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ILLEGAL SECRETS

JENNY-BROOKE CONDON*

ABSTRACT

When can the government keep its illegal action secret? In spite of the strong incentive for government officials and institutions to hide unlawful conduct from the public and their demonstrated tendency to do so, both public information access doctrines and the broader normative discussion of government secrecy inadequately answer this question. The questionable legality and pervasive secrecy of recent national security activities—in particular, the National Security Agency's ("NSA's") collection of millions of Americans' phone records, the government's unilateral and self-serving decision to characterize illegal conduct like torture as an "intelligence method" protected from public disclosure, and the government's position that it can secretly kill suspected terrorists through unmanned drone strikes abroad without public oversight of the claimed legal authority to do so—underscore the extent to which democratic accountability is undermined when government secrecy and the prospect of illegality converge. This Article examines when the illegality (as well as the possible illegality) of executive action should preclude government attempts to keep its conduct secret. Or, to put it simply, it examines when a government secret becomes an illegal secret.

* Associate Professor of Law, Seton Hall University School of Law. Jenny-Brooke.Condon@shu.edu. Thanks to Baher Azmy, Timothy Glynn, Jonathan Romberg, and Charles Sullivan for very helpful comments on earlier drafts. Additional thanks to participants in the Albany Law School 2013 Scholarship and Teaching Development Workshop and participants in the Seton Hall Law School Summer Brown Bag scholarship series. Thanks to Eleanor Wedum for excellent research assistance.

In addressing the under-theorized relationship between secrecy and illegality with respect to government information control, this Article also examines the insufficiently acknowledged problem of shallow secrets that conceal illegal or potentially illegal government conduct. In recent years, the problem of illegal secrets has surfaced with increasing frequency and urgency. In a variety of Freedom of Information Act ("FOIA") cases, when members of the public have sought information about controversial and legally suspect government policies and programs courts have largely deferred to the Executive's claims that it is entitled to withhold information irrespective of whether the activities at issue violate the law. Indeed, numerous courts have expressly held that government illegality is irrelevant when evaluating the appropriateness of government secrecy decisions. Examining this troubling trend, this Article argues that the legality of secret government conduct is a vital consideration that must be prominent in an information disclosure regime premised upon the goal of democratic accountability. It therefore proposes that the established illegality of the underlying conduct sought to be exposed is a powerful basis for compelling disclosure of government information. Only in the most pressing and exceptional cases should executive claims of a national security priority present a paramount justification for withholding information from the public. This Article further posits that where there is a plausible allegation of illegality, courts must consider whether sanctioning government secrecy will thwart public debate regarding the lawfulness of the conduct concealed, such that the more plausible the allegation of illegality, the stronger the basis for disclosure.

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INTRODUCTION

Government secrecy and the abuse of power have long shared a symbiotic relationship. Too often, government secrecy enables legally questionable government action.[1] And when government actors violate the law, they reflexively embrace secrecy as a means of shielding their actions from public scrutiny and legal responsibility.[2] Some forms of official abuse, most notably torture, depend upon secrecy and inflict more suffering because of it.[3]

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1. PUB. INTEREST DECLASSIFICATION BD., REPORT TO THE PRESIDENT: TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM 6 (2012), http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.pdf (government secrecy "at worst . . . enables corruption and malfeasance").

2. *See* SISSELLA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 25–26 (1982); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 886 n.162 (1990); *See also* Arthur Schlesinger, *Preface* to DAVID BANISAR, GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY 13 (2007).

3. Lisa Hajjar, *Sovereign Bodies, Sovereign States and the Problem of Torture*, *in* QUEST: AN AFRICAN JOURNAL OF PHILOSOPHY, XVI, No. 1–2, at 108, 118 (2002); Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN ST. L. REV. 1, 42–43 (2009) ("Secrecy also denies the obligation to justify the exercise of power on individuals, it denies the legitimate interest of the political community in what happens to the torture victim, and in this cruelty it alienates and dehumanizes her.").

Indeed, as a global and historical phenomenon, when governments commit grave human rights violations or engage in other serious abuses of power, secrecy invariably provides space for such crimes to occur, and for victims silenced or denied public acknowledgment of their injury, secrecy necessarily serves as an additional tool of oppression.[4] Throughout U.S. history, secrecy has at times played a similarly nefarious role, shielding from public scrutiny controversial government policies, elected officials' embarrassing mistakes, and perhaps most significantly, illegal government action.[5]

In recent years, the question of whether the government should be entitled to keep its illegal action secret has emerged frequently in the context of national security policy. In the pattern now routinely followed in today's secrecy regime, the government regularly cloaks in secrecy the purported authorization for some of the most contentious and legally questionable policies of our time, including the treatment of detainees and interrogation policy, the targeted killing of suspected terrorists abroad, and most recently, the NSA's massive, warrantless electronic surveillance of millions of Americans.[6] The government also regularly withholds details regarding implementation of such policies, including information related

4. *See generally* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

5. *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE (1998); INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II OF THE FINAL REPORT OF SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, pt. 2, at 292 (1976) [hereinafter CHURCH COMMITTEE REPORT], *available at* http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf (concluding that "excessive secrecy" had long been used by government to "shield the existence of constitutional, legal, and moral problems").

6. In June 2013, the Guardian newspaper and Washington Post, based upon leaks of classified information by former NSA contractor Edward Snowden, revealed a secret NSA surveillance program through which the agency collects bulk telephony metadata from millions of Americans. *See The NSA Files*, THE GUARDIAN (Feb. 6, 2014), http://www.theguardian.com/world/the-nsa-files [hereinafter *The NSA Files*]. An aspect of the NSA's secret warrantless electronic surveillance program was first revealed to the public in 2005. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. But the Snowden revelations revealed the scope of the NSA's bulk data collection, and a host of other domestic surveillance activities, prompting renewed questions about the program's legality. For a synopsis of the surveillance program and opposing conclusions about its legality, see Klayman v. Obama, No. 13-0851, 2013 WL 6571596 (D.D.C. Dec. 16, 2013) (enjoining the NSA's warrantless collection of bulk telephone metadata after finding that it likely violates the Fourth Amendment); ACLU v. Clapper, no. 13 Civ. 3994, 2013 WL 6819708, at *1 (S.D.N.Y. Dec. 27, 2013) (upholding the constitutionality of the NSA program after noting "[t]his blunt tool only works because it collects everything."). Since the first Guardian story, a stream of disclosures regarding other secret NSA surveillance programs followed and at the time of this writing continue to emerge, including revelations about the NSA spying on foreign leaders and disclosures about Prism, a secret surveillance program through which the government accesses information about users directly from the servers of major technology companies. *See The NSA Files.*

to their efficacy and human costs. And irrespective of the legality of the government conduct concealed, courts have repeatedly turned back claims by members of the public seeking information about these activities and the policies informing them.[7]

Specifically, courts have allowed the government to keep secret documents regarding the CIA's use of waterboarding[8]—a technique long and widely considered to constitute unlawful torture,[9] and which the United States has previously prosecuted as a crime in domestic courts and military tribunals.[10] Courts have sanctioned the secrecy of the government's purported authority for killing suspected terrorists through drone strikes abroad,[11] even where the legality of such actions remains a hotly contested legal question.[12] Courts have also declared the legality of President Bush's warrantless electronic surveillance of U.S. citizens in contravention of the requirements of the Foreign Intelligence Surveillance Act ("FISA")[13] irrelevant to whether documents regarding the program should be disclosed to the public.[14] And more than a year before Edward Snowden leaked classified information regarding the massive scope of the NSA's warrantless surveillance program purportedly authorized by Section 215 of the Patriot Act, a district court ruled that the alleged bad faith of the government in misleading Congress about the scope of surveillance authorized by that law was irrelevant to whether the government could keep its legal interpretation secret.[15]

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7. *See infra* text accompanying notes 10, 13, and 14.

8. *See, e.g.*, ACLU v. DOJ, 681 F.3d 61, 73–75 (2d Cir. 2012) (allowing the CIA to keep secret documents relating to the use of waterboarding on terrorism suspects abroad on grounds that waterboarding constituted an "intelligence method" protected from disclosure under FOIA irrespective of its legality).

9. Daniel Kanstroom, *On "Waterboarding": Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT'L & COMP. L. REV. 203, 204 (2009) ("[T]he practice is one of the oldest and most widely recognized forms of torture.").

10. *See* Evan Wallach, *Drop By Drop: Forgetting The History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 472 (2007).

11. *See, e.g.*, N.Y. Times v. DOJ, 915 F. Supp. 2d 508 (S.D.N.Y. 2013); ACLU v. DOJ, 808 F. Supp. 2d 280 (D.D.C. 2011).

12. COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & CTR. FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS (2012) [hereinafter CIVILIAN IMPACT OF DRONES], *available at* http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/civilian-impact-drone-strikes-unexamined-costs-unanswered-questions (describing numerous ways secrecy surrounding U.S. targeted killing policy hinders assessment of the program's legality, efficacy, and impact on civilians).

13. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, §§ 102–03, 92 Stat. 1783, 1786–88 (to be codified as amended at 50 U.S.C. §§ 1801).

14. *See, e.g.*, Wilner v. NSA, 592 F.3d 60, 77 (2d Cir. 2009); People for the Am. Way v. NSA, 462 F. Supp. 2d 21, 30–31 (D.D.C. 2006).

15. *See* N.Y. Times v. DOJ, 872 F. Supp. 2d 309, 317–18 (S.D.N.Y. 2012); The Patriot Act,

Thus, under prevailing law governing public access to government information, a remarkable principle is clear: our legal system is no more suspicious or demanding of government secrecy when it conceals patently unlawful conduct or potentially illegal government conduct than when secrecy conceals the legitimate workings of government. Indeed, courts have effectively declared disputes about the secrecy surrounding controversial and potentially illegal national security policies non-justiciable.[16]

This judicial deference to executive secrecy without regard to the lawfulness of the government's actions is cause for concern given that the ability to both conceal and enable government wrongdoing is secrecy's most illegitimate yet seductive feature. Given the symbiotic and historic relationship between secrecy and illegality, this Article argues that concerns about government illegality ought to play a greater role in the law regulating state secrecy. Some scholars have begun to recognize that the law should be more skeptical of government secrecy when it conceals potential illegality, but have not described at length why that is the case or how—under FOIA's existing disclosure framework or in other contexts like the state secrets privilege—the law should respond to the problem.[17]

This Article addresses this under-theorized relationship between secrecy and illegality with respect to government information control. It aims to identify when concerns about the legality of executive action should preclude government attempts to keep its conduct secret. Or, to put it simply, it examines when a government secret becomes an illegal secret.[18]

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§ 215(a)(1), 50 U.S.C.A. § 1861(a)(1) (2010).

16. *See* Ben Wizner, Dir. of the Speech, Privacy & Tech. Project at the ACLU, Fordham Law Sch., Ctr. on Nat'l Sec., Comments at Government, Secrecy, and National Security Symposium (Oct. 16, 2012) (notes on file with author) (invoking the concept of "non-justiciability" to describe judicial treatment of national security FOIA cases).

17. *See* Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 91 (2011–12) ("[T]he government has no legitimate interest in keeping secret its own illegality, and the public has a compelling interest in the disclosure of such information. . . . In a self-governing society, citizens need to know when their representatives violate the law."); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1314 (2007) (arguing that although the state secrets privilege may appropriately strike a balance in favor of national security, in many contexts "where the legality of government conduct is itself at issue, it may be appropriate to explore other solutions to the secrecy dilemma"); Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 731 (1984) ("The only circumstances in which a court would be constitutionally justified in examining particular secrets and order their disclosure are those in which reasonable grounds exist to believe that the President or executive officials are using secrecy to cover up violations of federal law.").

18. For some readers, the title of this Article and the concept of illegal secrets may invoke

In addressing the illegal secrecy dilemma, this Article adds an important observation to the recent literature cataloguing the structural characteristics of government secrets and their corresponding dangers. Scholars have recently argued that the form of secrecy most dangerous and repugnant to the Constitution is what some alternately term "deep secrecy"[19] or "macro secrecy"[20]—that is, where the very existence of an executive secret is kept a secret as well.[21] Under this view, deep secrecy eliminates any possible check on the abuse of executive power and is thus far more threatening to the constitutional order than "shallow secrets" or "micro secrecy" regarding, for example, how the executive branch implements policy.[22]

The deep secrecy frame highlights the profound danger posed by secret national security programs and secret law.[23] This Article argues, however, that "shallow secrets" can, in fact, be no less problematic than deep secrets when they insulate the government's illegal conduct from judicial and

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sociologist and legal scholar Kim Lane Scheppele's book, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW (1988), which examines the myriad of ways in which the law confronts secrets—from trade secrets to contract law—and either privileges or punishes their disclosure. Scheppele's book does not address state secrets or public access to government information. Thus, the topic and title of this Article references Scheppele's work only insofar as it provides a rhetorical counterpoint to her discussion of the law of secrets. The question of whether some secrets held by the state are so threatening to the goals of accountability (such as secrets concealing government illegality) that they are metaphorically and substantively "illegal secrets" is unique to this discussion.

19. *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010) (distinguishing between deep and shallow secrets irrespective of their "function, their subject matter, or the competing interests in disclosure versus nondisclosure."). Pozen draws upon sociologist and legal scholar Kim Lane Scheppele's book LEGAL SECRETS, *supra* note 18, which introduced the concept of deep and shallow secrets within a discussion of private law. For an earlier discussion of executive secrecy that similarly focused on the structure of secret-keeping, rather than the contents of secrets, *see* Cheh, *supra* note 17, at 730 (noting that with respect to information access "there appears no principled, workable way for the courts to review the validity of particular secrecy decisions" such that courts should review "the system of secrecy, but not the secrets themselves").

20. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 494 (2007) [hereinafter *Separated Powers*] ("[T]he Constitution demands that secrets generated by the political branches be shallow and, to make the shallowness meaningful, politically checkable."); Heidi Kitrosser, *Supremely Opaque?*: *Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 62, 64 n.9 (2010) [hereinafter *Supremely Opaque*] (discussing concepts of "macro" and "micro" secrecy, which Kitrosser acknowledges "parallel in important respects those of 'deep' and 'shallow' secrecy"); Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163 (2007) [hereinafter *Macro-Transparency*].

21. *See generally* Kitrosser, *Supremely Opaque*, *supra* note 20.

22. Kitrosser, *Separated Powers*, *supra* note 20, at 494; Pozen, *supra* note 19.

23. Kitrosser, *Supremely Opaque*, *supra* note 20, at 67 ("Secret law occurs when the President not only circumvents a statute, but when he does so in secret. In such cases the President effectively amends public law without the knowledge of the public or the other branches . . . .").

public review. Contrary to dominant conceptions of state secrecy, public knowledge that the government is keeping a secret (or the transformation of information from a deep secret to a shallow one) may in fact do very little to curb illegal government action. Indeed, shallow secrets that conceal illegal or potentially illegal government conduct stand as a significant barrier to government transparency and accountability for a variety of important reasons.[24]

First, as demonstrated by the targeted killing controversy, understanding how the Executive implements policy is often essential to assessing the legality of executive action and whether government has abused its power. Additionally, the progression of a secret from deep to shallow frequently does not produce greater opportunities for accountability, particularly where the Executive selectively releases information through strategic leaks in a way that serves the political interests of the Executive, but not the goals of accountability.[25] For example, the NSA's warrantless domestic surveillance program was arguably no longer a deep secret after news reports in 2005 and 2006 revealed the agency's warrantless interception of Americans' phone and digital communications.[26] Yet, it was not until 2013, when Edward Snowden leaked information regarding how the NSA was carrying out this domestic spying, including through the bulk collection of millions of Americans' metadata, that concerns about the lawfulness of the agency's actions deepened, and the prospect of reform and accountability materialized.[27]

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24. Indeed, there may be reason to conclude that shallow secrets present a more persistent threat to democratic accountability given that, as Jameel Jaffer has noted, many controversial and legally suspect national security policies currently being debated have made the progression from deep to shallow secrecy, and are in fact, open secrets, or a "known unknown." Jameel Jaffer, *Known Unknowns*, 48 HARV. C.R.-C.L. L. REV. 457, 460–61 (2013).

25. *See* Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971).

26. *See NSA Spying on Americans*, ELEC. FRONTIER FOUND. (last visited Aug. 15, 2014), http://www.eff.org/nsa-spying; Lichtblau & Risen, *supra* note 6; James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES, Dec. 21, 2005; Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005; Leslie Cauley & John Diamond, *Telecoms Let NSA Spy on Calls*, USA TODAY (Feb. 6, 2006, 12:12 AM), http://usatoday30.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm.

27. Ellen Nakashima, *NSA Chief Defends Collecting Americans' Data*, WASH. POST (Sept. 25, 2013), http://www.washingtonpost.com/world/national-security/nsa-chief-defends-collecting-americans-data/2013/09/25/5db2583c-25f1-11e3-b75d-5b7f66349852_story.html (describing the 2005 disclosures regarding "the NSA's warrantless collection of domestic e-mails and phone-call content," which was later authorized by Congress in 2008 under Section 702 of the Patriot Act, and the separate bulk metadata collection program exposed in 2013, which the Executive claims is authorized under Section 215 of the Patriot Act).

Finally, allowing the government to keep secret details regarding the implementation and human costs of executive policies perpetuates false perceptions of government action, privileging the government-controlled narrative regarding executive abuses.[28] This not only inevitably masks information critical to evaluating the legitimacy of government action, it risks manipulating public opinion with long-term consequences for the goals of accountability and adherence to the rule of law.

One district court in *New York Times v. DOJ* ("*The Citizen Drone Strike Case*") recently noted the "Alice-in-Wonderland nature" of the illegal secrecy dilemma.[29] The court addressed whether the government should be permitted to keep secret its claimed legal authority to target and kill suspected terrorists, including United States citizens, through unmanned drone strikes abroad.[30] Describing the question before her as "a veritable Catch-22," District Judge Colleen McMahon saw "no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret."[31] This Article offers a way out of that thicket and demonstrates why concerns about illegality should be elevated within the broader discussion of government secrecy and how such concerns can be addressed when courts adjudicate disputes concerning access to government information.

Part I of this Article examines the long relationship between secrecy and illegality through a historical lens. Part II defines the concept of illegal secrets and surfaces the difficulties presented by better engagement with them in the legal system. Part III examines the particular dangers illegal secrets pose for transparent and accountable government. Here, this Article also explains how the long-standing norms supporting government transparency as a general matter at their core reveal concerns about the aggregation of executive power and the concealing of official misconduct—concerns at their apex when the state possesses illegal secrets. Conversely, it examines how the traditional justifications for state secrecy have little resonance when illegal secrets are at issue. Part IV addresses the constitutional and statutory law addressed to government

28. *See generally* Cohen, *supra* note 4; *see also* Kim D. Chanbonpin, *"We Don't Want Dollars, Just Change": Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth About Torture Commission*, 6 NW. J. L. & SOC. POL'Y 1, 21 (2011) (arguing that government narratives have prevailed regarding the U.S. government abuses against detainees).

