Intelligence, Regarding S. 1494 And H.R. 2701, The Intelligence Acts For Fiscal Year 2010 (March 15, 2010), at 263


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

B. Working Law

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

In 1935, Congress created the Federal Register. Statutory law requires publication of all “Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof.” Congress and the President have the authority to add additional matters for publication. Any document or order that carries a penalty is deemed to be of general applicability and legal effect.

At the close of each year, everything published in the Federal Register is placed in Title 3 of the Code of Federal Regulations. In the event of “an attack or threatened attack upon the continental United States,” if the President determines that publication “would not serve to give appropriate notice to the public of the contents or documents,” she may suspend any part of the publication requirement.

Not every document that the President signs and has legal effect must be published. Many Executive Orders issued through the National Security Council remain classified. There are also oral presidential directives, which are equally binding. Presidents distinguish between “decision directives” and “review directives,” providing each with a different abbreviation. Despite the clandestine nature of many of these documents, the DOJ’s Office of Legal Counsel (OLC) has “consistently advised” the President that they are controlling.

It would be difficult to find a better example of working law than the legal opinions issued by OLC. They contain independent legal analysis that is considered binding on the executive branch. OLC’s “Best Practices” documents emphasize the importance of stare decisis: outside of extraordinary circumstances, future opinions must conform to earlier ones, unless the prior opinion has been withdrawn. The agency at times insulates its opinions, however,
from public view, with the result that a secret jurisprudence now operates within the executive branch.173

FOIA requires federal agencies to publish “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency”.174 A person “may not in any manner be required to resort to, or be adversely affected by” a rule that should have been published in the Federal Register but was not.175 Each agency must further “make available for public inspection” (in electronic format) all “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”176 They also must make available “those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.”177

Despite the presumption of openness, under FOIA, certain information held by the executive is not subject to disclosure. This includes “records or information compiled for law enforcement purposes,” but only insofar as their production could reasonably be expected to either (a) interfere with law enforcement proceedings, or (b) constitute an unwarranted invasion of personal privacy.178 The statute also excludes matters that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [] are in fact properly classified pursuant to such Executive order.”179 The burden is on the agency to demonstrate that an exemption applies.180


In *NLRLB v. Sears, Roebuck & Co.*, a unanimous Supreme Court understood FOIA to require all federal agencies to publish their “working law.”[^181] The Court pointed to the reading room provision as representing “a strong congressional aversion to ‘secret law’” as well as “an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’”[^182] While pre-decisional or deliberative documents may be withheld under FOIA exemption five, the final decisions must be released.[^183]

The DOJ argues that OLC can never generate working law—a claim at odds with its assertion that OLC opinions are binding.[^184] If they are binding, they have the force of law. In some cases, such as the Terrorism Surveillance Program or the use of enhanced interrogation, it is only OLC analysis that undergirds programs. In 2016, Congress contemplated legislation that would have required the executive to release legal opinions that reflected “controlling interpretations of law.”[^185] It also would have required release of any “final reports or memoranda created by an entity other than the agency” making final decisions, as well as “guidance documents.”[^186] Congress did not pass the measure, however, opting instead to pass a FOIA reform bill.[^187] FOIA requests prove inadequate to unearth OLC opinions, despite the statute’s goal of eliminating secret law.[^188]

### C. Interpretive Law

Interpretive law incorporates judicial decision-making, where secrecy operates to masque statutory construction, constitutional analysis, and government malfeasance, raising constitutional concerns. The Foreign Intelligence Surveillance Court (FISC) provides a good example of both interpretive law withheld from public inspection and the deleterious consequences of doing so.

In 1978, Congress introduced FISC, and the appellate Foreign Intelligence Surveillance Court of Review (FISCR) to consider whether the government had demonstrated probable cause that an individual was a foreign power or an agent of a foreign power, and that the individual would use the facilities to be placed under surveillance, prior to issuing an order for electronic surveillance. Congress did not anticipate that the FISC and FISCR would issue precedential opinions involving complex matters of statutory construction and constitutional interpretation. There are now nearly 90 declassified and redacted FISC/FISCR opinions and

[^182]: *Sears*, 421 U.S. at 153. See also Jaffer & Kaufman.
[^185]: H.R. 653, 114th Cong. §2(b)(1)(2016); Jaffer & Kaufman, at 250.
[^186]: Id.
300 orders in the public domain. They address matters that have a profound impact on individual rights. The failure to provide this information in a public context undermines democratic government.

The Section 215 telephony metadata program provides an excellent example. For years, the government’s contention, and court’s acceptance, that language in the USA PATRIOT Act could be read broadly to authorize the collection of nearly all Americans’ telephony metadata, remained secret. In 2013, when the secret legal interpretation emerged, the public outcry shook all three branches. The Privacy and Civil Liberties Oversight Board (PCLOB), which had floundered since its creation, took form and issued its first report, in which it found that the government had engaged in illegal surveillance.\textsuperscript{189} The body called for the immediate cessation of the program. President Obama appointed the Review Group on Intelligence and Communications Technologies, which sharply criticized the statutory interpretation and calling for an end to the program.\textsuperscript{190} He went on to issue PPD-28 to try to restore domestic and international confidence in the U.S. intelligence community.\textsuperscript{191}

In the courts, numerous cases challenged the program. The Second Circuit called the statutory interpretation “unprecedented and unwarranted” and ruled that it violated the act.\textsuperscript{192} In \textit{Klayman v. NSA}, Judge Leon granted an injunction against the NSA, calling the program “Almost Orwellian” and “almost certainly unconstitutional.”\textsuperscript{193} FOIA requests and suits suddenly exploded: in one, the Electronic Frontier Foundation requested “all decisions, orders, or opinions issued by FISC or FISCR between 1978 and June 1, 2015, that include a significant construction or interpretation of any law.”\textsuperscript{194}