29. N.Y. Times Co. v. DOJ, 915 F. Supp. 2d 508, 515 (S.D.N.Y. 2013).

30. *Id.*

31. *Id.* at 515–16.

secrecy and the public's right to know, paying particular attention to how concerns about government misconduct and illegal action have informed those systems. Part V critiques the FOIA decisions accepting the notion that government may legitimately keep secret information about its own unlawful acts. Part VI prescribes how courts can better check illegal secrets and proposes that the established illegality of the underlying conduct sought to be exposed is a powerful basis for compelling disclosure of government information.

In pressing the case for greater exposure of illegal secrets, I acknowledge that judging secrecy through the lens of illegality increases the complexity of information access disputes before the courts. In particular, the legality of an executive act concealed by secrecy is not always knowable nor will it necessarily involve a clearly resolved question of law at the time of a public information access dispute. I endeavor to demonstrate, however, that the struggle to identify and allow the public to grapple with illegal secrets is critical to the long-term health of democracy, and that this complexity does not make meaningful judicial evaluation of illegal secrets insurmountable. In addition to more readily exposing secrets that conceal patently unlawful conduct, courts must, at the very least, consider whether sanctioning government secrecy will thwart public debate regarding potentially unlawful government action. The more plausible the allegation of illegality, the stronger the basis for disclosure.

I. SECRECY AND ILLEGALITY: THE NOT-SO-SECRET HISTORY

Theorists have long noted the "strong association between secrecy and bad acts."[32] As philosopher and ethicist Sissela Bok has noted, secrecy does not always conceal bad acts, but bad acts nearly always invite secrecy.[33] Bok provides a useful explanation of the symbiotic and corrupting relationship between secrecy and illegality, noting that secrecy has the capacity to both "breed corruption" and "follows malfeasance like a shadow."[34] This dangerous and symbiotic relationship has persisted throughout U.S. history,[35] as illustrated by the following, necessarily abbreviated examination of the role of secrecy in the nation's history.

32. *See* Wetlaufer, *supra* note 2, at 883–94, 886.

33. *Id.* at 886 n.162 (noting that Bok does not contend "that secrecy is always bad," but rather that "'all that is discreditable and all wrongdoing seek[s] out secrecy'") (quoting BOK, *supra* note 2, at 26).

34. BOK, *supra* note 2, at 26.

35. DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 4 (1981).

A. Secrecy at the Founding

Most of the literature addressed to the role of government secrecy at the nation's founding has focused on the Framers' views regarding the advantages of a unitary Executive and the scope of inter-branch checks on executive secrecy powers.[36] Less attention has been paid, however, to the Framers' concerns about the relationship between secrecy and government misconduct as a normative matter. But implicit in the Framers' views about the advantages of a unitary Executive was a recognition that state secrecy could produce dishonest and corrupt government.

For example, Alexander Hamilton, while famously extolling the advantages of a unitary executive to act with "[d]ecision, activity, secrecy, and dispatch" simultaneously recognized that securing these traits in one individual presented another advantage: that the detection of Executive wrongdoing was more feasible.[37] He noted that "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness."[38]

Others in the Founding Era generation similarly noted the potential for secrecy to conceal wrongdoing. For example, during the North Carolina ratification debate, William Davie argued that the "predominant principle" arising out of proposals for a unitary executive at the Constitutional Convention was not the capacity for secrecy to promote vigor and dispatch in the Executive, but "the more obvious responsibility of one person."[39] He noted, that "if there were a plurality of persons, and a crime should be committed, when their conduct was to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one man."[40]

The Framers were thus wary of the potential for secrecy to produce dishonesty, even while they employed it themselves when crafting the nation's constitution.[41] As legal scholar Heidi Kitrosser has noted, this history suggests that though the Framers accepted that certain state functions required secrecy, they simultaneously recognized "the capacity

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36. *See, e.g.*, HOFFMAN, *supra* note 35 (analyzing founding era views on executive privilege); Gregory S. McNeal, *The Pre-NSC Origins of National Security Expertise*, 44 CONN. L. REV. 1585 (2012).

37. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. *Id.* at 427–29.

39. HOFFMAN, *supra* note 35, at 30.

40. *Id.*

41. *See* HOFFMAN, *supra* note 35, at 21 (describing Founders' divergent views about the secrecy surrounding the drafting and debate of the Constitution).

for abuse inherent in such power and appeared to assume that congressional oversight would keep such capacity under tight political control by threatening to expose the existence or even content of secrets."[42] As the next Section demonstrates, secrecy and illegality converged with destructive results during the second half of the Twentieth Century, illustrating that the structural advantages of a unitary executive have not always minimized abuses, nor led to more accountability.[43]

B. Secrecy and Illegality in the Watergate Era

The Watergate scandal is the most notable American example of secrecy's capacity to enable and shield executive misconduct.[44] During Congressional hearings considering the 1974 FOIA amendments, Senator Ted Kennedy lamented the role of secrecy during Watergate, noting how it emboldened high level government officials to casually plan crimes like bugging and blackmail from the Attorney General's office.[45] Not only did secrecy during Watergate facilitate such brazen abuses of power, once the scandal unfolded, President Nixon again employed secrecy, through his assertion of executive privilege, in an abortive strategy for preventing those abuses from coming to light. In urging greater openness in public affairs after Watergate, U.S. Supreme Court Chief Justice Earl Warren wrote in 1974, "[i]t would be difficult to name a more efficient ally of corruption than secrecy."[46]

Beyond Watergate, during the Twentieth Century, secrecy facilitated and hid a wide range of illegal executive conduct. The CIA figured

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42. Kitrosser, *Separated Powers*, *supra* note 20, at 526.

43. That is particularly true as a practical matter given that Congressional oversight over shallow secrets involving national security matters is often delayed, ineffective, or entirely lacking. *See* Serge Grossman & Michael Simon, Short Essay, *And Congress Shall Know the Truth: The Pressing Need for Restructuring Congressional Oversight of Intelligence*, 2 HARV. L. & POL'Y REV. 435 (2008); Samuel Brenner, *"I Am a Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight after My Lai and Abu Ghraib*, 205 MIL. L. REV. 1, 3–4 (2010) (arguing that congressional leaders after both the U.S. military's massacre at My Lai in Vietnam and the abuse of prisoners at Abu Ghraib "used their oversight functions to obscure the facts, hobble potential prosecutions of high military officials, and shuffle embarrassing episodes off the national and international stage as quickly as possible").

44. KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESIGATIONS OF THE CIA AND FBI 15 (1996) (arguing that Watergate "demonstrated that 'national security' claims could serve as veils for illegal activity").

45. *Freedom of Information, Executive Privilege, and Secrecy in Government: Hearings Before the Subcomms. on Admin. Practice & Procedure and Separation of Powers of the S. Comm. on the Judiciary & the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations*, 93d Cong., 209–10 (1973) [hereinafter *Executive Privilege*].

46. Earl Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550 (1974).

prominently in this history.[47] For example, only four months after President Nixon's resignation, the *New York Times* revealed that Nixon had utilized the CIA in secret, domestic intelligence operations that included the illegal wiretapping and surveillance of citizens.[48] The CIA targeted reporters and others whom the Administration feared would criticize executive policies or reveal executive secrets and deception.[49] In fact, after former military analyst Daniel Ellsberg leaked the classified Pentagon study about the Vietnam War later known as the *Pentagon Papers* to the media, President Nixon's White House "plumbers," aided by the CIA, broke into the office of Ellsberg's psychiatrist in an attempt to discredit him.[50]

The allegations of domestic CIA surveillance prompted the Senate Intelligence Committee, under the leadership of its Chair, Senator Frank Church, to investigate.[51] A simultaneous and steady stream of media revelations regarding additional CIA and FBI abuses led the Church Committee to expand its focus from domestic intelligence gathering under Nixon to include questionable executive branch activities committed during the four, previous presidential administrations.[52]

In a damning, multi-volume report, the Committee later found evidence that the CIA had plotted assassination attempts against foreign leaders, intervened to disrupt foreign elections in Chile, where the agency sought to ignite a coup,[53] subjected unconsenting human subjects to drug testing, and engaged in a variety of other criminal and unconstitutional acts.[54] The Church Committee further concluded that the CIA, FBI and NSA had engaged in widespread and illegal, covert surveillance activities aimed at

47. *See generally* TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA (2008).

48. *See* Seymour Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1 (describing the CIA's "massive, illegal domestic intelligence operation during the Nixon Administration against the antiwar movement and other dissident groups in the United States"); Weiner, *supra* note 47.

49. MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW (1977).

50. WEINER, *supra* note 47, at 378 (noting Howard Hunt's testimony implicating the CIA's "technical assistance" with the Plumbers' break-in). The break-in and other government misconduct undertaken in an effort to investigate and smear Ellsberg and his lawyers led to the dismissal of a criminal indictment against him for espionage, conspiracy and theft arising out of his leaking of the Pentagon Papers. *See* HALPERIN & HOFFMAN, *supra* note 49, at 13–14.

51. OLMSTED, *supra* note 44, at 81–82.

52. *Id.*; *see* CHURCH COMMITTEE REPORT, *supra* note 5, at Book II, 292.

53. Seymour Hersh, *CIA Chief Tells House of $8-Million Campaign Against Allende in '70–'73*, N.Y. TIMES, Sept. 8, 1974, at 1.

54. *See* CHURCH COMMITTEE REPORT, *supra* note 5.

domestic political organizations, religious groups, and individuals, including politicians, civil rights advocates, and anti-war protesters.[55]

Legally questionable covert activity by the intelligence agencies, and in particular by the CIA, continued well after the Church Committee completed its duties. For example, during the Iran-Contra Affair of the 1980s the Reagan White House secretly directed the CIA to provide aid to the Nicaraguan Contras through covert arms sales to Iran, in spite of an embargo on Iranian arms sales and Congress's restrictions on further funding of the Contras.[56]

One might respond to this historical snapshot by concluding that the CIA's mandate to engage in activity that is often secret by its very nature renders illicit conduct inevitable, expected, and perhaps even desired. Or, even more cynically, one might posit that the secrecy surrounding CIA activities stems from an unspoken mandate to engage in illicit conduct. As an army general with a hand in creating a precursor agency to the CIA concluded at the end of World War II: "Clandestine intelligence operations involve a constant breaking of all the rules . . . To put it baldly, such operations are necessarily extralegal and sometimes illegal."[57] More recently, others have noted the tension between the CIA's mandate to gather intelligence and legal accountability norms.[58]

But government institutions like the FBI and the military that lack the same deep culture of secrecy (and perhaps perceived exceptionalism) as the CIA have also embraced secrecy in the service of illegal secrets, suggesting something far more fundamental about the symbiotic relationship between secrecy and illegality in government.

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55. *Id.*, BOOK II, at 5–20. As documented in Tim Weiner's history of the CIA, subsequent disclosures have added to the information revealed by the Church Committee, demonstrating even further that the agency has engaged in a long history of illegal conduct. WEINER, *supra* note 47.

56. *See* LAWRENCE E. WALSH, IRAN-CONTRA: THE FINAL REPORT 199–309 (1994) (detailing the CIA's secret role in the Iran-Contra scandal). Commentators have also noted the role of secrecy in masking wrongdoing and frustrating accountability during the Iran-Contra scandal. *See* Dr. Anthony Simones, *The Iran-Contra Affair: Ten Years Later*, 67 UMKC L. REV. 61, 75 (1998) ("The conflict between secrecy and accountability permeated the Iran-Contra Affair."); *see also* Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra*, 91 COLUM. L. REV. 1651, 1654 (1991).

57. WEINER, *supra* note 47, at 13 (quoting letter of Brigadier General John Magruder).

58. *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 94 (2012) ("Democratic accountability for secret intelligence activities is one of the hardest problems in constitutional government because public debate and review of these activities are inconsistent with the intelligence mission."). Others have described this problem as being more about the agency's "culture" of secrecy and disengagement with concerns about legality than the nature of intelligence gathering itself. *See* CIVILIAN IMPACT OF DRONES, *supra* note 12, at 55–57 (asserting that concerns about illegality within the agency are limited to "avoiding liability and political fall-out").

As Christina Wells has noted in critiquing the FBI's history of misconduct in times of perceived crisis, secrecy and abuse of power often work hand-in-hand.[59] Citing the Church Committee's revelations regarding the FBI's questionable activities beginning after World War I through the 1970s, Wells persuasively contends that "the FBI's abuse of its intelligence-gathering power . . . could not have occurred without control of confidential and public information."[60]

The Executive has also improperly shielded legally questionable military action. For example, in 1969, President Nixon secretly ordered the bombing of Cambodia, a neutral nation, keeping most members of Congress and the public in the dark about the action for nearly three years.[61] The secrecy surrounding the operation was not borne of military necessity, but was designed to thwart public debate about escalating military operations in Vietnam and the very serious legal and diplomatic questions raised by the bombing of a neutral nation.[62]

Secrecy has also empowered the military to conceal war crimes and other abuses. For example, the notorious 1968 massacre at My Lai by U.S. troops of more than one-hundred unarmed, Vietnamese civilians, including women and children, remained a secret for more than a year after it occurred until a whistleblower broke the silence.[63] As concluded in a later report by the House Armed Services Subcommittee in 1970, "military and civilian officials in Vietnam had attempted to 'cover up' what had happened."[64] My Lai is not an isolated case; unfortunately there are both antecedent[65] and subsequent examples of the military suppressing information about war crimes.[66]

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59. Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 493–94 (2004).

60. *Id.* at 471–79, 493.

61. HALPERIN & HOFFMAN, *supra* note 49, at 14.

62. *Id.* at 14–19. Exacerbating this deception, while directing the secret bombings, the Nixon Administration simultaneously assured the American public that it was working to end the war in Vietnam. *Id.* at 16.

63. *See* Brenner, *supra* note 43, at 72.

64. *Id.* at 26 (citing Editorial, *House-Panel Says the Army Hampered Investigation Into Songmy Incident*, N.Y. TIMES, July 16, 1970, at 15); *see also Investigation of the My Lai Incident: Hearings of the Armed Services S. Comm. of the H. Comm. on Armed Services*, 91st Cong. 4 (1970), *available at* http://www.loc.gov/rr/frd/Military_Law/ML_investigation.html. Even after Congress and the military began to investigate the incident, some officials tried to obstruct the further release of information about it. Brenner, *supra* note 43, at 84.

65. *See, e.g.*, Tae-Ung Baik, *A War Crime Against an Ally's Civilians: The No Gun Ri Massacre*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2001) (examining massacre of more than one hundred South Korean refugees, including women and children, by U.S. soldiers during the Korean War that remained shrouded in secrecy for nearly fifty years).

66. Most recently, secrecy surrounded the abuse of prisoners at Abu Ghraib prison in Iraq until

After this bleak period of government mistakes and crimes committed under the cover of secrecy, a period of reform (and, for some institutions, self-examination) followed.[67] After My Lai, the U.S. military recognized the need for all members of the armed forces to respect and engage with the laws of armed conflict.[68] This resulted not only in more rigorous training regarding the military's legal obligations, but sparked a long-lasting institutional commitment to the principles and values of accountability.[69] The FBI similarly embraced a period of reform.[70] And during this period, the efforts to curb executive abuses and promote accountability took on government secrecy directly as well. On the heels of Watergate in 1974, Congress amended FOIA to require greater judicial oversight of government secrecy claims.[71]

Yet, in spite of secrecy and illegality's dangerous history, and notwithstanding these reforms, an entrenched system of secrecy in America has remained.[72] Indeed, even before 9-11, a secret government began to take shape once again.[73]

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whistleblowers leaked images of the abuse to the media in spring 2004. *See* Brenner, *supra* note 43, at 37–38. The government did its best to conceal the abuses from public view, and even after their exposure, some members of Congress attempted to limit public access to information about the scandal. ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 52–53, 84 (2006) (noting that the chairman of the House Armed Services Committee "successfully prevented committee members from requesting additional documents from the Bush Administration" regarding Abu Ghraib). *But see* GOLDSMITH, *supra* note 58, at 147–48 (making the case that accountability systems and the military's chain of command "kicked in" and largely worked after Abu Ghraib).

67. Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 299–300 (2012) (describing the creation of permanent congressional intelligence oversight committees and the enactment of FISA, among other examples of reform).

68. CIVILIAN IMPACT OF DRONES, *supra* note 12, at 52–53.

69. *Id.* at 51–52.

70. Seeking to avoid a repeat of the widespread constitutional violations documented by the Church Committee investigation President Carter enacted guidelines in 1976 designed to curb the FBI's domestic intelligence gathering activities. *See* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1208 (2004) (referencing the Levi Guidelines, reprinted in *F.B.I. Statutory Charter: Hearings on S. 1612 Before the S. Comm. on the Judiciary*, 95th Cong. 235–41 (1978)).

71. Martin E. Halstuk, *Holding the Spymasters Accountable after 9/11: A Proposed Model for CIA Disclosure Requirements under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT L.J. 79, 92 n.76 (2004) (quoting Sen. Ted Kennedy's statement during the hearings preceding the 1974 amendments to FOIA that the Watergate hearings "demonstrate[] beyond debate that government secrecy breeds government deceit") (quoting *Executive Privilege*, *supra* note 45, at 209–10).

72. MOYNIHAN, *supra* note 5, at 227 (concluding in 1998 that "[i]t is time to dismantle government secrecy, this most pervasive of Cold War-era regulations").

73. ROBERTS, *supra* note 66, at 36 (noting that prior to 9-11, "the process of rebuilding [the] walls of secrecy had begun").

C. Secrecy and Illegality: The Recent History

As commentators have widely acknowledged, after 9-11 secrecy in government reached another pinnacle;[74] the Bush Administration's relationship with secrecy displayed secrecy's full potential to both conceal and enable questionable policies and executive overreaching.[75] As numerous scholars have persuasively illustrated, the symbiotic relationship between secrecy and illegality during the Bush years manifested itself with respect to numerous secret programs—the questionable legality of which demanded their secret character.[76]

For example, secrecy was instrumental to the Bush Administration's secret warrantless wiretapping of U.S. citizens in contravention of FISA. The Administration argued that national security compelled the program's secrecy because oversight of its activities would have necessarily exposed the government's counterterrorism strategy.[77] Secrecy also helped define the Bush Administration's clandestine, extrajudicial transfer of terrorism suspects to foreign countries for the purpose of torture and interrogation[78] and its torture and detention of terrorism suspects at secret prisons abroad.[79] In each of these settings, secrecy empowered the government to elude legal constraints prohibiting such activities.[80] Indeed, the use of "black sites" for secret detention and interrogation during this period—a concept and physical structure defined by secrecy—epitomizes the exploitation of secrecy for unlawful ends.

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74. *See, e.g.*, Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1622 (2004); Nadine Strossen, *Maintaining Human Rights in Time of Terrorism: A Case Study in the Value of Legal Scholarship in Shaping Law and Public Policy*, 46 N.Y.L. SCH. L. REV. 373, 383–84 (2003).

75. *See, e.g.*, ROBERTS, *supra* note 66, at 69; Eric Lane et al., *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 767 (2010) ("It is difficult to summon a starker example of destructive policies enabled through the power of secrecy than those implemented by the Administration of George W. Bush.").

76. *See generally* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH (2004); John D. Podesta, *Shadow Creep: Government Secrecy Since 9/11*, 2002 U. ILL. J.L. TECH. & POL'Y 361.

77. *See* Kitrosser, *Macro-Transparency*, *supra* note 20, at 1199.

78. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1393 (2007) (describing perverse "incentive structure" at work in extraordinary rendition: "the sending country has an investment in the receiving country's abusive practices and both states want those abuses to remain secret").

79. *See* Bagchi, *supra* note 3, at 42–43.

80. *Id.* at 42–43 ("Secrecy makes it impossible for law to govern the torturing state . . . .").

The entrenchment and attraction of secrecy, of course, did not end with the Bush Administration. As other Presidents have done before him,[81] President Obama promised at the start of his first term as President a new era of openness in government.[82] But since that time, secrecy has continued to mask controversial and legally questionable national security policies.

The President has cloaked in secrecy the purported legal authority for killing U.S. citizens and others through unmanned drone strikes far from any battlefield abroad.[83] The Department of Justice has continued to invoke the state secrets privilege to defeat litigation challenging extraordinary rendition on behalf of individuals who claim they were tortured at the direction or with the acquiescence of the United States and in litigation challenging the targeted killing of U.S. citizens abroad.[84] Moreover, in spite of the reforms of the 1970s, the FBI is again covertly collecting intelligence through domestic operations that implicate protected First Amendment activities, including the surveillance and

81. HALPERIN & HOFFMAN, *supra* note 49, at 4 (noting that "Lyndon Johnson and Gerald Ford, to name just two" came into office committed to a more open system but ended up "leading the nation into foreign adventures, vetoing or threatening to veto antisecrecy legislation, and condemning leaks of information they sought to keep secret").

82. *See* President Barrack Obama, *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies*, WHITEHOUSE.GOV (Jan. 21, 2009) [hereinafter *Transparency Memo*], http://www.whitehouse.gov/the_press_office/TransparencyandOpen Government (pledging in a directive to the heads of executive branch agencies to create "an unprecedented level of openness in Government"). It is not unusual for Presidents to promise openness at the start of their terms, and it is not uncommon for them to break those promises. *See* Lane et al., *supra* note 75, at 737 n.4 (noting similar inaugural pronouncements by Presidents Nixon and Ford).

83. Scott Shane, *Renewing a Debate Over Secrecy, and Its Costs*, N.Y. TIMES, June 7, 2012, at A1, *available at* http://www.nytimes.com/2012/06/07/world/americas/drones-and-cyberattacks-renew-debate-over-security.html; Jameel Jaffer & Nathan Freed Wessler, *The C.I.A.'s Misuse of Secrecy*, N.Y. TIMES (Apr. 29, 2012) (op-ed), *available at* http://www.nytimes.com/2012/04/30/opinion/the-cias-misuse-of-secrecy.html. Jaffer and Wessler note that the Obama Administration has publically defended the controversial use of drone strikes as "effective, lawful and closely supervised," while at the same time in court, the CIA refuses "to acknowledge that the targeted killing program exists." *Id.* Indeed, until it proved strategically advantageous to leak and then officially release it, the Administration had long concealed an Office of Legal Counsel ("OLC") white paper summarizing the Administration's legal justification for its targeted killing of U.S. citizens abroad, even though the document was unclassified. *See* Steven Aftergood, *DOJ White Paper Released as a Matter of "Discretion,"* FAS.ORG (Feb. 11, 2013), http://www.fas.org/blogs/secrecy/2013/02/leak_boosts/ (noting that the DOJ released the OLC White Paper on targeted killing to FOIA requesters several days after it was leaked, after having fought the unclassified documents disclosure in FOIA litigation).

84. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); Brief for Defendants in Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 43, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469), *available at* http://www.lawfareblog.com/wp-content/uploads/2010/09/usgbrief.pdf.

infiltration of mosques with undercover informants.[85] And secrecy remains the government's response to challenges of such programs' legality.[86] Indeed, in many of these contexts, the government has claimed expansive authority to conceal information from the public.[87]

The recent disclosures of the NSA's massive, domestic surveillance program have sparked a recommitment to transparency among many government officials—at least on a rhetorical level—and some momentum toward reform.[88] Yet, given its pervasive scope,[89] secrecy under the Obama Presidency may be difficult to disengage.[90]

Indeed, as the press has widely reported, the Obama Administration has prosecuted more government employees for releasing information to the public under the Espionage Act than the four previous Administrations combined.[91] Critics contend that the Administration has aggressively

85. *See* EMILY BERMAN, BRENNAN CTR. FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 2, 4, 29, 35 (2011), *available at* http://brennan.3cdn.net/b80aa0bab0b425857d_jdm6b8776.pdf.

86. Hamed Aleaziz, *Want to Sue the FBI for Spying on Your Mosque? Sorry, That's Secret*, MOTHER JONES (Aug. 8, 2011, 6:00 AM), http://www.motherjones.com/politics/2011/08/state-secrets-fazaga-v-fbi (reporting that President Obama's Justice Department invoked the state secrets privilege to defend against litigation by the ACLU and the Council on American-Islamic Relations (CAIR) challenging the FBI's intelligence-gathering activities targeting Muslim Americans, particularly the use of undercover informants and surveillance). For a thorough, recent explanation of the frequency and nature of the Executive's invocation of the state secret privilege, see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

87. *See* Jaffer & Wessler, *supra* note 83 (critiquing the government's *Glomar* response to the ACLU's FOIA request about the CIA's targeted killing program); Aleaziz, *supra* note 86 (noting the exceptional nature of the DOJ invoking the state secrets privilege to conceal the FBI's domestic surveillance of Americans); Jewel v. NSA, 965 F. Supp. 2d 1090 (N.D. Cal. 2013) (rejecting government's attempt to invoke the state secrets privilege in defending challenge to NSA's dragnet surveillance of Americans' communication records).

88. *See* Ellen Nakashima, *NSA Bills Set up a Choice in Congress: End Bulk Collection of Phone Records or Endorse It*, WASH. POST (Oct. 28, 2013), http://washingtonpost.com/world/national-security/nsa-bills-set-up-a-choice-in-congress-and-bulk-collection-of-phone-records-or-endorse-it/2013/10/28/99007880-3fd5-11e3-a75-f032898f2dbc_story.html.

89. Jaffer, *supra* note 24, at 460 (suggesting that "[w]e live in an era of unprecedented government secrecy" in terms of the quality of the information concealed and "the means government uses to safeguard them").

90. *See* Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 400–01 (2009) (noting that "[c]oncerns about excessive government secrecy have accompanied the national security classification system for decades" but that in recent years "classification—specifically overclassification—has increased, not diminished"); Dana Priest & William M. Arkin, *Top Secret America: 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/ (detailing the widespread, secret, domestic national security apparatus); *see also* Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901 (2008) (describing the federal government's secret reliance upon private actors to deliver vast amounts of intelligence information).

91. Phil Mattingly & Hans Nichols, *Obama Pursuing Leakers Sends Warning to Whistle-Blowers*, BLOOMBERG NEWS (Oct. 17, 2012, 8:01 PM), http://www.bloomberg.com/news/2012-10-

identified and punished those who have leaked information about illegal (or at least legally questionable) government conduct, while it has shown no interest whatsoever in punishing or even exposing the underlying illegal conduct itself.[92]

At the same time, the complexity of the modern national security state makes holding government accountable particularly difficult. For example, in counterterrorism operations abroad (including targeted drone strikes) the duties of the conventional military and intelligence agencies have increasingly converged,[93] blurring responsibility for violations of law.[94]

These developments illustrate that the problem of illegal secrets is a prominent and complex one that warrants meaningful scholarly attention and more serious consideration by the courts.

II. CONCEPTUALIZING THE PROBLEM OF ILLEGAL SECRETS

The recent literature analyzing government secrets has largely theorized secrets' structural characteristics, particularly whether they are deep or shallow secrets and thus capable of providing opportunities for checks on executive conduct by both the citizenry and other branches of government.[95] This scholarship makes an important contribution to the greater understanding of government secrecy within the constitutional order, and in particular helps provide greater understanding of the threats

18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html; Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO (May 25, 2010, 4:44 AM), http://www.politico.com/news/stories/0510/ 37721.html (quoting Steven Aftergood of the Federation of American Scientists: "They're going after this at every opportunity and with unmatched vigor").

92. *See* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 576–78; Tim Shorrock, *Obama's Crackdown on Whistleblowers*, THE NATION (Mar. 26, 2013), http://www.thenation.com/article/173521/obamas-crackdown-whistleblowers; *see also* Scott Horton, *The DOJ's Torturer-Protection Program*, HARPER'S MAGAZINE (Jan. 11, 2013, 3:28 PM), http://www.harpers.org/blog/2013/01/the-dojs-torturer-protection-program/ (describing prosecution of former CIA agent John Kirakou for releasing details about CIA torture program and describing it as "confirmation of an official policy . . . those who rat on torturers and program masterminds will be treated ruthlessly"); Scott Shane, *From Spy to Source to Convict*, N.Y. TIMES, Jan. 6, 2013, at A1, *available at* http://www.nytimes.com/2013/1/06/us/former-cia-officer-is-the-first-to-face-prison-for-a-classified-leak.html.

93. *See generally* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539 (2012).

94. *See id.*; *see also* CIVILIAN IMPACT OF DRONES, *supra* note 12 (criticizing the secret cooperation between the military's Joint Special Operations Command (JSOC) and the CIA in carrying out drone strikes abroad, specifically the blurring lines of authority, accountability, and responsibility to mitigate civilian harm).

95. *See* Pozen, *supra* note 19. For a discussion a sustained discussion of the concept of "macro transparency," see the multiple works of Heidi Kitrosser, *supra* note 20.

to democracy posed by deep secrecy.[96] But shallow secrets that conceal illegal, and potentially illegal, conduct by the Executive also powerfully undermine opportunities for government accountability. Irrespective of the depth of secrecy at issue, whether the government should be permitted to keep its illegal action secret warrants more serious scholarly and judicial consideration.

That question requires consideration of what exactly is encompassed within the realm of illegal secrets as well as how the public, deprived of information about even shallow government secrets, can establish or discern an underlying violation of law. But first, the symbolic worth of labeling certain government secrets illegal secrets warrants preliminary discussion.

The concept of an illegal secret fittingly connotes the corrupt and anti-democratic nature of secret government wrongdoing. The term identifies and names the long-standing symbiotic relationship between government secrecy and the abuse of power, whereby secrecy can both enable lawlessness and is all too easily embraced after the fact when government actors violate the law.[97] The idea of an illegal secret also evokes the immorality of government abuse such as torture that exploits secrecy and can inflict more suffering because of it.[98] Evocation of this broader, and perhaps even colloquial, conception of illegality, captures the pernicious nature of the government concealing from the public information relevant to its own wrongdoing in the same way the terms "illegal settlements" or "illegal alien" arguably convey a host of pejorative meaning beyond the fact of an individual's technical violation of the law.[99]

Although the symbolic message of the term "illegal secret" helps conceptualize the danger presented by the prospect of secretive

96. *See supra* note 19 & 20. Pozen sees value in distinguishing between deep and shallow secrets irrespective of their "subject matter," and seeks to provide "a vocabulary and an analytic framework with which to describe, assess, and compare secrets, without having to judge what they conceal." Pozen, *supra* note 19, at 257. But he also recognizes the limits of the distinction he proposes. *See id*. at 276 ("Some shallow secrets may be highly problematic on account of their subject. Some deep secrets may be benign. . . . Appreciating the deep/shallow distinction may help clarify the normative questions raised by any particular secret. It cannot in itself answer them.").

97. *See* BOK, *supra* note 2; Schlesinger, *supra* note 2.

98. *See supra* note 3 and accompanying text.

99. Irus Braverman, *Powers of Illegality: House Demolitions and Resistance in East Jerusalem*, 32 LAW & SOC. INQUIRY 333, 342 (2007) (discussing so-called "illegal settlements" in East Jerusalem and suggesting that illegality exists as "a significant structuring device in its own right") (citing DAVINA COOPER, POWER IN STRUGGLE: FEMINISM, SEXUALITY AND THE STATE (1995)); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 177 (1996); Liliana M. Garcés, Note, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1039–40 (1998).

government wrongdoing, invoking the term alone cannot, of course, resolve which government secrets should be disclosed. Whether the law should compel disclosure of what I term illegal secrets requires a substantive consideration of whether government institutions or actors have violated the constitution, acted in defiance of statutes, or violated applicable international treaties and norms. Classifying secrets that conceal such presumptively unlawful conduct as illegal secrets is on the one hand straightforward. Yet, even this category of illegal secrets can be difficult to discern given that the parties to an information access dispute and members of the public more broadly may not have access to information that would permit them to establish that what the government has done in secret violates the law.

Identifying illegal secrets can be difficult for a host of other reasons, as well. For example, although the general factual picture of secret government action may be publically known—like the targeting killing of U.S. citizens abroad—the conduct at issue may not have been established as unlawful or the question of its legality—like that of the NSA's bulk collection of Americans' phone records—may be the subject of debate or disagreement within the courts.[100] Moreover, the secret at issue may be susceptible to claims by the Executive, particularly in the realm of national security policy, that the President possesses unilateral constitutional authority as Commander in Chief to engage in such conduct irrespective of statutory restraints imposed by Congress or international law.[101] And still, even where the threshold question of illegality is established, some, including the government, will invariably contend that national security priorities nevertheless justify keeping illegal secrets in the dark. Assessing government secrecy through the frame of illegality also raises the problem of whether information access disputes such as FOIA litigation are appropriate vehicles for examining the lawfulness of government action.

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100. Klayman v. Obama, 957 F. Supp. 2d 1 (2013) (enjoining the NSA's warrantless collection of bulk telephone metadata after finding that it likely violates the Fourth Amendment); ACLU v. Clapper, 959 F. Supp. 2d 724 (2013) (upholding the constitutionality of the very same program).

101. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 706 (2008) (describing the consistent claim by Bush Administration lawyers that the President, as Commander in Chief, possesses "a right to act in defiance of congressional limitations in a range of areas" including those applicable to detention and interrogation policy). John Yoo, for example, has argued that because "[w]ar's unpredictability can demand decisive and often secret action," the Framers intended to create "an executive with its own independent powers to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws." JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 112, 119–20 (2006).

All of these considerations illuminate the persistent, yet under-theorized, problem of illegal secrets—which the law and literature addressed to government transparency have far too long ignored. This Article contends that although identifying and assessing illegal secrets can be difficult, given the consequences for democratic accountability, the challenge does not justify the status quo: allowing the government by default to keep illegal action secret by deeming the illegality of conduct concealed by secrecy irrelevant to the merits of disclosure.[102] In Part VI, I revisit these quandaries and propose some initial interventions to move forward the law's engagement with illegal secrets. But first I present what may be intuitive, but is by no means well-established: the numerous reasons why in a democracy the law must be wary of illegal secrets and better interrogate government claims that it is entitled to withhold such secrets from the public.

III. THE DANGERS OF ILLEGAL SECRETS DEFINED

A. The Transparency Rationales

Nearly all of the long-standing rationales justifying transparency in government as a general matter reflect concerns about the aggregation of executive power and the concealing of official misconduct—acute dangers when the state possesses illegal secrets. For example, one of the leading arguments for transparency in government is the notion that without the checks of dissenters, the scrutiny of critics, as well as the self-regulation imposed by the awareness of outsiders' critical gaze, secrecy leads to bad decision-making.[103]

Numerous commentators have made this critique from an historical perspective, including, most notably, late sociologist and Senator Daniel Patrick Moynihan.[104] In his book devoted to the subject of secrecy, Moynihan methodically chronicled how excessive secrecy during the Cold War made possible the abuses of the McCarthy Era[105] and led to serious miscalculations of the Soviet threat, depriving the United States of an enlightened foreign policy and resulting in the misallocation of valuable

102. *See* Wizner, *supra* note 16.

103. Kitrosser, *Separated Powers*, *supra* note 20, at 537 ("[c]ountless scholars, journalists, legislators, and executive branch officials have noted secrecy's judgment-clouding and security-hindering effects in relation to historic and current events.").

104. MOYNIHAN, *supra* note 5.

105. *See id.*; *see also* EDWARD A. SHILS, THE TORMENT OF SECRECY: THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLICIES (1956).

resources.[106] Others have similarly recounted how secrecy degraded the quality of U.S. policymaking during the Vietnam era.[107] Several more recent assessments of government mistakes made under the cover of secrecy, including the intelligence failures preceding 9-11,[108] have embraced this reasoning as well.

Part of this rationale rests upon concerns about the corrupting influence of groupthink—the tendency of isolated groups to seek consensus without critically testing ideas through opposing viewpoints.[109] In contrast, officials' awareness of public scrutiny and the prospect of accountability, so the theory goes, can encourage more well-reasoned and just outcomes.[110] This justification for government transparency has obvious relevance for illegal secrets. The public scrutiny and accountability occasioned by transparency can deter government actors from pursuing unlawful actions.

Another widely recognized rationale for transparency is government officials' tendency to exploit secrecy to multiply individual or agency

106. *See* MOYNIHAN, *supra* note 5.

107. *See generally* STEVEN L. KATZ, GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY 11–27 (1987); HALPERIN & HOFFMAN, *supra* note 49, at 3, 7–10 (describing foreign policy "debacles" during this period).

108. Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq, S. REP. NO. 108-301, at 18 (2004), *available at* http://www.intelligence.senate.gov/108301.pdf (concluding that excessive secrecy and lack of outside scrutiny adversely effected the CIA's assessment of weapons of mass destruction in pre-war Iraq); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 138 (2006) (discussing 9-11 Commission's finding that publicity regarding the arrest of Zacarias Moussaoui, the so-called 20th 9-11 highjacker could have allowed greater coordination among counterterrorism agencies and more proactive intelligence efforts) (citing NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 247, 276 (2004)); Aftergood, *supra* note 90, at 400 (quoting Congressional testimony of former Justice Department official Jack L. Goldsmith: "There's no doubt that the extreme secrecy [associated with the Bush Administration's Terrorist Surveillance Program] . . . led to a lot of mistakes").

109. *See* Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 236, 242 (2008) ("Isolating the President and his advisors from public scrutiny helps to induce groupthink conditions at the outset and to exacerbate consensus-seeking tendencies once established.") (citing Marlene E. Turner & Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory and Research: Lessons from the Evaluation of a Theory*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 105, 106 (1998); IRVING L. JANIS, GROUPTHINK 7–9 (2d ed. 1982); IRVING L. JANIS, VICTIMS OF GROUPTHINK 3–9 (1972)).

110. *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL L. REV. 1339, 1352 (noting that Jeremy Bentham recognized "the more strictly we are watched, the better we behave") (citing JEREMY BENTHAM, FARMING DEFENDED, IN 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., Oxford Univ. Press 2001) (1796)); Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 629–30 (2010) ("Psychological research on accountability reveals that individuals who believe they will be held accountable generally reach better-reasoned decisions.") (citing Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999)); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 668–72 (2010).

power.[111] As Moynihan argued, the more information officials conceal or restrict, the more power they wield.[112] Conversely, the more powerful an official becomes, the more dependent she becomes upon secrecy—or, at the very least, the more entitled to secrecy she perceives herself to be.[113] Max Weber famously noted that the same is true of organizations, which tend to amass power by acquiring secrets.[114]

Concerns about illegal secrets are of great consequence with respect to this power-enhancing rationale too. The power that flows from the ability to keep secrets includes a greater ability to conceal one's excesses and abuse of that power.[115] This danger is not simply about the opportunities for abuse; there is also a danger in the message that secrecy sends. Freedom from scrutiny suggests to secret holders that they possess unchecked power, perhaps suggesting that they are beyond reproach, or worse, above the law.