In Congress, from only three bills the prior year (addressing sunset provisions), the year following the revelations saw the introduction of 42 bills containing wide-ranging proposals that included changes to the manner of appointment to the FISC/FISCR and the FISC/FISCR process, as well as requiring the release of all FISC/FISCR opinions and orders. Congress ultimately adopted a provision requiring that the Director of National Intelligence in consultation with the Attorney General publicly reveal any significant construction or interpretation of the law, including (to the extent consistent with national security), “a description of the context in which the matter arises and any significant construction or interpretation of any statute, constitutional provision, or other legal authority relied on” by the FISC/FISCR.\textsuperscript{195}

Part of the reason for the outcry was that the Court’s decision in regard to telephony metadata essentially \textit{created new law}, without undergoing the appropriate democratic procedures: adversarial debate, open court, and a published opinion. Instead, a handful of individuals deep in the executive branch, with approval from judges on a secret court, adopted a \textit{sui generis} understanding of the statutory law.

Another way in which the structure of clandestine judicial decision-making presents issues for the legal system is through its impact on constitutional interpretation. In her 2013 memorandum opinion on bulk collection, Judge Claire Egan, citing just one Supreme Court decision, dispatched any Fourth Amendment concerns.\textsuperscript{196} She relied entirely on \textit{Smith v. Maryland}—a case from the 1970s, when the technologies currently at play were restricted to

\textsuperscript{189} PCLOB.
\textsuperscript{190} Review Group Report.
\textsuperscript{191} PPD-68.
\textsuperscript{192} ACLU v. Clapper, 785 F.3d 787, 805 (2d Cir. 2015).
\textsuperscript{195} USA FREEDOM Act, section 602, codified at 50 USC 1872.
\textsuperscript{196} In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-109, at 6 (FISA Ct. Aug. 29, 2013).
the domain of science fiction. The opinion did not even mention First Amendment concerns. The Court did not provide any detailed legal reasoning based on careful legal argument. Yet it was binding on future decisions.

When a secret court creates an entirely new doctrine, secrecy is particularly worrisome. In In re Directives, FISCR looked back at its decision in In re Sealed Case to confirm “the existence of a foreign intelligence exception to the warrant requirement.” The Government was the only party before the court, which made any appeal—either to FISCR or to the Supreme Court—impossible. Yet the decision became binding precedent.

When the Snowden documents exploded on the public scene, Congress took steps to “end secret law.” The USA FREEDOM Act required the FISC to appoint at least five amici who could be asked for comment when any novel questions of law were presented. It also required that FISC opinions undergo declassification review. However, neither measure adequately addressed the structural concerns. Amici are not adversarial parties. They serve at the pleasure of the court and have no formal right of appeal. And despite mandatory review, the executive still controls what information is, and is not, made public. Yet it is hardly a disinterested observer where its own interests are concerned.

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

Publicly-available judicial opinions yield information about not just government malfeasance, but the extent to which legislators may be enabling executive branch actions that adversely impact rights. When the Snowden documents were released, part of the public’s strong response was directed towards SSCI and HPSCI, who had tacitly allowed the government to engage in bulk and programmatic collection of citizens’ Internet and telephony content and metadata. While a few members of the committees had been sounding the siren

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198 In re Directives [REDACTED] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008). The court wrote: “The question . . . is whether the reasoning of the special needs cases applies by analogy to justify a foreign intelligence exception to the warrant requirement for surveillance undertaken for national security purposes and directed at a foreign power or an agent of a foreign power reasonably believed to be located outside the United States. Applying principles derived from the special needs cases, we conclude that this type of foreign intelligence surveillance possesses characteristics that qualify it for such an exception.” Id., at 1011.
199 Like the FISC/FISCR, the DOJ considers the courts’ opinions to be binding precedent. In ACLU v. Clapper, for instance, the government responded to arguments that it had exceeded its authority by arguing, “[S]ince May 2006, fourteen separate judges of the FISC have concluded on thirty-four occasions that the FBI satisfied this requirement, finding “reasonable grounds to believe” that the telephony metadata sought by the Government “are relevant to authorized investigations . . . being conducted by the FBI . . . to protect against international terrorism.” Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 16, Clapper, 959 F. Supp. 2d 724. The government further cited to Judge Eagan’s August 2013 memorandum opinion in support of its interpretations of “relevance.” Id.
for some time, others were immediately seen as culpable in the widespread violation of Americans’ rights. Senator Dianne Feinstein took to the road to defend her role, for the first time having to answer to her constituents for her behavior behind closed doors. For representative democracy to work, citizens need to know how their legislators are acting.

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

What the forms of secret law in each branch have in common is their profound impact on the legitimacy of the legal system. In Western jurisprudence, lack of publicity means, at some level, that the law no longer exists. Neither does it carry moral qualities that entail a duty of obedience. These ideas are far from new. They extend across natural law, the liberal democratic tradition, and legal positivism. To the extent that secrecy is tolerated in the liberal, democratic model, it is done so in relation to preservation of the state. National security trumps the citizens’ right to know to ensure that the state continues to exist. But even here, there are important limits.

The concept of reason of state and the need of the ruler to control information has long been part of political discourse. Epitomized by Niccolò Machiavelli, the underlying concept is that certain actions contribute to a higher good: the existence, stability, and well-being of political structures. Machiavelli’s consequentialist approach excuses transgressions based on the ends that they achieve.

In the sixteenth century, Giovanni Botero picked up on Machiavelli’s reasoning, defining *arcana imperii* as “knowledge of the means by which such a dominion may be founded, preserved and extended.” To sustain (and extend) power, discretion and secrecy prove paramount. Like Machiavelli, Botero saw the management of information, and its constriction, to be key to political survival.