Scholars and public officials also frequently argue that government secrecy breeds the public's distrust and degrades democracy by fomenting cynicism about government.[116] As one scholar has noted, "secrecy operates to alienate—to create subjective distance between—the secret keeper and the one from whom the secret is kept."[117] In the public sphere, this distancing damages democracy not only by putting more unchecked power in the hands of government officials, but also by increasing citizen skepticism and apathy about public affairs. As the Judiciary Committee Report accompanying the Freedom of Information Act noted,

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111. Pozen, *supra* note 19, at 278; MOYNIHAN, *supra* note 5, at 73 ("Secrets become organizational assets, never to be shared save in exchange for another organization's assets.").

112. MOYNIHAN, *supra* note 5, at 169.

113. Wetlaufer, *supra* note 2, at 885 (stating that "information, and the control over its flow, is power").

114. Wetlaufer, *supra* note 2, at 885–86 (citing MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H. Gerth & C. Mills eds. 1946), quoted in B. LADD, CRISIS IN CREDIBILITY 216–17 (1968)).

115. *See* Schlesinger, *supra* note 2, *at* 13 (describing secrecy as "a source of power and an efficient way of covering up the embarrassments, blunders, follies and crimes of the ruling regime"); DAVID WISE & THOMAS B. ROSS, THE INVISIBLE GOVERNMENT 224 (1964) (describing how U.S. intelligence agencies' power to engage in covert actions insulates such agencies from outside scrutiny of whether such activities are "necessary or even legal").

116. *See* Wetlaufer, *supra* note 2, at 886; Pozen, *supra* note 19, at 279. As Sen. John McCain stated in 2003: "Excessive administration secrecy . . . feeds conspiracy theories and reduces the public's confidence in government." Michelle Mittelstadt, *Senators Fault Secrecy in Sept. 11 Probes*, Dallas Morning News, May 23, 2003. President Richard Nixon similarly noted in 1972: "When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies." 37 Fed. Reg., vol. 37, no. 48 (Mar. 10, 1972), *available at* http://www.fas.org/irp/offdocs/eo/eo-11652.htm.

117. Wetlaufer, *supra* note 2, at 886.

"government by secrecy . . . breeds mistrust, dampens the fervor of its citizens and mocks their loyalty."[118]

Illegal secrets present a particularly acute danger to democratic government under this rationale as well. Such secrets confirm the worst suspicions of the public: that government officials operate under another set of rules and that government officials are inclined to deceive. For this reason, contrary to prevailing wisdom, shallow secrets can, as a practical matter, be just as dangerous as deep secrets. Shallow secrets concealing illegal or potentially illegal government conduct have the capacity to powerfully induce public apathy and cynicism at the expense of democratic participation. The public's awareness that the government is withholding information about its potential wrongdoing, often with the sanction of deferential courts, can induce a sense of apathy about the public's capacity to exercise meaningful checks on government wrongdoing.

Some scholars, however, have expressed skepticism of the capacity of transparency norms under any circumstances to produce an informed and engaged citizenry capable of holding the governors accountable.[119] These concerns are amplified when the disclosure of significant information about government misconduct is met with citizen inaction or apathy—as one might fairly characterize, for example, the prevailing public reaction to disclosures of illegal secrets involving CIA torture.[120] But disclosure of government misdeeds need not provoke immediate and responsive public action in order to serve democratic ends.

As Seth Kreimer and others have persuasively argued, the disclosure of government information to the public fosters democratic participation and

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118. S. REP. NO. 813, at 45 (1965), *available at* http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/S.%20Rep.%20No.%2089-813%20(1966%20Source%20Book).pdf; *see also* Richard Gid Powers, *Introduction* to MOYNIHAN, *supra* note 5, at 58 ("What secrecy grants in the short run—public support for government policies—in the long run it takes away, as official secrecy gives rise to fantasies that corrode belief in the possibilities of democratic government.").

119. Charles H. Koch, Jr. & Barry R. Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 33 ("[E]ducating the citizenry about the functions of government is a very idealistic and probably unattainable goal."); Mark Fenster, *Disclosure's Effects: Wikileaks and Transparency*, 97 IOWA L. REV. 753, 801, 807 (2012) (suggesting that the lack of a "discernible movement to change existing military engagements or foreign policy in the period following the WikiLeaks disclosures" discredits the assumption underlying transparency norms that disclosure of government information will "necessarily transform the United States or any Western democracy into a model of popular deliberation, participatory decision making, and perfect governance").

120. *See* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014–15 (2008) (noting that critics have "lamented that even where FOIA requests disclose abuses, disclosures have scant impact; revelation has not been followed by repudiation").

accountability through "gradual and cumulative momentum" which over time can catalyze responses to government overreaching and ultimately effect change.[121] The argument for transparency in this regard is not that discrete disclosures result in public knowledge that then translates into specific acts of citizen-driven accountability directed at particular state action, though that certainly can occur and is a positive outcome when it does. The point is broader—for the public to believe in its own power within democracy, secrecy, and in particular illegal secrets, must be kept to a minimum.

B. Authoritative Visions of Truth

In addition to the long-standing rationales justifying transparency in government, additional reasons in the realm of shallow secrets warrant particular skepticism of government claims that it may conceal whether it has violated the law. In 1979, Justice William Brennan described in his dissenting opinion in *Herbert v. Lando*[122] the ways in which the First Amendment "foster[s] the values of democratic self-government." In doing so, he made an important observation: "[t]he First Amendment bars the state from imposing upon its citizens an authoritative vision of truth."[123] The question in *Herbert* involved defamation and Justice Brennan's characterization described the public's role in sifting out truth from falsehood.[124] But this language also aptly captures a danger posed by government information control when illegal secrets are at issue—the risk that government will manipulate both secrecy and leaking to perpetuate a distorted view of the State.

Government officials regularly attempt to control the public narrative regarding contested and controversial national security policy—whether detention and interrogation policy, the use of unmanned drones to target and kill suspected terrorists abroad, or the NSA's massive, warrantless, electronic surveillance program—by successfully resisting disclosure of information to the public with the sanction of deferential courts.[125] But at the same time, the government sculpts public knowledge about these very same activities through strategic leaks of classified information.[126]

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121. *Id.* at 1064; Schauer, *supra* note 110, at 1344–45.

122. Herbert v. Lando, 441 U.S. 153, 184 (1979) (Brennan, J., dissenting in part).

123. *Id.*

124. *Id.* at 184–85.

125. *See infra* Part V.

126. As others have noted, however, the role of government leaking in democracy is complex and can serve a variety of goals and produce a variety of outcomes including some arguably healthy for

To impose an "authoritative vision of truth," the government regularly attempts to quash dissent and discourage the dissemination of information inconsistent with its message. To accomplish this end, it has selectively punished unauthorized disclosures of government information through aggressive prosecutions of government leakers under the Espionage Act.[127] It has also selectively enforced agencies' pre-publication review rules[128] as a way of thwarting former government employees from publicly revealing information that is inconsistent with the government's official account of its policies or actions.[129]

These forms of information control invariably privilege government-controlled narratives regarding executive misconduct and abuse,

democracy. *See, e.g.*, Affidavit of Max Frankel, United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), *available at* http://www.pbs.org/wgbh/pages/frontline/newswar/part1/frankel.html (affidavit filed by New York Times Washington Bureau Chief Max Frankel in the Pentagon Papers case contending that absent leaking, "there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people"); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 476, 469–83 (2006) (contending that though leaks play a role in political maneuvering and manipulation, they also help "facilitate governance by supplementing the formal channels of organizational and inter-organizational communication" allowing government officials to bypass political obstacles that may make internal communication networks inadequate and permitting whistleblowers to serve an important and valuable checking function when internal communication and accountability mechanisms fail); *see also* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

127. *See* Mattingly & Nichols, *supra* note 91.

128. Pre-publication review is the process by which the CIA, as well as other intelligence agencies, require employees to sign employment contracts requiring them to seek formal agency approval prior to writing books, op-eds, or other public accounts of their government service. John Hollister Hedley, *Reviewing the Work of CIA Authors: Secrets, Free Speech, and Fig Leaves* (May 8, 2007, 8:56 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/docs/v41i3a01p.htm.

129. As Justice Stevens noted in his dissent in *Snepp v. United States*, a case in which the Supreme Court enforced a CIA prepublication review agreement against a former agent, such agreements are ripe for abuse. 444 U.S. 507, 526 (1980) (Stevens, J., dissenting). Justice Stevens noted the inherent risk "that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy." *Id.* This form of government information control has received substantial deference from the courts. *See id.* at 510 (imposing penalties for former CIA agent's violation of pre-publication review agreement even where the government conceded "that Snepp's book divulged no classified intelligence"); United States v. Marchetti, 466 F.2d 1309, (4th Cir. 1972) (holding that enforcement of a CIA prepublication review and secrecy agreement against former agent was not a prior restraint that violated the First Amendment), *cert. denied*, 409 U.S. 1063 (1972). As a result, the government has been allowed to shape public debate about both patently illegal and possibly illegal government activities by carefully controlling public knowledge. *See* Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of Wikileaks*, 34 HASTINGS COMM. & ENT. L.J. 27, 38, 36–43 (2011) (citing cases illustrating "the risk of abuse by the reviewing agency" noted by Justice Stevens in *Snepp*).

suggesting, for example, that waterboarding and other abusive interrogation tactics effectively thwarted terrorist attacks,[130] that drone strikes effectively target individuals posing an imminent threat to the United States with precision and little injury to innocents,[131] and that the collection of mass amounts of electronic data from Americans has kept the country and world safe from terrorists.[132] At the same time, the government denies the public facts from which the legitimacy of such claims and the legality of the government's action can be fully assessed.[133]

Courts grappling with government secrecy and transparency obligations generally have not fully accounted for the Executive's dissemination of an authoritative vision of the truth. The district court that decided the *Citizen Drone Strike Case* at least recognized the problem.

In a decision allowing the government to keep secret the purported legal justification for the targeted killing program, the court described the government's public statements and strategic releases of information about the secret program as a "relentless public relations campaign" to convince the public of the program's legality.[134] Yet, still, the Court did not order the government to publicly release any information that would allow the

130. Critics contend that Justice Stevens' concerns in *Snepp* have been borne out by recent CIA manipulation of the prepublication review process to restrict publication of critical accounts of CIA interrogation policy, while allowing agency supporters to speak freely in defense of agency tactics. *See* Steven Aftergood, *Pre-Publication Review as a Secrecy Battleground*, SECRECY NEWS, FAS.ORG (Nov. 16, 2011), http://www.fas.org/blogs/secrecy/2011/11/prepub_review.html; Davidson, *supra* note 129, at 38.

131. CIVILIAN IMPACT OF DRONES, *supra* note 12, at 59.

132. *See* Spencer Ackerman, *NSA Chief Claims 'Focused' Surveillance Disrupted More Than 50 Terror Plots*, THE GUARDIAN (June 18, 2013), http://www.theguardian.com/world/2013/jun/18/nsa-surveillance-limited-focused-hearing; Justin Elliott & Theodoric Meyer, *Claim on "Attacks Thwarted" by NSA Spreads Despite Lack of Evidence*, PROPUBLICA (Oct. 23, 2013, 8:59 AM), http://www.propublica.org/ article/claim-on-attacks-thwarted-by-nsa-spreads-despite-lack-of-evidence.

133. Governments' self-serving manipulation of the historical record is a theme often discussed in the literature on accountability for human rights violations and post-conflict transitions. *See* COHEN, *supra* note 4; Brian F. Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605, 607–08 (2005) (arguing that government elites construct official, inauthentic public memories of historical events through "public law devices and statements of official policy" that result in a "contrived ideological account of the past" that "mask[s] contestations of that account"). In critiquing state secrecy from a broader perspective, scholars have acknowledged the Executive's selective leaking of classified information for strategic gain. *See, e.g.*, Kitrosser, *Supremely Opaque*, *supra* note 20, at 108; Henkin, *supra* note 25, at 278; Wells, *supra* note 59, at 494. Kitrosser, in particular, has cited the "skewing effect on public discourse" of "the executive [having] free reign not only to classify and selectively disclose information, but to prosecute classified information leaks and publications when it sees fit[.]" *See* Heidi Kitrosser, *What if Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89, 109 (2011). Yet, the frequent role of illegal secrets in this process and the resulting impact on accountability have not been fully explored.

134. N.Y. Times v. DOJ, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2012).

public to evaluate for itself the legitimacy of the government's claims or the lawfulness of its actions.

This is deeply problematic. How the government identifies targets and evaluates the imminence of the danger they pose, as well as whether the government adequately considers alternative means of neutralizing threats and takes adequate precautions to limit civilian harm are all relevant to determining whether such uses of force comply with the Due Process Clause of the Constitution and the laws of war.[135] Thus, although targeted killing by the United States is a shallow secret, the public can not fully assess the truth about the program,[136] a significant threat to democratic accountability.

By manipulating public opinion, the perpetuation of the government's preferred account regarding controversial national security policies and actions also poses potential damage to important legal norms, such as the absolute prohibition on torture[137]—the force of which depends upon state and public recognition of such rules as non-derogable.[138] In other words, the danger of illegal secrets is not simply about the merits of particular disclosures; even when shallow, such secrets can play a troubling role in a broader contest regarding the legality and indefeasibility of executive power.

C. Legitimizing Illegality

The literature and jurisprudence addressing state secrecy has also not fully accounted for the capacity of shallow secrets to provide an imprimatur of legitimacy to controversial and potentially illegal acts

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135. *See* CIVILIAN IMPACT OF DRONES, *supra* note 12, at 67, 75–77.

136. The belated release of an OLC white paper addressed to the targeted killing program in February 2013—which the Executive Branch long withheld from the public until it proved strategically advantageous to release it—actually raises more questions about the Executive's claimed secret killing power than it answers. Adam Serwer, *Obama Targeted Killing Document*: *If We Do It, It's Not Illegal*, MOTHER JONES (Feb. 5, 2013, 12:53 PM), http://www.motherjones.com/mojo/2013/02/obama-targeted-killing-white-paper-drone-strikes (noting after release of the white paper that the procedure by which the Obama Administration claims a single "well-informed high level administration official" can determine to put a U.S. citizen on a targeting killing list remains entirely secret, thus "it's impossible to know which rules the administration has established to protect due process and to determine how closely those rules are followed").

137. *See generally* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (examining absolute prohibition on torture).

138. *See* Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 418 (citing "short- and long-term consequences of illegality" as threats "to constitutional government and our democracy [and] law and order more generally").

shielded by state secrecy. This legitimizing potential of secrecy has both practical and symbolic characteristics.

As a practical matter, secrecy can immunize legally questionable executive conduct from public challenge and legal rebuke with repercussions for public perception and acceptance of the conduct concealed. As demonstrated by the post 9-11 litigation challenging extraordinary rendition,[139] warrantless wiretapping,[140] and the targeted killing of U.S. citizens abroad,[141] government secrecy claims have the capacity to extinguish legal challenges alleging government abuse and wrongdoing. By thwarting judicial review and simultaneously stymying the public's ability to see and check executive misconduct, secrecy allows potentially unlawful government conduct to continue without testing, and past wrongs to fade into history without public condemnation and accountability.[142]

Secrecy can, of course, increase the public's skepticism about government policies and tarnish an Executive's reputation irrespective of whether critics establish the illegality of the underlying conduct, as demonstrated by the public reaction to the rampant secrecy of the Bush Administration.[143] But even when public skepticism increases, secrecy may still operate to legitimatize illegal or legally questionable conduct by the government such as torture and extrajudicial killing. That is, when legally questionable government conduct surfaces enough that the public is aware of it while the government still obscures facts necessary to assess the legality and propriety of the conduct concealed, the public may perceive the government's actions as acceptable because they are beyond the reach of public inquiry or censure.

Behavioral research provides a basis for this concern. John Jost and other leading social psychologists have documented the strong tendency of individuals to "defend and justify the social status quo," which they

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139. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); El-Masri v. United States, 479 F.3d 296, 300, 304 (4th Cir. 2007).

140. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148 (2013) (holding that plaintiffs lacked standing to challenge the legality of the NSA's warrantless electronic surveillance program because they could not prove that they were actually subject to surveillance given the program's secrecy and because they did not show that they faced a "threatened injury" of surveillance in the future).

141. Al–Aulaqi v. Obama, 727 F. Supp. 2d 1, 11 (D.D.C. 2010) (noting government's invocation of the state secrets privilege in support of motion to dismiss challenge to placement of U.S. citizen on CIA "kill list," but dismissing case on standing and political questions grounds).

142. Chesney, *supra* note 17, at 1269 (arguing that the state secrets privilege has the practical effect of preventing courts from determining the legality of challenged executive conduct, denying courts the opportunity of "potentially intervening to prevent further unlawful conduct").

143. *See supra* notes 74–76.

characterize as "system justification theory" or "status quo bias."[144] While scholars and theorists often utilize system justification theory as a means of examining or explaining groups' acceptance of social inequality, a small number of studies have also addressed the effect in regard to public acceptance of government policies or political outcomes.[145]

Significantly, researchers have tested this theory in the context of torture and concluded that "[p]resenting torture as a status quo practice enhances its support and justifications" among the public.[146] The authors of that study explain that the results of their research show "the power and reach of describing actions as business as usual."[147] Further illustrating the power of the status quo, the extraordinary secrecy and strategic leaks surrounding the Obama Administration's targeted killing program have, in combination, helped garner extensive public support for the lethal targeting of terrorists,[148] even though the public has not had access to the full and official legal justification for the government's claimed killing power, nor to information related to the program's efficacy and human costs. Indeed, advocates have expressed concern that the public has already accepted the lethal targeting of suspected terrorists through drone strikes abroad as the norm.[149]

There is also reason to fear that excessive state secrecy helps to legitimize patently illegal conduct like torture. For example, recent polling research suggests that since 9-11, the American public has grown increasingly accepting of torture and receptive to arguments about its necessity in particular circumstances.[150] While it is difficult to know

144. *See, e.g.*, John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 912 (2004); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1160 (2006).

145. Blasi & Jost, *supra* note 144, at 1132–34, 1143 (describing study showing public support for eventual winner of an election increased once the candidate's success appeared likely and another study showing that students voiced greater opposition to maintaining all-Black colleges after the U.S. Supreme Court's decision in *Brown v. Board of Education* than prior).

146. *See* Christian S. Crandall, et al., *Status Quo Framing Increases Support for Torture*, 4 SOC. INFLUENCE 1, 6 (2009).

147. *Id.* at 6–7.

148. *See* CIVILIAN IMPACT OF DRONES, *supra* note 12, at 69–70.

149. *See id.*

150. *See* Jim Lobe, *U.S.: Poll Tracks Shifts in Public Attitudes Since 9/11*, INTER PRESS SERV. (Sept. 11, 2011), http://www.ipsnews.net/2011/09/us-poll-tracks-shifts-in-public-attitudes-since-9-11/; *Forcing Policy Attitudes Now Driven by 9/11 and Iraq: Eroding Respect for America Seen as Major Problem*, PEW RESEARCH CTR. (Aug. 18, 2004), http://www.people-press.org/2004/08/18/foreign-policy-attitudes-now-driven-by-911-and-iraq/; *Public Remains Divided Over Use of Torture*, PEW RESEARCH CTR. (Apr. 23, 2009), http://www.people-press.org/2009/04/23/public-remains-divided-over-use-of-torture/; *Ten Years After 9/11: United in Remembrance, Divided over Policies*, PEW

why—and many factors, including the widespread, permissive treatment of torture in popular culture may play a role in this development—the role of secrecy in allowing information about the United States' use of torture to remain hidden from the public, devoid of public condemnation and accountability, may well contribute to acceptance of the practice as the status quo.

In addition, but relatedly, as a symbolic matter, secrecy has the power to elevate the perceived importance of concealed information with the risk of bestowing unlawful state action with the appearance of legitimacy. As historian Luise White has argued, secrecy not only withholds information, it "valorize[s]" it.[151] White explains that secrets "signal that what has been declared secret . . . is more significant than other stories and other ways of telling."[152] Indeed, because of the aura and allure of secrecy, in classical times, many deemed state secrets as symbolic of a ruler's dignity and righteousness.[153]

This legitimization argument may seem counterintuitive. How can secrecy legitimize acts that are unknown because they are concealed? While it is true that secrecy's legitimizing potential would obviously not operate with respect to deep secrets, which the public does not know exist, the same is not true of shallow secrets. Secrecy can prevent the public from knowing the details of illegal secrets such as those involving torture, but although "[s]ecrecy and lies conceal, they camouflage . . . they certainly don't hide everything."[154] That is, when the government is accused of patently unlawful conduct, and its response is not an impassioned denial, but rather, "it's a secret," the practical effect may be that the public, knowing it does not have all the facts, still deduces that the government's policy must be important and valuable—or, at the least unassailable—because it is being kept secret.

Put another way, because secrecy is both reflective of power and operates as power, it has the potential to tip the scale in favor of the Executive with respect to normative judgments about the necessity, legitimacy, and desirability of the conduct concealed.[155] The legitimizing

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RESEARCH CTR. (Sept. 1, 2011), http://www.people-press.org/2011/09/01/united-in-remembrance-divided-over-policies/.

151. Luise White, *Telling More: Lies, Secrets, and History*, 39 HIST. & THEORY, Dec. 2000, at 11.

152. *Id.* at 15.

153. *See* HOFFMAN, *supra* note 35, at 11.

154. White, *supra* note 151, at 15.

155. *See* Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 11 (2006) (describing secrecy as the "mystification of

capacity of secrecy should produce great concern about the role of illegal secrets in our government.

D. The Case for Illegal Secrecy Examined

Though the justifications for secrecy are strong when certain national secrets are at issue, like those implicating military strategy, diplomacy, or the names of covert intelligence sources, the rationales lose force when illegal secrets are at issue. For example, a common justification for government secrecy is the foil to the "bad policy" rationale for transparency: the concern that over-exposure of government conduct to outside scrutiny degrades government deliberation and decision-making.[156] Scholars have critically examined the claim that the Executive needs secrecy in order to promote candid advice and discussion during internal deliberations, and there is reason to reserve judgment on whether confidentiality in fact produces better decisions.[157] At the same time, others have recognized—including the U.S. Supreme Court in *United States v. Nixon*,[158] when addressing executive privilege asserted to conceal recordings of the President's conversations—that in some contexts, public scrutiny might make it harder for well-meaning officials to do their jobs effectively.[159] In fact, members of the Founding Era generation embraced this view in defending the secret drafting of the Constitution.[160]

The problem with this rationale, however, is that its value varies depending upon whether the subject concerns secret government deliberation with law-abiding and legitimate ends or deliberation aimed at or tainted with lawlessness. Indeed, in other contexts, the law recognizes that the prospect of secrecy enabling or shielding illegality warrants an

power" or the act of deceiving others "into believing that a state which was chosen, and may be resisted, is actually natural and fixed").

156. *See* Pozen, *supra* note 19, at 277.

157. Lee, *supra* note 109, at 242 ("[I]t is simply unclear whether, or to what extent, confidentiality leads to better presidential decisions.").

158. United States v. Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process."). *But see* Lane et al., *supra* note 75, at 744 (critiquing the Court's reliance upon this rationale when recognizing executive privilege).

159. Schauer, *supra* note 110, at 1349–50, 1352 (citing the prospect of televised Supreme Court arguments as an example of transparency as "populism in its pejorative sense, creating a decision-making environment in which the lowest common denominator dimensions of widespread public involvement would cause bad arguments to drive out good ones").

160. *See* HOFFMAN, *supra* note 35, at 21 (quoting Alexander Hamilton as stating "[h]ad the deliberations been open while going on, the clamours of faction would have prevented any satisfactory result. Had they been afterwards disclosed, much food would have been afforded to inflammatory declamation").

exception to confidentiality norms otherwise premised upon the notion that confidentiality produces better deliberation.

For example, in the context of the attorney-client privilege, courts have long recognized secrecy's benefits, similarly acknowledging that confidentiality enhances the quality of deliberation by "encourage[ing] full and frank communication between attorneys and their clients" including about past wrongdoing.[161] Yet, courts have also recognized that the value of this rationale diminishes as a justification for secrecy "where the desired advice refers not to prior wrongdoing, but to future wrongdoing."[162] Indeed, the underlying rationale for the crime-fraud exception to that privilege is a concern that secrecy should not encourage or serve lawless ends.[163]

Similarly, even while recognizing secrecy's capacity to enhance Executive deliberation and extending considerable deference to a coordinate branch,[164] the Supreme Court in *Nixon* concluded that executive privilege must be qualified where the information sought to be exposed related to an active criminal prosecution.[165] Although the Court recognized the value of the deliberation rationale, it carried less weight when criminal conduct was at issue.[166]

Consistent with this doctrine, it may be appropriate to provide some measure of confidential space for internal government debate about how close to the line of illegality a considered course of action brings the Executive. Still, knowledge that the cover of secrecy might yield if officials cross that line or erroneously assess their actions to be lawful can

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161. I thank Professor Timothy Glynn for this observation. *See* United States v. Zolin, 491 U.S. 554, 562 (1989) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); *see also* 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 14 (2d ed. 1923) ("In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.") *But see* Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301 (2013) (examining the origins of the privilege and critiquing Wigmore's explanation).

162. *Zolin*, 491 U.S. at 562–63 (citing 8 WIGMORE, *supra* note 161, § 2298, at 573 (emphasis omitted)).

163. Spaulding, *supra* note 161, at 314–16 (describing how Wigmore's concern that the secrecy of attorney-client deliberation would provide cover for lawlessness provided the modern justification for the crime-fraud exception to that privilege).

164. United States v. Nixon, 418 U.S. 683, 715–16 (1974).

165. *Id.* at 707. The Court further noted that the information withheld did not relate to sensitive military or diplomatic matters. *Id.*

166. *Id.* at 712 (expressing doubt that advisers to the President would "be moved to temper the candor of their remarks by the infrequent occasions of disclosure . . . in the context of a criminal prosecution").

serve as a powerful deterrent. In the end, if colorable evidence exists that public officials have engaged in illegal conduct, absent a narrow set of paramount national security interests as discussed in Part VI, there is little justification for shielding such action from the public. The interest in democratic accountability in such cases outweighs the risk that executive officials might be less candid in their internal deliberations in the future.

Additionally, perhaps the most critical justification for state secrecy is the notion that our leaders must prevent the nation's enemies from accessing information that will undermine our safety and security.[167] This rationale is, of course, a legitimate basis for state secrets. Unfortunately, the government exploits the argument in order to conceal much beyond its legitimate security interests, including misconduct and illegality.[168] As discussed in Part VI, although the law must recognize that a superseding national security interest could warrant the protection of illegal secrets, the great challenge in better theorizing the relationship between secrecy and illegality is ensuring that this interest does not extinguish engagement with illegal secrets altogether. Arguably, that outcome is now the current state of the law. This Article later suggests a preliminary framework for ensuring that national security claims do not automatically supplant meaningful interrogation of the lawfulness of the government conduct concealed.

Another powerful justification for secrecy with important consequences for illegal secrets is the notion that secrecy is an aspect of inherent Executive power. For example, John Yoo, along with other prominent theorists,[169] has argued that because "[w]ar's unpredictability can demand decisive and often secret action," the Framers intended to create "an executive with its own independent powers to manage foreign affairs and address emergencies which, almost by definition, cannot be

167. *See generally* Laura A. White, Note, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071, 1078 (2003).

168. *See* Henkin, *supra* note 25, at 275–76; *See* Wells, *supra* note 110, at 635 ("The government's tendency to exaggerate national security harms posed by the release of information is well-documented."); Wells, *supra* note 59, at 452–61 (describing historical examples); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 92 (2008) ("The very case recognizing the 'state secrets' privilege was based on an executive impulse to conceal its own mistakes . . . ."); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 99 (2005) ("[I]t is now known that the goal of the government in claiming the privilege in [United States v. Reynolds, 345 U.S. 1 (1953), the first case to recognize the state secrets privilege] was to avoid liability and embarrassment.").

169. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 45, 47–48 (2007).

addressed by existing laws."[170] Under this conception of robust executive power, the Executive's decision to circumvent law in order to protect the nation from threats to national security is necessary, desirable, and above all, legal.[171] This school of thought argues that the Executive has exclusive authority to balance national security with civil liberties in times of crisis and that the judiciary must defer to the Executive's judgments in this area.[172] With respect to secrecy, such conceptions of executive power would suggest either that the Executive is constitutionally justified in holding illegal secrets from the public or that a secret is not an illegal secret because the concealed conduct is lawful when carried out pursuant to the Executive's exclusive authority as commander in chief.[173]

A persuasive body of literature has critiqued such theories about exclusivist executive power on their own terms,[174] and I will not revisit those debates here, except to highlight the fallibility of such arguments in the context of the secrecy surrounding the NSA's massive domestic surveillance system, which cannot plausibly be justified by the exigencies of war. If such theories were to govern, notwithstanding the Fourth Amendment, the Executive alone could lawfully permit the NSA's surveillance far from any battlefield of millions of Americans electronic communications and keep its conduct secret. Such arguments would render the Judiciary obsolete in checking government misconduct and undermine the very concept of democratic and accountable government.

IV. THE LAW OF SECRECY AND TRANSPARENCY

Analyzing whether the law adequately interrogates and exposes illegal secrets requires an initial review of the constitutional and statutory law addressed to government secrecy and the public's right to know. As

170. YOO, *supra* note 101, at, 112, 119–20.

171. *See* Barron & Lederman, *supra* note 101, at 704–11 (describing the theoretical and practical effect of the Bush Administration's conception of preclusive Commander in Chief powers).

172. *See* POSNER & VERMEULE, *supra* note 169.

173. In a series of important articles, Heidi Kitrosser has challenged the notion that exclusivist visions of Executive power would justify deep secrecy, noting that the threat to democratic accountability and structural checks in the constitutional order require that executive secrets be shallow and politically checkable. *See supra* note 20 and accompanying text. Kitrosser's work does not examine in depth the problem I seek to highlight here—shallow secrets that insulate government wrongdoing from public accountability.

174. *See, e.g.*, Barron & Lederman, *supra* note 101; Fionnuala Ni Aoláin, *Terror Conflated?*, 25 CONST. COMMENT. 131 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (2007)); *see also* Kitrosser, *Supremely Opaque*, *supra* note 20, at 84.

described next, the relevant law recognizes the central role in democracy of citizen-driven checks on government misconduct.

A. Information Access and the Constitution

The extent to which the Constitution requires government transparency and public access to government information remains a relatively unsettled area of constitutional law. The Constitution does not expressly protect a public right to access government information or to know what the government is doing.[175] Theorists, beginning most famously with Alexander Meiklejohn, have long suggested, however, that the First Amendment's primary purpose is to ensure that the public can make informed judgments and meaningfully self-govern.[176] Under this view, the express guarantees of the First Amendment might imply a right to government information in order to promote informed deliberation and public participation in democracy.[177]

Other theorists, chief among them Vincent Blasi, have argued that the primary function of the First Amendment is to provide a check on government abuse and misconduct.[178] Under Blasi's "checking theory" of the First Amendment, speech relating to "official misconduct," "abuse of power," and "breaches of trust by public officials" should receive the greatest constitutional protection.[179] According to Blasi, fostering this citizenry-driven check was likely the concern "uppermost in the minds of the persons who drafted and ratified the First Amendment."[180]

Both theories provide support for the notion that the Constitution protects the public's right to access government information and therefore limits state secrecy. As a general matter, however, courts have not recognized this sort of First Amendment right to access secret government

175. Kielbowicz, *supra* note 126, at 430, 486 nn.400–03; Henkin, *supra* note 25, at 273.

176. Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 889–90 (1986) (critiquing Alexander Meiklejohn's self-governing theory) (citing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–27 (1948)); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 253–54 (2005); Schauer, *supra* note 110, at 1349.

177. *See* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 289 (1995) ("Although Meiklejohn did not directly address rights of access to government information, his principles of self-governing democracy have proven seminal to the development of such putative rights").

178. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526.

179. *Id.* at 527, 542, 601. For a critique of Blasi's checking theory, see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

180. Blasi, *supra* note 178, at 527.

information.[181] There are two areas of qualified exception. The Supreme Court has been solicitous of the public's ability to acquire government information when members of the public seek access to judicial proceedings[182] and when restrictions on the press work to hinder the public's ability to obtain and exchange information.[183] Concerns about the dangers of illegal secrets resonate with the Court's rationale in both categories of First Amendment cases. But when addressing the government's statutory obligations regarding the release of government information, courts have typically not invoked First Amendment concerns, nor, as discussed in Part V, have they been particularly suspicious, or demanding in their assessments, of illegal secrets.

1. Public Access to Judicial Proceedings

The high-water mark in Supreme Court jurisprudence regarding access to government information was a case that did not directly involve government wrongdoing, but the Court's reasoning nevertheless recognized the role of the citizenry in checking government abuse and overreaching. In *Richmond Newspapers v. Virginia*,[184] the Supreme Court held that the First Amendment protects the right of members of the public to attend criminal trials in order to "give meaning to" the explicit guarantees of freedom of speech and of the press. The plurality decision rested heavily upon "the long history of trials being presumptively open" and the role of public access as an "important aspect" of the trial process itself.[185] But, importantly, the decision also emphasized the broader self-governing principles and checking functions served by government openness and public access to government information.

Specifically, the Court reasoned that like public access to any public space, court room access allows the public "to listen, observe, and learn" and thereby meaningfully exercise First Amendment rights.[186] The Court further noted that the public's presence serves as a check on the judicial system, "enhanc[ing] the integrity and quality of what takes place" during trial.[187]

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181. *See generally* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004).
182. *Id.* at 105–06.
183. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).
184. 448 U.S. 555, 556, 575–76 (1980).
185. *Id.* at 575.
186. *Id.* at 578.
187. *Id.*; *see also* Kitrosser, *supra* note 181, at 107 (arguing that the Supreme Court cited the

Some members of the Court seemed particularly receptive to recognizing a broader First Amendment right of access. Justice Brennan's concurring opinion, for example, referred to the right at issue as a right to access "information," not merely the right to attend "proceedings."[188] Expressly embracing a Meiklejohn view of the First Amendment as an essential instrument of democracy and self-government, Justice Brennan reasoned that the First Amendment "has a structural role to play in securing and fostering our republican system of self-government."[189] In Justice Brennan's view, that structural role not only promotes the robust public debate essential to democratic government, it presupposes an informed citizenry as a necessary instrument of that debate.[190]

While both the plurality opinion and Justice Brennan's concurrence thus provided a foundation for recognizing a broader constitutional right of public access,[191] the Court has not embraced this view outside of matters involving access to judicial proceedings.[192] Indeed, the only time the Court has addressed the question outside of that context, it found that the First Amendment did not compel a public right of access.

Specifically, in *Houchins v. KQED*,[193] decided three years prior to *Richmond Newspapers*, the Court rejected the notion that the First Amendment granted the press a right to access a local jail. The Court concluded, "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[194]

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normative reasons for openness in government as a justification for finding a right to attend criminal trials).

188. *Richmond Newspapers*, 448 U.S. at 585–86 (Brennan, J., concurring).

189. *Id.* at 587–88 (citing in part ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

190. *Id.* at 587 (stating that "[v]aluable public debate—as well as other civic behavior—must be informed.").

191. *See* Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 944 (2006) ("There is reason to think that the broader access claim was on the table after *Richmond Newspapers*.").

192. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605–06 (1982) (concluding that criminal trials involving certain sexual offences against minors must be presumptively open); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (same as to jury voir dire); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("Press Enterprise II") (same as to pre-trial criminal proceedings). The lower courts split on the issue of whether the First Amendment compels public access to civil immigration proceedings. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002). For thorough discussions of the divergent opinions from the Third and Sixth Circuits on this issue, see Kitrosser, *supra* note 181, and Samaha, *supra* note 191, at 945.

193. 438 U.S. 1 (1978).

194. *Id.* at 15. *Houchins*, however, may be limited to its facts. *See* Samaha, *supra* note 191, at 942–43 (noting that the Court's decision might be dismissed on grounds that it focused on "whether

In the lower courts, the First Amendment rarely makes an appearance in disputes involving access to government information. But when it does, courts are quick to reject claims that the First Amendment compels public access to government information, reasoning that *Richmond Newspapers* and its progeny were limited to judicial proceedings.[195] And even when the information sought to be exposed pertains to alleged government misconduct, courts generally give short shrift to the First Amendment policies animating the *Richmond Newspapers* line of decisions.[196]

The same is true of Supreme Court doctrine addressing the First Amendment rights of government whistleblowers. Although the Court has protected the right of government employees to speak as citizens, in *Garcetti v. Ceballos*,[197] it held that "the Constitution does not insulate" public employees from discipline by their employers due to speech made "pursuant to their official duties." The Court thereby closed the door on First Amendment protections for a great deal of government whistleblowing, irrespective of whether the statements, as in *Garcetti*, related to misconduct or potential misconduct by government officials.[198]

2. Press Limitations as Public Information Restrictions

Though the Supreme Court has stated that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act,"[199] the Court has recognized the public's interest in accessing information about government, albeit in an indirect and limited way. When the Court has struck down restrictions on the press under the First Amendment, it has cited the creation of an informed electorate as a primary purpose of the

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'the press' was entitled to greater access than others, or because the Court was placing special limits on judicial interference with the physical management of government facilities, particularly prisons, or even because the claimant relied on the First Amendment rather than a structural argument about democracy") (footnotes omitted).