The problem with hearkening back to the Machiavellian tradition and reason of state as sufficient to offset public access to the law is grounded in how secrecy functions. Insofar as deliberative secrecy or even certain forms of information secrecy are at stake, the public may forgo immediate knowledge. But secret law undermines the liberal, democratic state.

As seventeenth-century English scholars reimagined Magna Carta, an effort was made to rein in the Crown. Sir Edward Coke, arguing in Parliament for a clause prohibiting arbitrary arrest and search authorities, explained,

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

201 See generally Lon Fuller, *The Morality of Law* 39, 47.
203 See, e.g., id., c. 15 (“[I]t is necessary for a prince wishing to hold his own to know how to do wrong, and to make use of it or not according to necessity.” “[I]t would be most praiseworthy in a prince to exhibit all the above qualities that are considered good; but because they can neither be entirely possessed nor observed, for human conditions do not permit it, it is necessary for him to be sufficiently prudent that he may know how to avoid the reproach of those vices which would lose him his state”; “[H]e need not make himself uneasy at incurring a reproach for those vices without which the state can only be saved with difficulty”).
204 Giovanni Botero, *The Reason of State*, bk. 1, Trans. by P.J. & D.P. Waley 3 (1956) (defining *arcana imperii* as “Notitia medium & rationum, quibus fundatur, firmatur & augentur status.”). Note that Botero was the writer who revived Tacitus’s formulation of *arcana imperii*. (See discussion, infra).
Ultimately, Parliament, and then the people, became the supreme power, giving democratic institutions more authority.\textsuperscript{206}

Secrecy thus presents a threat as great as, if not even more profound than, the national security threats being claimed as justification. A terrorist organization may threaten the life and property of the citizens, but the erection of secret law threatens the very structure of government. It undermines the moral qualities of the law. And it raises the question of whether and to what extent obedience is due. Ultimately, what is at stake is the rule of law.

D. Adjudicatory secrecy

For centuries, criminal trials have been presumptively open. The right of the accused and defendants to have the proceedings witnessed by others derives from common law.\textsuperscript{207} In the sixteenth century, Sir Thomas Smith highlighted the role of public trials in \textit{De Republica Anglorum}.\textsuperscript{208} Sir Matthew Hale in his \textit{Historia Placitorum Corone} similarly discussed public attendance at trial proceedings.\textsuperscript{209} As Blackstone later explained,

\begin{quote}
This open examination of witnesses \textit{viva voce} in the presence of all mankind, is much more inductive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical and all others that have borrowed their practice from the civil law.\textsuperscript{210}
\end{quote}

The right operated during colonial times and appeared in the nascent state constitutions prior to incorporation in the Sixth Amendment.\textsuperscript{211} Accordingly, in 1948 the Supreme Court was “unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.”\textsuperscript{212} The Court added, “Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.”\textsuperscript{213} The Court attributed the guarantee of public trial to the U.S. English common law heritage, as part of the “ancient institution of jury trial.”\textsuperscript{214}

The right to a public trial protects two types of rights: first, the right of the defendant to have the proceedings open to public scrutiny; and second, the right of the public to witness the administration of justice.\textsuperscript{215} Multiple considerations attach to the defendant’s right. One relates to pressure on witnesses to tell the truth in front of the community—assumedly either because the individual would be shunned, or because there might be someone else present who

\begin{footnotes}
\item[207] Note absence of discussion of the right to a public trial in Magna Carta, the Bill of Rights of 1621, and the Bill of Rights of 1689. For good discussions of the right to a public trial see Harold Shapiro, \textit{Right to a Public Trial}, 41 J. Crim. L. & Criminology 782 (1951); Radin, \textit{The Right to a Public Trial}, 6 Temp. L. Q. 381 (1932); Thomas S. Schattenfield, \textit{The Right to a Public Trial}, 7 Case Western Reserve L. Rev. 78 (1955).
\item[208] Thomas Smith, \textit{De Republica Anglorum}, (1583), c. 6 (Triall or Judgment by Parliament; c. 8 (Triall by Assise or SIJ). Men and First of the Three Parties which Be Necessary in Judgment); c. 10 (Of the Chiefe Tribunals, Benches or Courttes of Englande); c. 12 (Of Judges in the Common Lawe of England, and the Mner of Triall and Pleading There).
\item[211] Pennsylvania Constitution, Declaration of Rights IX (1776); North Carolina Constitution, Declaration of Rights IX (1776); U.S. Const., 6th Amend.
\item[212] In re Oliver 333 U.S. 266 (1948).
\item[213] 333 U.S. 266.
\item[214] 333 U.S. 266.
\item[215] Shapiro also recognizes these two rights, but he offers different arguments in support of them.
\end{footnotes}
would object based on their knowledge of the facts. The presence of witnesses can help to keep the judge and jurors in check. There is power that comes with observation—the flip side of the Panopticon being when the public watches the watchers. As Jeremy Bentham explained:

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

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

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

In Richmond Newspapers v. Virginia, the Supreme Court underscored the First and Fourteenth Amendments as guarantor of the right of the public and press to attend criminal trials. Two years later, the Supreme Court ruled a mandatory closure rule designed to protect minors in sexual assault cases unconstitutional. The fact that criminal trials had traditionally

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217 Shapiro, supra note 207 at 784.

218 See Jeremey Benthemb, FATIONALE OF JUDICIAL EVIDENCE 524 (1827).


221 See, e.g., State v. Scrugs, 165 La. 842, 116 So 206 (1928); Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508 (1917).

222 See, e.g., Hogan v. State, 191 Ark. 437, 86 S.W.2d (1935); Gren v. State, 135 Fla. 17, 184 So. 504 (1938); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).


been open to the public mattered, not least because such hearings play a significant role in the legal process.