195. *See, e.g.*, United States v. Gonzales, 150 F.3d 1246, 1255 (10th Cir. 1998), *cert. denied*, 525 U.S. 1129 (1999) (rejecting First Amendment claim to access executive branch administrative documents). *But see* Samaha, *supra* note 191, at 944–45 n.164 (citing cases in which lower courts have been "willing to consider access arguments on the merits of individual cases").

196. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 933–36 (D.C. Cir. 2003) (rejecting plaintiff public interest groups' claim that they had a First Amendment right, pursuant to *Richmond Newspapers*, to access "the names of INS and material witness detainees, and the dates and location of arrest, detention, and release").

197. 547 U.S. 410, 421 (2006).

198. *Id.* at 414–15.

199. *See Houchins*, 438 U.S. at 14.

Amendment and recognized the public's role in checking abuse and government mistakes.[200]

For example, in *Near v. Minnesota*,[201] the Court noted "the primary need of a vigilant and courageous press" to respond to the growing "opportunities for malfeasance and corruption" in public life occasioned in part by "unfaithful officials" and "official neglect." Similarly, in *Grosjean v. American Press Co.*, the Court reasoned that "since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[202] The Court echoed its conception of the First Amendment as "a powerful antidote" to government abuse of power in *Mills v. Alabama*.[203]

Although these decisions endorse a "checking theory" of the First Amendment that is arguably supportive of a broader constitutional right to access government information, this line of cases has not influenced the jurisprudence addressing public access to government information based upon First Amendment claims any more so than the *Richmond Newspaper* line of cases. Yet, given the public's recognized role in curbing government wrongdoing, a constitutional argument for exposing illegal secrets might find greatest support in this corner of First Amendment doctrine.

3. Secrecy as Constitutional Power

Just as the Constitution does not expressly address public access to government information, it also does not expressly provide for government secrecy.[204] As a purely textual matter, the Constitution addresses secrecy only in two limited means. First, the Constitution provides that both chambers of Congress shall publish a journal of their proceedings "excepting such Parts as may in their Judgment require

200. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1931); N.Y. Times Co. v. United States, 403 U.S. 713, 723–24 (Douglas, J., concurring) ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.").

201. 283 U.S. 697, 719–20 (1931).

202. *Grosjean*, 297 U.S. at 250.

203. 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

204. Samaha, *supra* note 191, at 916.

Secrecy."[205] Second, the Constitution requires "a regular Statement and Account of the Receipts and Expenditures of all public Money" to be "published from time to time."[206] The Court of Appeals for the D.C. Circuit has interpreted the qualified nature of the latter provision as authorizing "secret expenditures for sensitive military or foreign policy endeavors."[207] Given the limited discussion of secrecy in the Constitution, those who argue that the Executive has the prerogative to operate with robust secrecy often ground such arguments in the President's constitutional authority in the area of foreign affairs and national security.[208]

Courts often accept these arguments, viewing the Executive's responsibility over foreign affairs and national security as providing a concomitant constitutional authority with respect to secrecy.[209] Justice Stewart, for example, in his concurring opinion in *New York Times Co. v. United States*, while agreeing with the unanimous Court that the government's attempt to restrain publication of the Pentagon Papers violated the First Amendment, nevertheless reasoned that the Executive possesses a "constitutional duty . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."[210]

This rationale for Executive secrecy powers continues to have force in a variety of contexts. It is front and center in cases involving claims of executive privilege.[211] It informs the state secrets doctrine.[212] And, when the government resists disclosure of government information through

205. U.S. Const. art. I, § 5, cl. 3; *see also* Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805 (1985).

206. U.S. Const. art I, § 9, cl. 7; *see* Fein, *supra* note 205.

207. Halperin v. CIA, 629 F.2d 144, 154–60 (D.C. Cir. 1980).

208. Wells, *supra* note 59, at 460 ("President Ford vetoed the 1974 amendments to FOIA (which Congress overrode) on the basis that judicial review of classification procedures violated the President's inherent, constitutional powers.") (citing Morton H. Halperin, *The President and National Security Information*, *in* THE PRESIDENCY AND INFORMATION POLICY 1, 9–12 (Harold Relyea et al., eds. 1981)).

209. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."); El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007) (recognizing "that the Executive's constitutional mandate encompasses the authority to protect national security information"); United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir. 1972) (reasoning that the "President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief" includes "the right and the duty to strive for internal secrecy" consistent with the nation's interest).

210. N.Y. Times Co. v. United States, 403 U.S. 713, 729–30 (1971) (Stewart, J., concurring).

211. Lane et al., *supra* note 75 (discussing executive privilege doctrine).

212. Totten v. United States, 92 U.S. 105, 106 (1875); *El-Masri*, 479 F.3d at 304.

FOIA, even though FOIA raises questions of statutory disclosure obligations and exemptions, the Executive's purported constitutional secrecy powers often have force, as well.[213]

In sum, although the Constitution neither speaks directly of a public right to government information nor of an executive right to state secrecy, the Constitution, nevertheless, informs both the public's right to know and the government's right to conceal. Thus, constitutional principles and doctrine inevitably play a role in any discussion of the illegal secrecy dilemma even within the subconstitutional legal systems that largely regulate government secrecy in the United States.[214]

B. Secrecy by Statute

In enacting FOIA in 1966, Congress responded to what it viewed as the Executive's long history of improperly denying the public access to information about the government by mandating public disclosure of most government records.[215] In doing so, Congress recognized that the statute would give meaning to the First Amendment rights of free speech and a free press.[216] Scholars have accordingly recognized FOIA as a statute with "constitutional resonance."[217]

Although Congress's primary goal in enacting FOIA was to ensure an informed citizenry capable of holding "the governors accountable to the governed,"[218] it also recognized the government's legitimate interest in keeping certain information secret. The statute thus provides nine statutory exemptions—protecting a range of content from classified information to certain law enforcement records—from the requirements of public disclosure.[219] Nevertheless, FOIA purports to embrace an overriding

213. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 932 (D.C. Cir. 2003) (rejecting FOIA request seeking information about post 9-11 detention of immigration detainees and citing in part the Executive's constitutional role in "protecting national security").

214. *See* Kreimer, *supra* note 120, at 1047; Samaha, *supra* note 191, at 960.

215. *See* EPA v. Mink, 410 U.S. 73 (1973), *superseded by* 5 U.S.C. § 552(b)(1) (1966) & 5 U.S.C. § 552(a)(4)(B) (1966).

216. FOIA's legislative history cites favorably the view of the American Society of Newspaper Editors that "[t]he right to speak and the right to print without the right to know are pretty empty." H.R. REP. NO. 89-1497, at 2 (1966).

217. *See, e.g.*, Eric M. Freedman, Commentary, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOK. L. REV. 835, 837 (1983) ("Arrangements for the exercise of popular control are necessary, and such arrangements, because they bear so directly on the public's power to control its governors, have a constitutional resonance, though they may be but statutes in form.").

218. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 938; NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

219. *See* 5 U.S.C.A. § 552(b)(1) to (b)(9) (2014).

policy of transparency with a presumption in favor of public access.[220] The withholding of government information is meant to be the exception to the general rule of disclosure and the government therefore bears the burden of demonstrating that documents fall within specific statutory exemptions and therefore may be withheld.[221]

Although FOIA's legislative history reflects Congress's concerns about secrecy concealing government misconduct,[222] the statute itself does not speak to the question of whether the government may conceal its unlawful acts. Similarly, in 1974, when Congress amended FOIA after Watergate to require greater judicial oversight over government secrecy claims,[223] it did not expressly address the government's ability to withhold illegal secrets. Nevertheless, the FOIA and its amendments intended to shift control over public access to government information from the Executive to the other branches of government. Congress tasked the courts with enforcing the public's statutory right to know.

Although Congress assigned courts the obligation of regulating FOIA's disclosure framework, when national security is invoked, the government still effectively controls disclosure of information about its activities. In the national security context, courts defer nearly wholesale to the Government's claimed need for secrecy, even where the secret conceals illegal activities in which the government has no authority to engage.[224]

This deference to the government's national security claims is part of a larger pattern in national security litigation of judges deferring based upon separation-of-powers principles to the factual judgments of the executive branch—what Robert Chesney has critiqued and characterized as "national security fact deference."[225] It may also be the inevitable result, however, of Congress directing courts in FOIA litigation to grant "substantial weight"

220. *See* S. REP. NO. 89-813, at 3 (1965); *see also* Dep't of Air Force v. Rose, 425 U.S. 352, 360–61 (1976) (stating that FOIA reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language") (quoting S. REP. NO. 89-813, at 3 (1965)); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (noting FOIA mandates a "strong presumption in favor of disclosure").

221. 5 U.S.C. § 552(a)(4)(B) (2006).

222. H.R. REP. NO. 89-1497, at 6 (1966) ("Historically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy."); *id.* at 9 (explaining that national security exemption would not be governed by a "public interest" standard because "[n]o Government employee at any level believes that the 'public interest' would be served by disclosure of his failure and wrongdoings").

223. Halstuk, *supra* note 71, at 92.

224. *See infra* Part IV.

225. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009).

to affidavits from government officials explaining why documents fall within a specific statutory exemption from disclosure.[226]

In enacting that provision, Congress surely sought to protect the Executive's need to keep legitimate information posing a threat to national security and other exempt information secret. But Congress did not intend for courts to defer wholesale to the Executive in assessing state secrecy. In fact, Congress overruled the U.S. Supreme Court's decision, *EPA v. Mink*,[227] which held that FOIA courts were not authorized to review *in camera* information the government withheld on the basis of national security classifications. Responding to that decision a year later in the 1974 FOIA amendments, Congress "increase[d] the authority of the courts to engage in a full review of agency action" with respect to classified information, signaling its intent that courts "examine the contents of the records themselves."[228] In fact, Congress was so intent on an active judicial role in regulating public access to government information that when President Ford vetoed the 1974 FOIA amendments largely because of this provision,[229] it overrode the veto.[230]

Following this history, a substantial literature has criticized the excessive judicial deference to the Executive that occurs under FOIA, particularly in matters involving national security.[231] Scholars have persuasively noted that courts are quick to defer to the government's withholding of information based upon asserted threats to national security because of an internalized, unproven assumption that the judiciary is ill-equipped to assess the impact of information disclosures.[232] That assumption is worthy of some skepticism, particularly in the realm of

226. 5 U.S.C.A. § 552 (2014); Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994).

227. 410 U.S. 73 (1973).

228. H.R. REP. NO. 93-876, at 7 (1974), *available at* http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/H.R.%20Rep.%20No.%2093-876%20(Mar.%205,%201974).pdf.

229. Message from the President of the United States vetoing HR 12471, H.R. Doc. No. 93-383, at 36243 (Nov. 18, 1974).

230. 120 CONG. REC. H10864–H10875 (daily ed. Nov. 24, 1974); 120 CONG. REC. S19806–S19823 (daily ed. Nov. 21, 1974).

231. *See generally* Christina E. Wells, CIA v. Sims: *Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 847, 854 (2006) (criticizing "extreme judicial deference" to government secrecy claims in national security matters); Pozen, *supra* note 19, at 305, 323–38 (noting that courts "virtually rubber-stamp" FOIA denials based upon national security exemptions); Fuchs, *supra* note 108, at 132 ("[T]he judiciary has largely failed to accept its critical role of monitoring and limiting secrecy."); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 631–32 (2005) (describing judicial deference under FOIA as "deeply susceptible to abuse and overbreadth").

232. *See, e.g.*, Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 906 (2004) (relying upon social science research regarding the psychology of risk assessment and the psychology of accountability to argue that judges' ability to assess national security threats is often undervalued).

illegal secrets, given the numerous, high-profile government secrets later exposed as illegitimate.[233]

V. SECRECY AND THE JUDICIAL CHECKING FUNCTION

As a general matter, courts have not viewed secrecy concealing illegal conduct as troubling. Within FOIA, Congress did not directly address in whether the government may conceal unlawful acts.[234] But it has made clear within statutes granting the Executive statutory secrecy privileges that the intelligence agencies must comply with the Constitution and laws of the United Sates.[235] Even so, courts have treated illegal secrets permissively, refusing to probe meaningfully whether the secrecy exemptions granted by Congress presuppose the Executive's compliance with other law.[236]

In declining to second-guess illegal secrets, courts frequently rely upon *CIA v. Sims*,[237] a 1985 decision of the Supreme Court involving the CIA's extensive medical and psychological experimentation on human subjects during the 1950s and 1960s. *Sims* did not address whether the legality of the CIA's experiments had any bearing upon the merits of publicly disclosing details about the program.[238] The decision, nevertheless, has had enormous influence in lower court jurisprudence disclaiming judicial responsibility for checking illegal secrets.[239]

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233. *See, e.g.*, Wells, *supra* note 110, at 635 ("The government's tendency to exaggerate national security harms posed by the release of information is well-documented."); Weinstein, *supra* note 168, at 92 ("The very case recognizing the 'state secrets' privilege was based on an executive impulse to conceal its own mistakes . . . ."); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 99 (2005) (same); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 895 (noting that former solicitor general of the United States Erwin N. Griswold, who litigated the Nixon Administration's claims to prevent publication of the Pentagon Papers, observed later "I have never seen any trace of a threat to the national security from the [Papers'] publication. Indeed, I have never seen it even suggested that there was such an actual threat").

234. The Executive Order that regulates classified information, which is frequently implicated in FOIA disputes, does, however, speak to illegal conduct, but only insofar as it prohibits classifications made in bad faith for the purpose of concealing "violations of law, inefficiency, or administrative error." *See* Exec. Order No. 13,292, 68 Fed. Reg. 15315, 15318 (Mar. 28, 2003). Even when the legality of underlying executive action concealed by secrecy is at issue, showing that the information was classified for the purpose of hiding wrongdoing is a very difficult burden.

235. *See, e.g.*, 50 U.S.C. § 403–1(f)(4) (Supp. V 2012) (mandating that the Director of National Intelligence "ensure [the CIA's] compliance with the Constitution and laws of the United States").

236. *See, e.g.*, Wilner v. NSA, 592 F.3d 60, 77 (2d Cir. 2009); People for the Am. Way Found. v. NSA, 462 F. Supp. 2d 21, 30–31 (D.D.C. 2006).

237. 471 U.S. 159 (1985).

238. *Sims*, 471 U.S. at 159.

239. *See infra* Part V.B.

A. CIA v. Sims

In *Sims*, the Court held that the CIA could keep secret under FOIA the names of dozens of private researchers and institutions that helped the CIA investigate the use of "chemical, biological, and radiological materials . . . to control human behavior."[240] Details of the program, code-named MKULTRA, first surfaced in 1974, when the *New York Times* reported that the CIA had used LSD and other drugs on unconsenting and unwitting human subjects, at least two of whom died as a result of the experiments.[241] The CIA reportedly initiated MKULTRA to keep pace with perceived Soviet and Chinese advancements in "brainwashing and interrogation techniques."[242]

When an attorney and an employee from the Ralph Nader group Public Citizen filed a FOIA request seeking specific information about the experiments, the CIA refused to disclose the identity of the researchers and institutions involved. The CIA invoked FOIA Exemption 3.[243] That provision exempts from FOIA information that is specifically protected from disclosure by statute.[244] The agency claimed that the identity of the researchers and institutions that engaged in the mind-control and interrogation research were CIA "intelligence sources" expressly exempted from disclosure by the National Security Act of 1947.[245]

After the CIA appealed a district court decision ordering the agency to disclose the names of the researchers, the United States Court of Appeals for the D.C. Circuit vacated and remanded that decision, concluding that the term "intelligence sources" included only persons to whom the CIA was reasonably required to guarantee confidentiality in order to obtain the relevant information.[246] The primary issue before the Supreme Court was therefore a narrow one: whether "intelligence sources" included the "need

240. *Sims*, 471 U.S. at 161 (quoting CHURCH COMMITTEE REPORT, *supra* note 5, at Book I, 389).

241. Seymour Hersh, *Proxmire to Seek Inquiry on C.I.A. Over Role in U.S.*, N.Y.TIMES, Dec. 23, 1974, at 1; *Sims*, 471 U.S. at 161–62.

242. *Sims*, 471 U.S. at 162.

243. *Id.* at 162–64.

244. 5 U.S.C. § 552(b)(3) (2012). Exemption 3 privileges from disclosure information "specifically exempted from disclosure by statute" if that statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ." *Id.* If the statue was "enacted after the date of enactment of the Open FOIA Act of 2009" it must also cite specifically to 5 U.S.C. § 552(b)(3).

245. *Sims*, 471 U.S. at 161. The withholding provision at issue, 50 U.S.C. § 403-1(i)(1), required the Director of Central Intelligence to "protect intelligence sources and methods from unauthorized disclosure."

246. Sims v. CIA, 642 F.2d 562, 571 (D.C. Cir. 1980).

for confidentiality" limitation imposed by the Court of Appeals.[247] The Supreme Court's decision in *Sims*, however, reached far beyond that narrow question, declaring that Congress granted the CIA "sweeping power" to protect "all sources of intelligence that provide, or are engaged to provide, information that the Agency needs to perform its statutory duties."[248] According to the Court, the term "intelligence sources and methods" in the CIA's withholding statute "may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence."[249]

In adopting such a broad definition of "sources," the Court was partly concerned about narrowing the pool of individuals from which the CIA might obtain intelligence,[250] an arguably reasonable instinct, particularly viewed with today's post-9-11 consciousness regarding the dangers of viewing potential intelligence with unnecessary formalism.[251] But, as Justice Marshall suggested in his concurring opinion, that rationale did not compel the Court's "expansive reading,"[252] which degraded the judicial role in checking illegal secrets in several important ways.

First, by circularly defining "intelligence sources" as sources that provide or are engaged to provide "information the Agency needs to perform its statutory duties,"[253] the Court rendered itself no longer qualified to discern whether an individual or object should be concealed. Under the Court's test, the judicial branch, constrained by separation of powers considerations and its limited institutional capacity to know the value of particular intelligence, is compelled to accede to agency claims regarding what it needs to know. This result is particularly dangerous given the government's tendency to call "almost everything sources and methods."[254]

In discerning what Congress intended by the disclosure exemption for "sources and methods," the Court did not consider that only five years earlier, Congress had publicly rebuked the intelligence agencies for illegal

247. *Sims*, 471 U.S. at 161.
248. *Id.* at 169–70.
249. *Id.* at 169.
250. *Id.* at 176–77.
251. *See* 9-11 COMMISSION REPORT, *supra* note 108.
252. *Sims*, 471 U.S. at 191 (Marshall, J., concurring).
253. *Id.* at 170.
254. THE CTR. FOR LAW & SEC. AT THE NYU SCH. OF LAW, SECRECY & GOV'T, AMERICA FACES THE FUTURE: PRIVACY IN THE AGE OF NATIONAL SECURITY 28 (2009), http://www.lawandsecurity.org/Portals/0/Documents/SecrecyPrivacy.pdf (reporting comments of Washington Post Report Dana Priest).

conduct during the Church Committee hearings,[255] and thereafter attempted in the very same withholding statutes to ensure the executive branch's compliance with the law.[256]

Second, the Court reached beyond the narrow question of the researchers' status (and who or what may qualify as a source of intelligence more broadly) to also suggest that the CIA has sweeping authority to determine the *methods* the agency uses to gather information from those sources. The Court reasoned that Congress entrusted the CIA "with sweeping power to protect its 'intelligence sources and *methods*'"[257] and that the CIA Director must be able to "shield those Agency *activities* and sources from any disclosures that would unnecessarily compromise the Agency's efforts."[258] The Court's inclusion of "methods" within its discussion of intelligence "sources" poses significant consequences for the judicial checking of illegal secrets given that *how* the government gathers intelligence—whether it is in violation of the laws of war, without a warrant, or through unjustified uses of force—implicates the Constitution and laws of the United States in a way that the sources from which the government obtains information may not.

While one might dismiss the Court's inclusion of "intelligence methods" as imprecise drafting or merely dicta, the Court recognized—and appeared to accept—the prospect of entirely unauthorized and illegal "intelligence methods," going out of its way to establish deference not only to the agency's sources, but to its methods as well. Specifically, even while acknowledging that brainwashing is a "type of experimentation . . . expressly forbidden by Executive Order,"[259] the Court nevertheless suggested that the Executive possessed a legitimate interest in keeping such illegal conduct secret. Noting its concern that disclosure of the research subject would enable foreign government or adversaries to infer the general scope and nature of the project,[260] the Court reasoned that such disclosures could compromise the agency's intelligence-gathering just as much as disclosing the intelligence sources' identities.[261]

In the decades that followed, numerous FOIA courts have read *Sims* as a directive to defer to government claims that their activities constitute "intelligence methods" deserving of secrecy irrespective of whether those

255. *See* CHURCH COMMITTEE REPORT, *supra* note 5.
256. 50 U.S.C. § 403–1(f)(4) (Supp. V 2012).
257. *Sims*, 471 U.S. at 169 (emphasis added).
258. *Id.* (emphasis added).
259. *Sims*, 471 U.S. at 162 n.2 (citing Exec. Order No. 12333, § 2.10, 3 CFR 213 (1982)).
260. *Sims*, 471 U.S. at 177.
261. *Id.* at 176.

methods violate the law.[262] To put it simply, *Sims* has produced a jurisprudence that countenances illegal secrets.

B. Countenancing Illegal Secrets After Sims

After *Sims*, courts have expressly held that the legality of government conduct is irrelevant to the government's statutory disclosure obligations under FOIA. This doctrine has developed in a series of cases involving public access to information about patently illegal or legally questionable antiterrorism activities, including torture, warrantless electronic surveillance, and the targeted killing of terrorism suspects abroad.[263] This Article argues that these decisions wrongly sidestep the serious threat to democratic accountability posed by illegal secrets and, at the very least, the secrecy exemptions granted by Congress must be interpreted in accordance with other legal constraints upon the Executive.

1. CIA Torture

In *ACLU v. DOD*,[264] ("the *Waterboarding Case*") the United States Court of Appeals for the Second Circuit deferred to the CIA's claim that it needed to keep secret information related to the use of waterboarding during the interrogation of suspected terrorists abroad, addressing the same FOIA exemption at issue in *Sims*, which exempts "intelligence sources and methods" from disclosure.[265] Although the ACLU argued that the CIA could not avoid disclosure by characterizing illegal conduct such as waterboarding as a legitimate "source or method" subject to FOIA protection, the court disagreed, suggesting that the exemption at issue was

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262. This may partly be due to another legacy of the decision: the Court's embrace of the mosaic theory as a reason to grant deference to government secrecy claims. According to Christina Wells, the mosaic theory allows the government to withhold information beyond the categories of information delimited by Congress, based upon the claim that when such information is aggregated with other information it could "prove to be dangerous and must be withheld." *See* Wells, *supra* note 231, at 854. *Sim's* acceptance of the mosaic theory is the aspect of the decision that has received the most critical attention from scholars. *See id.*; Pozen, *supra* note 231.

263. *See, e.g.*, ACLU v. DOJ, 681 F.3d 61, 73–74 (2012); Wilner v. NSA, 592 F.3d 60, 77 (2d Cir. 2009); People for the Am. Way Foundation v. NSA, 462 F. Supp. 2d 21, 30–31 (D.D.C. 2006); N.Y. Times v. DOJ, 915 F. Supp. 2d 508 (S.D.N.Y. 2013); ACLU v. DOJ, 808 F. Supp. 2d 280 (D.D.C. 2011).

264. *ACLU*, 681 F.3d at 73–74. The author litigated this matter with co-counsel before the Southern District of New York, as an ACLU cooperating attorney while employed as a Gibbons Fellow in Public Interest and Constitutional Law at Gibbons P.C.

265. *Id.* at 72–73; 5 U.S.C. § 552(b)(3) (2012) (incorporating section 102A(i)(1) of the National Security Act of 1947 and section 6 of the Central Intelligence Act of 1949, 50 U.S.C. § 403–4a(d)).

not limited to lawful acts.[266] Affirming the district court's reasoning that "[c]ourts are not invested with the competence to second-guess the CIA Director regarding the appropriateness of any particular intelligence source or method,"[267] presumably even patently illegal techniques, the Second Circuit concluded that "such an 'illegality' inquiry is clearly beyond the scope and purpose of FOIA."[268] The court read the Supreme Court's reasoning in *Sims* regarding the agency's need for flexibility in acquiring information from a variety of sources to also apply to flexibility in the methods of intelligence gathering.[269]

Additionally, the court rejected the plaintiffs' argument that a separate provision of the same withholding statute limited the "methods" within the CIA's mandate because it required the Director of National Intelligence to "'ensure [the Agency's] compliance with the Constitution and laws of the United States.'"[270] In spite of the canon of statutory construction that provisions of the same statute should be interpreted in harmony with one another,[271] the Court cited *Sims* as a "clear directive against constricting the CIA's broad authority in this domain."[272] The Court concluded that "'beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence,'" under *Sims*, there are virtually no restrictions on the interrogation methods that the CIA may keep secret.[273]

The Second Circuit's refusal to examine whether Congress granted the CIA unreviewable authority to engage in conduct nearly universally considered illegal as torture,[274] and to thus keep that conduct secret, is remarkable. If taken to its logical conclusion, the Court's rationale would

266. *ACLU*, 681 F.3d at 73–74.

267. ACLU v. DOD, 723 F. Supp. 2d 621, 629 (S.D.N.Y. 2010).

268. *ACLU*, 681 F.3d at 74.

269. *See id.*

270. *Id.* (citing 50 U.S.C. § 403–1(f)(4)).

271. *See, e.g.*, Erlenbaugh v. United States, 409 U.S. 239, 242–44 (1972) (describing canon of statutory construction *in pari materia* as "a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject") (footnote and citation omitted).

272. *ACLU*, 681 F.3d at 74.

273. *Id.* (quoting CIA v. Sims, 471 U.S. 159, 169 (1985)).

274. *See* Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CAL. L. REV. 331, 363 (2012) (noting that "[w]aterboarding . . . has been prosecuted by the United States as a war crime when engaged in by our adversaries or even by domestic law enforcement") (citing OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 234–35 (2009)).

allow the agency to keep secret as intelligence "methods," rape, genocide or any number of other blatantly illegal acts simply because the agency declared it a "source" or "method." In the case of waterboarding, had the court even minimally probed whether Congress intended to sanction CIA torture as an "intelligence method," it would have had to confront U.S. ratification of the Convention Against Torture and Congress's codification of the absolute prohibition on torture.[275] It also would have encountered considerable evidence that when Congress created the CIA in 1947, it never intended for the CIA to engage in patently illegal "intelligence methods" or to operate under a policy of self-directed lawlessness.[276] Several decades later, the Church Committee confirmed that Congress did not intend to create an agency above the law.[277] Indeed, Congress has reconfirmed this intent when it has amended the CIA's withholding statutes.[278]

The Second Circuit's limited analysis of Congressional intent with respect to CIA lawlessness is not aberrational. Other courts have exhibited a similar aversion to assessing the CIA's illegal secrets. For example, the United States Court of Appeals for the District of Columbia Circuit addressed the secrecy of certain interrogation techniques and conditions of confinement related to the treatment of so-called "'high value' detainees" held and interrogated by the CIA at secret prisons abroad.[279] In that case, also captioned *ACLU v. DOD* ("the *CIA Interrogations Case*"), the plaintiffs argued that after President Obama had "banned" such techniques in an Executive Order, the interrogation methods and conditions of confinement were no longer protectable "intelligence methods" because they were now illegal and outside the Agency's mandate.[280] The court rejected that argument, reasoning "there is no legal support for the conclusion that illegal activities cannot produce classified documents."[281]

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275. *See* 18 U.S.C. § 2340A(a), (c) (2000).

276. OLMSTED, *supra* note 44, at 13.

277. *See* CHURCH COMMITTEE REPORT, *supra* note 52.

278. *See* 50 U.S.C. § 431(c)(3) (2006) (clarifying that the FOIA exemption applicable to CIA operational files did not apply to records containing information subject to congressional investigation "for any impropriety, or violation of law"); *see* Hannah H. Bergman, Comment, *The CIA's Public Operational Files: Accessing Files Exempt from the CIA Information Act of 1984 Because of Investigations into Illegal or Improper Activity*, 3 FLA. A & M U. L. REV. 99, 111 (2008) ("This language was meant to assure Congress that evidence of illegal activities . . . would still come to light, and was added over objections by the CIA . . . .").

279. ACLU v. DOD, 628 F.3d 612, 622 (D.C. Cir. 2011).

280. *Id.*

281. *Id.*

The government's unilateral and self-serving decision to characterize illegal conduct like torture as an "intelligence method," should not immunize such conduct from public scrutiny. But as the D.C. Circuit suggested, the government might have other, legitimate grounds for withholding documents concealing illegality. Conceivably a document containing information about illegal intelligence methods might also contain classified information deserving of protection, such as the names of covert operatives or actual intelligence. But the possibility that legitimate classified information could be revealed through disclosure of a government record should not transform an illegitimate and illegal interrogation technique discussed in the same document into a valid "source or method" deserving of protection. In accordance with FOIA's express language, courts routinely segregate information deserving of protection from that which should be disclosed.[282] In the *CIA Interrogations Case*, the circuit court failed to explain how disclosure of the interrogation techniques would improperly expose other legitimate intelligence information that could not be segregated from disclosure.

2. Warrantless Electronic Surveillance

Long before Edward Snowden exposed the NSA's massive warrantless collection of Americans' phone records, courts had already deemed the legality of the agency's controversial warrantless electronic surveillance program[283]—a portion of which President Bush acknowledged and referred to as the Terrorist Surveillance Program (TSP)—irrelevant to whether information about the program should be disclosed. For example in *Wilner v. NSA*,[284] a group of attorneys and law professors representing Guantanamo detainees sought records from the NSA and DOJ regarding whether the government had intercepted communications relating to the representation of their clients. In response, the agencies invoked what is commonly known as a *Glomar* response, refusing to either confirm or deny the existence of the records on grounds that such information would itself reveal classified information.[285]

282. 5 U.S.C. § 552(b) (2012) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

283. 50 U.S.C. § 1801–12 (Supp. V 2012).

284. 592 F.3d 60, 77 (2d Cir. 2009).

285. *Id.* at 67. The *Glomar* doctrine is named for the D.C. Circuit Court's 1976 decision in *Phillippi v. CIA*, a case involving records relating to the CIA's efforts to uncover a sunken oceanic research vessel, the Hughes Glomar Explorer. *See* Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

The plaintiffs challenged that response, arguing that if any such records existed they "would have been obtained in violation of the U.S. Constitution" and thus could not be concealed.[286] Specifically, the plaintiffs contended that the *Glomar* rationale cannot be used to "conceal illegal or unconstitutional activities."[287] But the United States District Court for the Southern District of New York refused to consider the legality of the NSA's surveillance "in the context of suits seeking disclosure of secret records."[288] The court also expressed skepticism that the NSA's *Glomar* response was designed to conceal "activities that violate the Constitution or are otherwise illegal."[289]

A similar issue arose in another FOIA suit seeking records about the NSA's warrantless surveillance of Americans, *People for the American Way Foundation v. NSA*.[290] There, a non-profit organization sought records from the NSA regarding the general authority and scope of the program and claimed, similar to the *Wilner* plaintiffs, that such information could not be concealed because the program was illegal.[291] The District Court for the District of Columbia declined to "grapple with" the legality of the program and deferred to the government's claim that revealing information about NSA surveillance would reveal information about its signals intelligence, a legitimate method of intelligence-gathering capable of use in lawful contexts.[292] While noting that the NSA's authority to keep its activities secret was "not without limits," the court did not consider whether information about a potentially illegal program could be disclosed while protecting information about otherwise legitimate intelligence techniques.[293]

This distinction again drawn by a court—that the exposure of illegal conduct can at times reveal legitimate information worthy of protection—is, of course, a proper consideration when courts grapple with illegal secrets. Unfortunately, courts often fail to provide a convincing

286. *Wilner*, 592 F.3d at 76–77.
287. *Id.* at 76.
288. *Id.*
289. *Id.* at 78.
290. 462 F. Supp. 2d 21, 30–31 (D.D.C. 2006).
291. *Id.* at 30.
292. *Id.* at 31.
293. *Id.* In two earlier FOIA cases, the D.C. Circuit similarly reasoned that government agencies "may properly withhold records gathered illegally if divulgence would reveal currently viable information channels, albeit ones that were abused in the past." Founding Church of Scientology v. NSA, 610 F.2d 824, 829 n.49 (D.C. Cir. 1979); *see also* Lesar v. DOJ, 636 F.2d 472, 483 (D.C. Cir. 1980).

justification for why particular disclosures jeopardize legitimate secrets. For example, in *People for the American Way*, it is unclear why all of the information sought, including "the total number of individuals who have been the subject of warrantless electronic surveillance by the NSA in the United States," would jeopardize the agency's future use of signals intelligence. The Court also failed to address why legitimate secrets could not be segregated and responsive information released.[294]

Of all the cases raising arguments about the legality of the NSA's surveillance activities, a non-FOIA case, *Terkel v. AT&T Corp.*,[295] reflects the greatest judicial skepticism of illegal secrets. *Terkel* involved a suit by telephone customers against AT&T for illegally disclosing their phone records to the NSA.[296] The NSA intervened in order to argue that the state secrets privilege barred discovery as to whether AT&T provided records to the NSA.[297] But the NSA also claimed that Section 6 of the National Security Agency Act ("NSAA") protected the information from disclosure.[298] That withholding statute contains even more expansive language than the statutes protecting the CIA's "sources and methods." It authorizes the agency to withhold information regarding "the organization or any function of the National Security Agency [and] of any information with respect to the activities thereof."[299] Although the court decided the case on the basis of the state secrets privilege and not the NSAA, unlike most of the district courts addressing illegal secrets under FOIA, the *Terkel* Court was skeptical that Congress granted the agency authority to keep secret even patently illegal activities. Noting its concern that the government's argument if "taken to its logical conclusion . . . would allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions,"[300] the court stated it was "hard-pressed to read section 6 as essentially trumping every other Congressional enactment and Constitutional provision."[301]

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294. *See Church of Scientology*, 610 F.2d at 829 n.49 (noting the government's obligation to segregate "aspects of the records" not implicating legitimate intelligence operations).

295. 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006).

296. *Id.* at 900.

297. *Id.*

298. *Id.* at 905.

299. *Id.* (citing 50 U.S.C. § 402 (2006)).

300. *Id.*

301. *Id.* One other court in a earlier FOIA case interpreting the same NSA withholding statute expressed skepticism about the withholding of illegal secrets. *See* Hayden v. NSA, 608 F.2d 1381,

These varied decisions addressed to the secrecy of the NSA's surveillance activities illustrate that even when government action has transcended the obscurity of deep secrecy, the government still denies the public access to information critical for understanding and holding the government accountable—all with the sanction of deferential courts.[302] Even *Terkel*, which recognized the danger of reading statutory secrecy privileges as trumping constitutional and other statutory restraints on the Executive, allowed details regarding domestic NSA surveillance to remain shrouded in secrecy under the state secrets privilege. This NSA program and others thus continued virtually unchecked until a government contractor exposed the scope of the NSA domestic spying seven years later.

3. Targeted Killing Through Drone Strikes Abroad

The government has also resisted disclosure of information sought by members of the public regarding the government's use of foreign drone strikes to lethally target suspected terrorists including U.S. citizens abroad. For example, in *New York Times v. DOJ*,[303] ("the *Citizen Drone Case*"), the Obama Administration refused to disclose information sought by the *New York Times* and the ACLU regarding the legal justification for the government's conclusion that it may lawfully target and kill persons whom it suspects of ties to Al–Qaeda, including United States citizens. Unlike other FOIA decisions addressing illegal secrets, in the *Citizen Drone Case*, the district court made considerable efforts to analyze the significant legal questions raised by the underlying government activities concealed by secrecy.[304]

After an extended discussion of the due process and statutory constraints on the extrajudicial execution of citizens, for example, the court noted "legitimate reasons, historical and legal, to question the legality of killings unilaterally authorized by the Executive that take place otherwise than on a 'hot' field of battle."[305] But in spite of its doubts about

1389 (D.C. Cir. 1979) (suggesting that section 6 of the NSAA would not apply to functions or activities that were not authorized by statute or otherwise lawful).

302. President Bush officially ended the deep secrecy surrounding the NSA's warrantless electronic surveillance in 2005, confirming a New York Times report in a weekly radio address. *See* President's Radio Address, WHITE HOUSE RADIO (Dec. 17, 2005), *available* at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html. Yet, the government continued to successfully resist disclosure of information about the program.

303. 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

304. *Id.* at 521–24.

305. *Id.* at 524.

the legality of the program, which the court acknowledged were not "straightforward," the court nevertheless concluded that the government could keep secret, under a variety of statutory exemptions, all documents related to the Administration's legal justification for its purported killing power.[306] The court concluded that decisional law compelled that conclusion.[307] District Judge McMahon noted her frustration, however, at what she described as the "Alice-in-Wonderland nature" of her decision.[308] She explained it as "a veritable Catch-22," stating: "I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret."[309]

This decision followed a similar 2011 decision by the United States District Court for the District of Columbia. In *ACLU v. DOJ*,[310] ("the *Targeted Killing Case*"), the district court affirmed the CIA's *Glomar* Response to an ACLU request seeking information not only about the purported legal justification for the United States' targeting killing program, but also about the scope of the drone program, the standards governing targeting decisions, the agencies involved, and the impact on civilians.[311] As in the *Citizen Drone Case*, the court, citing *Sims*, rejected the ACLU's claim that extrajudicial killing was outside the CIA's mandate to gather intelligence.[312]

Taken together, all of these decisions suggest that when faced with controversial and legally questionable government policies, courts often quickly defer (or in the case of the *Citizen Drone Strike Case*, reluctantly defer) to Executive branch arguments about the need to cloak in secrecy both the purported legal authority for their actions, as well as information related to the efficacy and human costs of government action. The unbroken cover of secrecy that results undermines democratic accountability—the very purpose of FOIA—and illustrates the need for a new approach to illegal secrets.