E. Quasi-Judicial Executive Functions

The expansion of secret executive branch quasi-judicial functions coincides with the growth of the administrative state and the post-WWII emphasis on U.S. national security. The related clandestine processes impact citizens directly, with little or no recourse provided for those affected to seek justice in a regular court of law. Like the concerns that accompany secret law, this category is of particular concern. What is at stake is the usurpation of the judicial functions of government from Article III, impacting separation of powers. So, too, does the outcome undermine substantive rights related to life, liberty, property, privacy, and due process of law. This section focuses on three of the most concerning aspects of secrecy in this realm: decisions related to targeted killing; liberty restrictions resulting from courts martial, military commissions, and immigration proceedings; and interference with property.

1. Targeted Killing

The most prominent and concerning development in the clandestine evolution of quasi-judicial proceedings are the procedures related to targeted killings. The number of individuals estimated to have been killed by drone strikes since 2002 is estimated to be in the thousands. The Bureau of Investigative Journalism, for instance, has documented more than 14,000 confirmed strikes, estimating the cost in human life as between 8,858 and 16,901 people. These numbers include up to 2,200 civilians and 454 children. The decision of whom to target is hidden from public view: the military and CIA maintain top secret lists of high-value targets eligible for kill or capture. Some of the factors considered are the strength of intelligence indicating enemy combatant status, whether the individual poses an imminent threat, and how significant they are in the enemy forces, and whether capture is feasible.

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

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227 Id. Government figures are lower, owing in part to the assumption that, absent clear evidence to the contrary, all military-age males in a strike zone are considered combatants. Jo Becker & Schott Shane, Secret “Kill List” Proves a Test of Obama’s Principle and Will, N. Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.

The 2001 AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the 9/11 attacks.\(^{229}\) Although not a formal declaration of war, Congress couched the Joint Resolution as specific statutory authorization within the meaning of the 1973 War Powers Resolution.\(^{230}\)

The language of the resolution has been interpreted broadly to include not only individuals and organizations who are not part of al Qaeda, the Taliban, or associated forces, but also some who are actively hostile to these groups.\(^{231}\) Between 2001 and 2016, the President cited his authorities under the AUMF in support of 37 military operations in 14 different countries—refusing to specify which groups the statute covered.\(^{232}\) Scholars are divided on the legitimacy of the rapidly expanding battlefield.\(^{233}\) Some argue the need take the fight to the enemy (wherever the enemy may be located) and respond to human rights concerns by suggesting that in a global battlefield, the distinction between war and peace becomes meaningless. In one of the strongest articles on this topic, Professor Jennifer Daskal proposes a set of binding standards to limit (and legitimize) the use of targeted killing outside “hot battlefields.”\(^{234}\)

In prosecuting its global war, the government maintains that it can place U.S. citizens on the kill or capture list.\(^{235}\) In 2011, for instance, the Central Intelligence Agency killed Anwar al-Awlaki.\(^{236}\) The placement of al-Awlaki, a U.S. citizen, on the top secret targeting list only came to light after a 2014 Freedom of Information Act lawsuit brought by the New York Times and the ACLU against the DOJ.\(^{237}\) Until that point, the records pertaining to the process via which U.S. persons could be designated for killing—including who had the authorization to make such determinations and what evidence was required to support the designation—was concealed from public view, as were all records pertaining to the legal basis of this process in domestic, foreign, and international law.\(^{238}\)

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\(^{231}\) For the past six years, the executive has claimed that the AUMF provides legal support for its fight against the Islamic State in Iraq and Syria—a claim disputed by scholars. For the past six years, the executive has claimed that the AUMF provides legal support for its fight against the Islamic State in Iraq and Syria—a claim disputed by scholars. See, e.g., Robert Chesney, *What Is the Domestic Law Basis for U.S. Airstrikes Supporting AMISOM in Somalia?*, LAWFARE (July 31, 2015), https://lawfareblog.com/what-domestic-law-basis-us-airstrikes-supporting-amisom-somalia.


\(^{235}\) The military’s Joint Special Operations Command has confirmed that several Americans are on the target list. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aying Yemen on Strikes*, WASH. POST (Jan. 27, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html.


\(^{238}\) Id., p. 13.
When information regarding al-Awlaki’s placement on the kill list was made public, the justification offered was one of public authority: a well-recognized principle that the government may engage in activity that is otherwise forbidden to private citizens. What exempted the CIA and DOD from the federal murder statute was their use of such force during “the lawful conduct of war.”\textsuperscript{240} The OLC heavily relied on “[h]igh-level government officials” which had concluded, “on the basis of al-Awlaki’s activities in Yemen, that al-Awlaki is a leader of AQAP whose activities in Yemen pose a ‘continued and imminent threat’ of violence to United States persons and interests.”\textsuperscript{241} His citizenship did not make him immune from the use of force outside U.S. borders.\textsuperscript{242} The fact that he was located in Yemen, and not anywhere near “the most active theater of combat” between the United States and al-Qaida, also did not matter, as AQAP was, if not part of al-Qaida, a co-belligerent with a strong presence in Yemen.\textsuperscript{243} Because the threat was continued and imminent, and an operation to capture al-Awlaki infeasible, neither the Fourth Amendment right against seizure nor Fifth Amendment due process rights prohibited killing him.\textsuperscript{244}

The rapidly-expanding concept of war and what constitutes a battlefield means that targeting, based on secret information only available to the executive, becomes the avenue for responding, instead of the state turning to criminal law. The government thereby sidesteps important protections otherwise meant to restrict the exercise of lethal power.

Capital punishment has long been a feature of the U.S. legal system, but, to the extent that the ability to take individuals’ lives exists outside of war, it is subject to lengthy judicial procedures to ensure that those who lose their lives are justly tried. Even then, estimates of the number of wrongful convictions are distressingly high.\textsuperscript{245} Since 1973, there have been 159 people exonerated while on death row—despite the procedural protections on capital cases.\textsuperscript{246} Further rules prevent execution based on age or mental capability and limit pain and suffering. None of these protections apply to extra-judicial targeting. Added to these concerns is the nature of the information on which extra-judicial killings are based and how the fog of war obscures what is actually known. War is notorious for the uncertainty it generates—a situation referred to in military terms as volatile, uncertain, complex, and ambiguous (colloquially referred to as “VUCA”). As Clausewitz observed, “war is the realm of uncertainty; three quarters of the factors on which action is based are wrapped in a fog of greater or lesser uncertainty.”\textsuperscript{247}

The kill list includes named persons. In 2008, a \textit{New York Times} article revealed further use of drone strikes against unnamed individuals, using location and patterns in behavior as evidence of involvement in al-Qaida or the Taliban.\textsuperscript{248} Also known as Terrorist Attack Disruption Strikes (TADS), signature strikes amount to decisions to kill unidentified individuals.\textsuperscript{249} That includes (potentially) U.S. citizens.

\begin{thebibliography}{99}
\bibitem{model Penal Code} Model Penal Code §3.03(2)(b), at 22, OLC memo at 16, 20.
\bibitem{OLC memo at 21} OLC memo at 21.
\bibitem{Id. at 23} \textit{Id.}, at 23.
\bibitem{Id. at 24} \textit{Id.}, at 24.
\bibitem{Id. at 39-41} \textit{Id.}, at 39-41.
\bibitem{national Registry of Exonerations} According to the National Registry of Exonerations, since 1989 there have been 2,075 exonerations, with some 18,062 years lost to false imprisonment. National Registry of Exonerations, \textit{Exonerations by State}, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx. The numbers work out to between 23 and 168 people per year. \textit{Id.}
\bibitem{Carl von Clausewitz} \textit{On War} 120 (Michael E. Howard & Peter Paret eds., 1976).
\end{thebibliography}
In November 2002, for example, human intelligence and signals intelligence intercepts suggested that Abu Ali al-Harithi, believed to be involved in the 2002 USS Cole bombing, was living in the Marib region of Yemen, near the Saudi Arabia border. U.S. forces on the ground were monitoring him when they saw two SUVs leave the compound. The NSA picked up a call from one of the cars. The analyst listening, who had listened numerous times to tapes of al-Harithi, was convinced that the person on the phone was not him. Overhearing someone in the back seat of the car, he immediately identified the background speaker as al-Harithi. He called a second analyst over for another opinion. The phone call lasted all of six seconds, at which point the command was given to fire a Hellfire missile at the car, killing all six occupants. One of them, Ahmed Hijazi (a.k.a. Kemal Derwish), was an American citizen.

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

2. Liberty Restrictions: Courts martial, military commissions, and immigration

Another way in which secrecy presents in Article I adjudication relates to restrictions on the freedom of movement. Military tribunals provide a good example. Their use is hardly an invention of the twenty-first century. The Second Continental Congress recognized a role

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251 Id.
253 Id.
254 Id.
255 Id.
256 Id.
257 Id.
260 For a thoughtful treatment of the issues that plague military adjudication of courts martial, military commissions, and courts incident to military rule (e.g., martial law or belligerent occupation), see Steven I. Vladeck, Military Courts and Article III, 103 GEO. L.J. 933 (2015). Other examples of Article I liberty restrictions include immigration proceeding, watch listing, and travel restrictions.
for military courts in relation to certain offenses linked to military order. In 1776, the American Articles of War provided for courts-martial over “[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline.” In considering the role of secrecy in the conduct of litigation, two forms of military tribunals are of particular import: courts-martial and military commissions. In addition, a less formal type of adjudication has existed in regard to detention. Secrecy plays a unique role in each type of adjudication.

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

The power of courts-martial is steadily expanding. Consistent with their traditional position, courts-martial have the authority to try current (or former) members of the constituent service for more than four dozen offenses laid out in the UCMJ. Until the 1987 case of Solorio v. United States, the Court required that the offenses be “service-connected,” and not ordinary crimes. But in Solorio, the Court held that individuals could be tried for any crime incorporated by Congress into the UCMJ—regardless of whether there was a direct connection to service in the military. Congress has “primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military,” which requires deference in all situations—including those implicating service members’ constitutional rights.

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


264 See 10 U.S.C.A. § 817 (jurisdiction in general); id. § 818 (general courts-martial); id. § 819 (special courts-martial); id. § 820 (summary courts-martial).

265 10 U.S.C. §§816 (1), 818(a)-(c).

266 10 U.S.C. §§816(2), 819.

267 10 U.S.C. §§816 (1), (2).

268 10 U.S.C. §§816(3), 820 (Note that summary courts-martial are not available in capital cases, dismissal, dishonorable or bad-conduct discharge, confinement for more than a month, hard labor without confinement for more than 34 days, restrictions for more than two months, or forfeiture of more than 2/3 of one month’s pay).


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

In 2006, Congress amended the UCMJ to extend courts-martial jurisdiction beyond service members and reservists, and individuals subject to the law of war, to include “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”273 In 2012, as Professor Vladeck notes, a lower court controversially held that this language applied to noncitizen civilian contractors outside the United States, even though Supreme Court doctrine otherwise rejects the application of military law to civilians.274

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

Another venue in which secrecy operates are military commissions, which focus not on discipline within the military, but on non-soldiers, such as enemy combatants and civilians in wartime.275 The most recent iteration stems from the attacks of September 11, 2001, in the aftermath of which President George Bush announced their creation to try “certain non-citizens” suspected of involvement in terrorism.276 The order gave the tribunals jurisdiction over any offense. It incorporated a wide range of secret information into the trial proceedings, including:

(i) information classified or classifiable pursuant to [Executive Order 12958];
(ii) information protected by law or rule form unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests.277

That definition extended beyond classified documents to include anything considered a threat to U.S. national security.

The order authorized the presiding officer (a military judge advocate officer) to take steps necessary to protect U.S. interests in regard to state secrets and protected information—including deleting information from documents provided to the accused or to defense counsel.278 The presiding officer could direct that a summary be provided in lieu of the information or substitute the data with a statement of the relevant facts that the sensitive

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273 10 U.S.C. §802(a)(10) (emphasis added). Congress included the italicized language to address any potential ambiguity regarding the so-called Global War on Terrorism. During the Vietnam conflict, the Court of Military Appeals had understood the language of the UCMJ to require a declaration of war. United States v. Averette, 19 C.M.A. 363, 365 (1970), discussed and cited in Vladeck, supra, note 260 at 942, n. 49. The 2001 AUMF did not clearly declare war, making the Constitutional posture ambiguous.


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

278 Id., para 6D(5)(b).
material would tend to establish. Further, the presiding officer could close any portion of the legal proceedings to prevent sensitive information from being disclosed.

The rules and procedures adopted by the commissions differed in important other ways from courts-martial or even ordinary judicial processes. Instead of five or twelve members of the U.S. armed forces, panels required just three military officers. They allowed for the use of evidence against an accused without providing access to the information; the potential admission of hearsay; the use of unsworn testimony and evidence obtained through coercive interrogation; and limited rights of appellate review.

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

Congress responded by passing the 2006 Military Commissions Act, which created a category of alien unlawful enemy combatants engaged in hostilities against the U.S. and provided for them to be tried by military commission for violations of the law of war, as well as other offenses. The statute established the right of the defendant to see evidence arrayed against him, to be tried before a qualified military judge and a panel of members of the U.S. services, to obtain evidence, to cross-examine witnesses who testify against him, and to bring witnesses in his or her defense. It allowed the defendant to seek review of the decision. At the same time, it limited the right of habeas corpus. It narrowed the right to counsel. It shifted the burden for hearsay onto the opponent, and, while it prohibited the use of statements obtained through torture, it did not prohibit the use of statements obtained through

279 Id.
280 Id., para. 6B(3).
284 Geneva Convention, Art. 3.
285 Id. (Stevens, J.).
287 Military Commissions Act of 2006, Pub. L. 109-366, Oct. 17, 2006. The statute defines “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.” (10 U.S.C. §948a). See also Vladeck.
288 10 U.S.C. §§949a, 949j. See also Vladeck.
289 10 U.S.C. §950b. See also Vladeck.
290 10 U.S.C. §950j. See also Vladeck.
291 10 U.S.C. §949c. See also Vladeck.
292 10 U.S.C. §949a. See also Vladeck.
coercive interrogation. Members of the panel cast secret ballots to determine guilt or innocence, with only two of the three votes necessary for conviction.

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

In 2008, the Supreme Court ruled that the 2006 Military Commissions Act unconstitutionally suspended detainees’ right to habeas corpus. That same year, Hamdan was tried and convicted by a six-member military commission and sentenced to 5 1/2 years’ confinement for providing material support to terrorism. Four years later, the U.S. Court of Appeals for the District of Columbia threw out the conviction, in a 3-0 decision, on the grounds that material support did not count as an international war crime until the 2006 MCA, at which point Hamdan was in U.S. custody. Judge Brett Kavanaugh noted, “[T]he Executive branch acknowledges that the international law of war did not—and still does not—identify material support for terrorism as a war crime.” He explained, “If the government wanted to charge Hamdan with aiding and abetting terrorism or some other war crime that was sufficiently rooted in the international law of war at the time of Hamdan’s conduct, it should have done so.” The principle at issue was a simple one: can an individual be held liable for conduct that is not criminal at the time it occurs? For centuries, legal jurists have responded to this question with a resounding “no!” Yet secret processes, cloaked from public view, and a hearing hidden from public access, came to a rather different answer. Just three months after the D.C. court’s decision, a panel of the D.C. Circuit came to a similar conclusion in regard to charges of conspiracy and solicitation brought against Ali Hamza Ahmad al Bahlul. Remarkably, in October 2016, the en banc court overturned the panel’s decision, upholding his conviction on numerous grounds.

Congress went on to introduce the 2009 Military Commissions Act, vesting the military commissions with jurisdiction over “alien unprivileged enemy belligerents” for violations of the law of war, Articles 104 or 106 of the UCMJ, or any of 32 substantive offences laid out in

293 10 U.S.C. §948r. See also Vladeck.
295 The first case to come forward under the 2007 Manual for Military Commissions (which implemented the 2006 MCA) was that of David Hicks, who pled guilty and was sentenced to seven years’ imprisonment for providing material support to terrorists. Notably, the system at the time allowed for significant amounts of secret information to be used against defendants, raising the possibility that secrecy could be used to encourage guilty pleas—essentially, a second-order effect.
the MCA. It prohibited the use of evidence obtained through torture or cruel and unusual punishment, and limiting the conditions under which hearsay evidence can be used. The law strengthened the accused’s rights to counsel, so that he or she could request a specific counsel from the pool of attorneys and, in capital cases, obtain a lawyer with previous experience in the area. The statute also shifted the burden for the use of hearsay evidence to the party intending to use it.

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

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

Immediately following the attacks of 9/11, the DOJ departed from this long-established practice. At the direction of Attorney General John Ashcroft, Chief Immigration Judge Michael Creppy informed all immigration judges that DOJ had implemented “additional security procedures” for cases of “special interest” to the government.

Hearings would henceforward be closed to all members of the public—including family, friends, and the

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301 10 U.S.C. §§948a(6), 948d; 904; 906; 950t, discussed in Vladeck, supra note 260 at 946, n. 90-93.
306 8 CFR §3.27 (“All hearings, other than exclusion hearings, shall be open to the public” [with exceptions noted]).
307 8 CFR §3.27(a).
308 8 CFR §3.27(b).
309 8 CFR §3.27(c).
311 Email memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001); See also Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State, 39 HARY. CIV. RIGHTS-CIV. LIBERTIES L. REV. 95 (2004); Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, 14 HUMAN RIGHTS WATCH (August 2002).
The Attorney General directed that information regarding the cases neither be posted on the court calendars outside the hearing rooms nor provided in the courts’ telephone services. Those working at the courthouse were not to discuss the cases of special interest with anyone—including indicating whether or not the case had been scheduled for a hearing. The Record of Proceeding (the official file with documents related to non-citizens’ immigration cases) could only be provided to the detainee’s attorney, and then only if it did not contain any classified information.

The decision to hide even the existence of the hearings, as well as the proceedings themselves, was made behind closed doors, without any opportunity for discussion. The DOJ refused to release the criteria for what constituted a case of special interest, and those whose cases fell into this category had no opportunity to contest the designation. Within six months, 611 people were subject to secret hearings, approximately two-thirds of whom had been subject to multiple ones.

Several lawsuits challenged the hearings on due process and First Amendment grounds. In *Haddad v. Ashcroft*, the Eastern District of Michigan considered a case in which an immigration judge had been forced to close proceedings to the public, including the family and friends of the individual in custody as well as the media. The court ruled that the government’s closure violated the due process clause of the Fifth Amendment—a constitutional protection that extends to “all ‘persons’ within the United States, including aliens, whether their presence here is unlawful, temporary, or permanent.” The court noted the many cases in which open hearings have been considered fundamental to concepts of fairness, recognizing that the rights at stake in immigration proceedings are at least as serious as those at issue in criminal or civil actions, if not more so. In light of the recent attack, it was especially important to ensure open access to adjudicative processes: “Few could disagree that the events of September 11 altered the way we view our world and the safety of our nation . . . we regard our own neighbors with suspicion and go about our day-to-day affairs wary of our own security.” The Court continued, “Traditionally, in such a climate, individuals (including some in government) are more willing to abridge the constitutional rights of people who are perceived to share something in common with the ‘enemy,’ either because of their race, ethnicity, or beliefs.” At such times, it was critical to maintain the country’s

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312 Email memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001), at ¶¶10, 11.
313 *Id.*
314 *Id.*
315 Letter to Senator Carl Levin, Chair, Senate Permanent Subcommittee on Investigations, from Daniel J. Bryant, assistant attorney general, July 3, 2002.
318 “A deportation proceeding, although administrative, is an adversarial, adjudicative process, designed to expel non-citizens from this country. ‘The ultimate individual stake in these proceedings is the same as or greater than in criminal or civil actions.’ See N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J.2002).”
319 “[D]epartment can be the equivalent of banishment or exile,” Delgadillo v. Carmichael, 332 U.S. 388, 391, 68 S. Ct. 10, 92 L. Ed. 17 (1947), and the Court has taken note of the “drastic deprivations that may follow when a resident of this country is compelled by our [g]overnment to forsake all the bonds formed here and go to a foreign land when he often [may] have no contemporary identification.” *Woodby v. INS*, 385 U.S. 276, 285, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966). Moreover, “[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.” *Bridges*, 326 U.S. at 154, 65 S. Ct. 1443. As such, “[t]hat deportation is a penalty at times a most serious one cannot be doubted.” *Id.* at 154, 65 S. Ct. 1443.
320 221 F.Supp.2d 804.
commitment to due process to ensure that the legal system did not arbitrarily invade the rights of individuals.

Other courts similarly picked up on the importance of open hearings for the rights of the defendant. In *North Jersey Media Group v. Ashcroft*, the Third Circuit noted the importance of having the public involved to serve “as a check on corrupt practices by exposing the judicial process to public scrutiny.”\(^{321}\) The Court highlighted the importance of spectators to discourage perjury, as well as to enhance “the performance of all involved.”\(^{322}\) No less important were open immigration hearings to the rights of the public. In the same case (*North Jersey Media Group*), the Court emphasized the importance of promoting an “informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system.”\(^{323}\) It underscored the importance of promoting “the public perception of fairness which can be achieved only by permitting full public view of the proceedings,” as well as “providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion.”\(^{324}\)

In May 2002, the DOJ issued an interim rule, allowing immigration judges to decide which hearings to close on a case-by-case basis.\(^{325}\) The order expanded the regulations to allow judges to issue protective orders and to accept documents under seal, to “ensure that sensitive law enforcement or national security information can be protected against general disclosure, while still affording full use of the information.”\(^{326}\) Some of the reasons given for needing the provision were strong, such as the concern that revealing the identity of witnesses might allow terrorists to threaten the witnesses or their families, with the result that witnesses would not, in the future, be willing to come forward. But other arguments, such as the need to protect the rules governing law enforcement investigations were particularly concerning, considering their spill over affect on the criminal justice system.

3. Interference with Property

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

Executive Order 13224 empowers the President to place sanctions on individuals. This power originated from legislation issued by Congress to give the President the flexibility to respond to foreign state threats. During the First World War, President Woodrow Wilson established an Office of Alien Property Custodian under the 1917 Trading with the Enemy Act.\(^{327}\) The statute authorizes the President to appoint an individual as Alien Property Custodian (APC) to “receive . . . hold . . . administer . . . and account for” “all money and property in the United States due or belonging to an enemy, or ally of enemy.”\(^{328}\) That office had the authority to seize, to administer, and (under certain conditions) to sell property held by anyone deemed to be a threat to the war effort. Wilson appointed A. Mitchell Palmer to head the office. Within a year, the office had amassed hundreds of millions of dollars in private

\(^{321}\) North Jersey Media Group, Inc. v. John Ashcroft, 308 F.3d 198 (3d Cir. 2002).
\(^{322}\) Id.
\(^{323}\) North Jersey Media Group, Inc. v. John Ashcroft, 308 F.3d 198 (3d Cir. 2002).
\(^{324}\) Id.
\(^{326}\) Id.
\(^{328}\) Id.
During World War II, President Franklin D. Roosevelt re-constituted the office, conferring powers from TWEA, as well as the First War Powers Act, 1941, on the APC. “Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct.”

Following abuses of the power by the Nixon Administration, Congress withdrew TWEA and replaced it with the International Emergency Economic Powers Act. This law focused on threats outside the country. Once a national emergency is declared, the President can designate entities considered a threat to national security, freezing their assets and blocking any trade between them and U.S. persons.

The President informs Treasury’s Office of Foreign Assets Control (OFAC), which informs banks. The statute includes a criminal penalty for those who refuse to comply. At first, successive administrations only applied IEEPA to states. But in the 1990s, President Clinton extended it to include nonstate actors: specifically, Palestinian organizations and the Cali drug cartel. In January 1995, for the first time, he extended it to individuals (those threatening to disrupt the Middle East peace processes), and he forbade transferring any funds, goods, or services to them. The annex to the order included a “Specially Designated Terrorist” list, on which a dozen organizations and eighteen individuals had been placed. In 1998, following the attacks on the U.S. Embassies in Nairobi and Dar es Salaam, Osama bin Laden and a number of his key aides joined them on the SDT list.

Following 9/11, President Bush issued a new executive order under the IEEPA, establishing a new “Specially Designated Global Terrorist” (SDGT) list. The order blocked “all property and interests in property” of individuals listed, as well as all persons determined “to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex.” As a practical matter, this means that entities who continue to do business with individuals listed in the order can have their assets frozen.

The process of listing individuals is highly secretive and takes place entirely within the executive branch. Efforts to challenge such designations have been met with refusal by the Courts to get involved. What makes these procedures remarkable is that they end up directly impacting the same rights that are normally addressed through ordinary judicial procedures. The effect is felt both in terms of rights and in diminishing the role of the judiciary. Even when cases end up in Court, the willingness of the judiciary to look too deeply into why individuals

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335 Id. The definition of specially designated terrorist as found in 31 CFR 595.311 reads: “(1) Persons listed in the Annex to Executive Order 12947; (2) Foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found: (i) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or (iii) To assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and (3) Persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other specially designated terrorist.”
338 Id.
have had their assets frozen turns out to be extremely limited. This is true even in regard to material support provisions, where criminal penalties are applied.\textsuperscript{339}

IV. CONCLUSION

It is not enough to ask how secrecy presents obstacles to civil and criminal litigation. First, one must ask how secrecy functions and then determine whether it is beneficial or harmful to the liberal, democratic state. This chapter has focused on three areas: deliberation, information, and law and legal processes, positing that the functional purpose of the secrecy, as examined against how it impacts the structure of the state and the substantive rights of individuals within it, are critical for understanding the legitimate, and illegitimate use of secrecy in a liberal, democratic state.

The first category, cloaking discussions from public inspection, has a long history of use. It may result in better policies, more robust laws, and the fairer administration of justice. The goal is to reach an optimal outcome. Accordingly, the United States has long protected legislative, executive, and judicial deliberations. To the extent that the deliberative process is probative of the meaning of the law, rule, or policy adopted, or probative of the process itself, however, then the function of secrecy shifts. It morphs into the third category, understanding of the law and legal processes. Its character changes to a much more insidious form of secrecy.

The second area, information secrecy, carries with it the benefit of protecting against vulnerabilities. In U.S. history, we have seen two primary ways in which this is accomplished: through material controls (e.g., classified and controlled unclassified information, and patent secrecy orders), and restrictions on government employees. Taken too far, actions particularly in regard to data restriction may prevent individuals wronged from being able to seek justice in either the civil or the criminal realm. Further damage may be done to the ability of the public to know what officials are doing and therefore to hold them accountable for their acts.

Of the types of secrecy addressed in this chapter, the third, secret law and legal processes, give rise to the greatest concern. Static law generated by Congress, working law introduced by the executive, and interpretive law offered by the courts all come within this domain. For the latter, secret opinions raise significant concerns related to statutory construction, constitutional interpretation, and accountability. In all three areas, norms have shifted over the past seventy years, to increasingly hiding government action particularly in the realm of national security. Claims of reason of state are insufficient in that the “state” which is being claimed no longer reflects the most basic principles of liberal democracy. To the extent that secrecy acts within adjudicatory processes, the greatest impact is felt in the administration of justice. At one end of the spectrum, cases may be prevented from proceeding. For trials underway, public exclusion may relieve pressure on the prosecution to mount a strong case and undermine the defendant’s—as well as the public’s—right to an open trial. Quasi-judicial executive functions, particularly in regard to targeted killing, liberty restrictions (such as courts martial, military commissions, and immigration), and interference with property as manifest through sanctions, provide salient and concerning examples of ways in which secrecy presents a profound challenge to liberal, democratic considerations. Where secrecy reaches into the legitimacy of the law and democratic legal systems, it erodes the morality of the law in ways that have profound consequences for the state. By asking how secrecy functions, a clearer picture of the purpose to which it is put emerges. This, in turn, elucidates ways in which it impacts separation of powers between the branches, as well as individual rights within the state.