306. *Id.* at 524, 538.
307. *Id.* at 515
308. *Id.*
309. *Id.* at 515–16.
310. 808 F. Supp. 2d 280 (D.D.C. 2011).
311. *Id.* at 285.
312. *Id.* at 291–92.

VI. CONFRONTING ILLEGAL SECRETS

A. Illegality Matters

To prescribe how the law might better grapple with illegal secrets requires a threshold consideration of why illegality matters to the secrecy discussion.[313] The themes developed earlier in this Article, and summarized here, help answer that question. First, the relationship between secrecy and illegality in American history warrants considerable skepticism of secrecy that conceals legally questionable government conduct. The track record strongly suggests a symbiotic relationship between government secrecy and illegality—secrecy can encourage bad acts while simultaneously illegal behavior seeks out secrecy to avoid responsibility and public censure.

Additionally, illegal secrets undermine democratic accountability in particular ways. By inviting manipulative state information disclosures, illegal secrets distort the public's view of the State. And such secrets, even when made shallow, are fraught with the risk that secrecy will legitimize the underlying unlawful conduct in the eyes of the public before there is an opportunity to debate the relevant policies or hold government actors accountable for unlawful acts.

Moreover, the primary normative justifications for transparency in government as a general matter are particularly sensitive to the threats posed by illegal secrets, even if commentators do not typically discuss the rationales in such terms. The same is true of the self-governing and checking theories of the First Amendment's role in democracy.

All of these principles provide historical and theoretical footing for this Article's primary claim: that our transparency norms and the judges enforcing them should be more skeptical and demanding of government secrecy when it conceals illegal and potentially illegal conduct by the Executive. Without access to illegal secrets, the public cannot hold the government accountable for blatant wrongdoing and ensure compliance

313. It is true that many of these same rationales would similarly support exposure of a wide range of disfavored conduct and bad acts concealed by secrecy beyond those that qualify as illegal. Indeed, normative justifications surely exist for exposing bad policy, misconduct, or unethical behavior that does not rise to the level of being illegal. This Article, however, is addressed to the particular and profound threat to democracy presented when the government shields unlawful conduct from the public: a government that operates with illegal secrets undermines the rule of law and society's faith in government.

with clearly established law.[314] And, as some courts have acknowledged, but have failed to resolve, without access to illegal secrets, the public cannot assess, challenge, or meaningfully debate the lawfulness of controversial government action—the legality of which is an open question.[315]

Though identifying and grappling with illegal secrets necessarily complicates information-access disputes before the courts, greater complexity is superior to the status quo of allowing the government to keep its illegal action secret by default without regard to any normative justifications for doing so.

B. The Proposed Framework

Throughout this Article, the term illegal secret refers to a wide range of state secrets implicating concerns about government illegality. Those include secrets concealing patently illegal conduct, like torture, as well as secrets that conceal conduct that appears to, but does not definitively, violate established law, either because the facts related to the potential violation have not been established or because the lawfulness of the conduct at issue is an open and undecided issue—such as secrets concealing the government's targeted killing and warrantless electronic surveillance programs. Given the ways in which each kind of secret undermines democratic accountability, I argue that both warrant close scrutiny and, in most cases, public exposure.

Thus, under the framework proposed here, the established illegality of government conduct underlying a secret—such as the president's criminal conduct,[316] an intelligence agency's use of torture,[317] or military war crimes[318]—should compel disclosure of such secrets given the irrefutable

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314. *See* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1064 (2008).

315. *See id.*

316. Indeed, the constitutional process for presidential impeachment and verdict requires Congress's consideration of whether the President has committed a high crime or misdemeanor. *See generally* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999). Resort to that process could not be considered or triggered if the underlying presidential crime, whatever its character, is not exposed.

317. Torture is illegal under numerous lines of domestic and international law that bind the United States, including federal criminal law. *See* Waldron, *supra* note 137 (examining absolute prohibition on torture); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009).

318. *See* 18 U.S.C.A. § 2441 (2006) (defining conduct committed domestically or abroad that is prosecutable as a war crime).

ways in which masking such presumptive unlawfulness undermines democratic accountability.[319] Only in the most pressing and exceptional cases, as explained more fully below, should executive claims of a national security priority present a paramount justification for withholding such information from the public.[320] Moreover, where there is a plausible allegation of illegality, courts should consider whether sanctioning government secrecy will thwart public debate regarding the lawfulness and appropriateness of the conduct concealed, such that the more plausible the allegation of illegality, the stronger the basis for disclosure.

In many cases, this proposed framework can be applied within FOIA's existing statutory disclosure and withholding scheme, given that an agency's statutory secrecy powers do not occur in a vacuum and other law necessarily comes to bear in delimiting the executive conduct that Congress deemed worthy of secrecy. For example, in the case of secret CIA torture, although the agency may be empowered by Congress to keep "intelligence sources and methods" secret through FOIA Exemption 3 and related withholding statutes,[321] other acts of Congress—not to mention the Constitution and international law—simultaneously constrain the agency's authority to engage in unlawful acts.

Given that many withholding statutes do not precisely define the "methods" or other activities that an agency may keep secret, it would be logical for courts construing such terms to consider other law, in particular other acts of Congress, relevant to the question of an agency's powers. Put another way, as the *Terkel* court suggested, it would be anomalous for courts to read secrecy statutes as "trumping every other Congressional enactment and Constitutional provision."[322]

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319. *See* S. REP. NO. 89-813, at 3 (1965); *see also* Dep't of Air Force v. Rose, 425 U.S. 352, 360–61 (1976) (stating that FOIA reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language") (quoting S. REP. NO. 89-813, at 3 (1965)); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (noting FOIA mandates a "strong presumption in favor of disclosure"); 5 U.S.C. § 552(a)(4)(B) (2006); Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994).

320. This proposition would not undermine the principle that information deserving of protection should be segregated from the portion of illegal secrets that should be disclosed. 5 U.S.C. § 552(b) (2012) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

321. 5 U.S.C. § 552(b)(3) (2006) (protecting information "specifically exempted from disclosure by statute" if that statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld"); 50 U.S.C. § 403(d)(3) (2006) (requiring the Director of Central Intelligence to "protect[] intelligence sources and methods from unauthorized disclosure").

322. Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006). One other court in a earlier FOIA case interpreting the same NSA withholding statute expressed skepticism about the withholding of illegal secrets. Hayden v. Nat'l Sec. Agency, 608 F.2d 1381, 1389 (D.C. Cir. 1979) (suggesting that

For example, in the case of torture, when Congress criminalized torture and made clear that the prohibition on torture is absolute, it could not have meant to simultaneously authorize government agencies to engage in torture as an acceptable "intelligence method" and privilege that conduct through secrecy.[323] The Second Circuit in the *Waterboarding Case* suggested, however, that resolving the legality of waterboarding once the CIA claimed it was a protected "intelligence method" was unduly complex.[324] According to the court, that analysis would require not only a determination of whether "torture" constitutes a protected method, but also a second-order analysis of whether the particular technique at issue itself qualifies as torture.

But courts are competent to determine whether particular conduct concealed by state secrecy is proscribed by law, and have on occasion done so in FOIA suits, albeit without discussing such limitations on agency conduct in terms of legality. For example, federal courts have held that the CIA could not keep its book publishing propaganda[325] and domestic law enforcement activities[326] secret as protected "intelligence methods" because Congress prohibited the agency from engaging in such activities.[327] Where Congress has delegated to the judiciary the authority to adjudicate substantive violations of a statute, such as the federal torture statute,[328] it is arguably even clearer that courts are well-equipped to

section 6 of the NSAA would not apply to functions or activities that were not authorized by statute or otherwise lawful).

323. *See* 18 U.S.C. § 2340A(a), (c) (2000).

324. *See* ACLU v. DOJ, 681 F.3d 61, 74 (2d Cir. 2012) (stating that such a complex illegality inquiry "is clearly beyond the scope and purpose of FOIA").

325. *See* Navasky v. CIA, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) (holding that book publishing and propaganda could not be withheld as secret "intelligence methods" because Congress intended to preclude CIA participation in those activities).

326. *See* Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (holding that domestic law enforcement activities could not be withheld as secret "intelligence methods" because Congress intended to preclude CIA participation in those activities).

327. The ACLU relied upon these decisions unsuccessfully in the *Waterboarding Case*. *See* Brief for the Plaintiffs—Appellees—Cross-Appellants, *ACLU*, 681 F.3d 61, 2011 WL 2441227 (June 3, 2011).

328. 18 U.S.C. § 2340A (2000). Moreover, the federal courts already assess whether particular methods amount to torture when they adjudicate cases by immigrants seeking relief from removal under the Convention Against Torture, and in fact, have a rich jurisprudence at their disposal. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984). Article 3 of the Torture Convention prohibits states from returning a person to a country in which she faces a substantial likelihood of torture. *Id.* In 1990, the U.S. Senate ratified the Torture Convention. *See* 136 Cong. Rec. S17,486–92 (daily ed. Oct. 27, 1990). In 1998, Congress implemented the nonrefoulement mandate of Article 3 of the Convention into U.S. law. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2822 (1998).

consider whether conduct falling within such statutes was otherwise intended by Congress to be concealed.

More broadly, given FOIA's overriding purpose of government accountability[329] and its relationship to the exercise of First Amendment rights,[330] one could arguably interpret the secrecy exemptions granted by Congress in FOIA as presupposing the Executive's compliance with statutory and constitutional law. Or illegal action by the Executive might fairly be viewed as akin to "unclean hands" that disentitle the State from invoking FOIA's disclosure exemptions.

Although courts could effectively check illegal secrets under the existing statute in these ways, courts have resisted doing so. Moreover, many of FOIA's existing exemptions (including Exemption 1 pertaining to classified material) do not direct courts to construe other statutory and constitutional limits upon agency conduct. For these reasons, Congress should consider amending FOIA to address illegal secrets directly. Indeed, Congress could further the goal of democratic accountability at the heart of FOIA by providing that the unlawfulness of secret government conduct creates a rebuttable presumption that a secret should be disclosed—legislatively codifying a carve-out to government secrecy withholdings similar to the common law crime-fraud exception to attorney-client privilege that courts routinely enforce.[331] Doing so could go a long way toward achieving FOIA's purpose of "holding the governors accountable to the governed."[332]

A final consideration under this framework—whether assessing illegal secrets under FOIA's existing exemptions or through a specific Congressional enactment as proposed herein—must acknowledge that a superseding national security interest could warrant the concealment of illegal secrets. Indeed, in *Near v. Minnesota*,[333] the Supreme Court suggested that, in a very narrow set of circumstances, national security and wartime exigencies might even justify a prior restraint on the press, which would otherwise clearly violate the First Amendment.[334] If national

329. *See, e.g.*, Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 925 (D.C. Cir. 2003); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1977).

330. *See* H.R. REP. NO. 89-1497, at 23 (1966) (citing favorably the view of the American Society of Newspaper Editors that "[t]he right to speak and the right to print without the right to know are pretty empty[.]"); Freedman, *supra* note 217, at 836–37.

331. *See supra* notes 159–61 and accompanying discussion.

332. *Ctr. for Nat'l Sec. Studies*, 331 F.3d, at 925; *NLRB*, 437 U.S. at 242.

333. 283 U.S. 697, 716 (1931).

334. Although the Court has never upheld such a restraint, in *United States v. Progressive, Inc.*, a district court issued a preliminary injunction to enjoin a magazine from publishing an article outlining

security interests can theoretically supersede core First Amendment rights in exceptional cases, such interests necessarily might limit the public's statutory right to know about illegal secrets as well. But given the threats to democracy presented by illegal secrets and the First Amendment policies served by their exposure, courts should treat such exceptions to disclosure as similarly exceptional.

To that end, when a secret conceals illegal government action or there is evidence that a secret conceals plausible illegality, FOIA's presumption in favor of disclosure should govern and courts should order the disclosure of illegal secrets unless the government shows that a serious threats to national security will occur should the secret be disclosed. Courts should require as much explanation regarding the illegal secret on the public record as possible. And even where the government demonstrates a legitimate need to conceal illegal secrets in the interests of national security, courts can still require the government to scrupulously segregate information that would threaten national security from information revealing the illegal secret to the public.[335]

C. Overcoming Perceived Limitations of the Proposed Framework

In arguing that the legality of secret government conduct is a vital consideration that must be prominent in an information-disclosure regime premised on the goal of democratic accountability, this Article addresses not only secrets suppressing patently illegal conduct, but also secrets concealing conduct that appears to, but does not definitively, violate the law. Though this latter category of secrets may appear too intractable to regulate, there are important reasons for including them within the framework proposed here.

Specifically, when the legality of government conduct concealed by secrecy is a close question, the interests in disclosure can be equally strong as cases of clear illegality. That is, exposure of such secrets allows the public to assess the legitimacy and lawfulness of government action and force the Executive to defend its conduct and disclose the claimed authority for its actions.[336] Disclosure thus allows for the debate and

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the design of the hydrogen bomb. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wisc. 1979).

335. *See* 5 U.S.C. § 552(b) (2012) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

336. In this sense, in the *Citizen Drone Strike* Case, the district court's exploration and discussion of its concerns about the legality of the targeted killing program in the course of its decision upholding

exchange of ideas that is central to democracy, irrespective of whether the particular policy at issue is ultimately deemed lawful.

For example, while Edward Snowden's disclosures about the NSA's massive domestic surveillance programs did not resolve the legality of such government action, and as of the time of this writing that issue remains unresolved,[337] concerns about its legality and impact on Americans' privacy have prompted what President Obama has acknowledged as an important debate.[338] That debate has sparked reform efforts within Congress and encouraged the Executive to study the issues more closely and contemplate changes to the programs.[339] But democracy cannot depend upon leakers alone for such important debates and checks on government to take place. Indeed, the NSA surveillance leaks and the debate that has followed vividly illustrate why courts must be suspicious of illegal secrets that present colorable evidence that the Executive has violated the law.

Questioning whether a secret passes this threshold does not lend itself to a bright line rule. But even without Congress legislating a rebuttable presumption in FOIA that illegal secrets should be disclosed, courts can nevertheless better regulate this form of illegal secrets through FOIA's existing provisions by, at the very least, allowing judicial doubts about the legality of secret executive conduct to modulate courts' deference to the Executive with respect to the applicability of FOIA's statutory exemptions,[340] prompting more detailed explanations from the government. Doing the latter can force the Executive, without necessarily exposing all of the details that it wishes to conceal, to at least defend the lawfulness of its actions on the public record. The current approach of

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the government's FOIA exemptions is a step in the right direction. N.Y. Times Co. v. DOJ, 915 F. Supp. 2d 508, 521–24 (S.D.N.Y. 2012). The court, however, could have gone further in pushing the Administration to defend what the court essentially identified as a potential illegal secret.

337. *See supra* text accompanying note 6.

338. Adam Gabbatt, *Obama Acknowledges Edward Snowden Disclosures in NSA Reform Speech*, THE GUARDIAN (Jan. 17, 2014, 1:54 PM) http://www.theguardian.com/world/2014/jan/17/Obama-acknowledges-edward-snowden-nsa-reform (reporting President Obama's acknowledgement of Edward Snowden's leaks and the importance of the debate over NSA surveillance that it sparked).

339. Francine Kiefer, *NSA Reform? Obama Faces Headwinds in a Congress Divided on Surveillance Policy*, CHRISTIAN SCIENCE MONITOR (Jan. 17, 2014), http://www.csmonitor.com/USA/DC-Decoder/2014/0117/NSA-reform-Obama-faces-headwinds-in-a-Congress-divided-on-surveillance-policy; Nakashima, *supra* note 88; Ellen Nakashima & Ashkan Soltani, *NSA Shouldn't Keep Phone Database, Review Board Recommends*, WASH. POST (Dec. 18, 2013), http://www.washingtonpost.com/world/national-security/nsa-shouldn't-keep-phone-database-review-board-recommends/2013/12/18/f44fe7c0-67fd-11e3-a0b9-249bbb34602c_story.html (describing recommendations of panel appointed by President Obama to review NSA surveillance activities).

340. 8 U.S.C. § 552A(1)(B) (2012).

treating the lawfulness of government action as irrelevant to the government's secrecy privileges undermines the potential for FOIA contests to test and push the government to account for controversial and legally questionable policies—a critical part of transparency even without disclosure of government secrets in full.

Moreover, assessing potential illegal secrets under the framework proposed here need not resolve the lawfulness of disputed government actions. Rather, the court's analysis of illegal secrets could operate similarly to the crime-fraud exception to the attorney-client privilege.[341] In that setting, courts consider whether a party has established prima facie evidence of attorney-client communications that would assist the client in a crime or fraud.[342] Such a prima facie finding does not automatically expose the presumptive wrongdoer to criminal punishment, damages, or, when the client is the U.S. government, result in nullification of the presumptively illegal policy—although those results might occur through other actions after exposure. A finding that the crime-fraud exception to confidentiality applies simply means that the party to the communication is disentitled from keeping its conduct or communication secret.

Evaluating illegality in the context of government secrecy should work in the same way. A FOIA court should similarly assess whether there is *prima facie* evidence of unlawful government conduct, such that, in the interests of democratic accountability, the privilege and benefits of secrecy should yield.

Although the crime-fraud exception to the attorney-client privilege is not a perfect analogy for grappling with illegal government secrets,[343] the example helps demonstrate the ways in which courts can and do make preliminary assessments of legality not for the purpose of nullifying

341. *See* United States v. Zolin, 491 U.S. 554 (1989).

342. Clark v. United States, 289 U.S. 1, 15 (1933). *But see* Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583 (2003) (noting that the quantum of proof required to establish the application of the privilege has varied by court and remains uncertain); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 113–15 (2002) (describing the uncertain nature of the crime-fraud exception's scope).

343. For example, the privilege and its underlying rationales are concerned with communications directed at the future commission of a crime or fraud, not records concealing illegality more generally. *See Zolin*, 491 U.S. at 562–63. Moreover, the crime-fraud exception is a development of the common law, and application of it to statutory secrecy privileges created by Congress through FOIA and related withholding statutes could present separation of powers concerns. *See* W. Union Tel. Co. v. Lenroot, 323 U.S. 490, 514 (1945) (Murphy, J., dissenting) ("[T]he judicial function does not allow us to disregard that which Congress has plainly and constitutionally decreed and to formulate exceptions which we think, for practical reasons, Congress might have made had it thought more about the problem.").

wrongful action or holding individual actors liable, but to determine that a secrecy privilege should be forfeited because strong normative justifications warrant exposure of the underlying information.[344] It also provides a starting point for conceptualizing the quantum of proof courts might require when identifying illegal secrets.

For example, in *Clark v. United States*, the Supreme Court case recognizing the crime-fraud exception,[345] the Court noted that mere allegations of wrongdoing alone would not justify an exception to the privilege. The Court stated that to break the "seal of secrecy" requires "*prima facie* evidence" demonstrating that the alleged crime or fraud "has some foundation in fact."[346]

In this way, the crime-fraud exception provides a helpful antidote to the argument that FOIA litigation is an inappropriate vehicle for testing the legality of government information and would open the door to disclosure of a wide range of legitimate secrets based upon mere allegations of unlawful conduct. Similar to courts' evaluations of privilege disputes, whether government withholdings constitute illegal secrets would not compel a trial within a trial on the question of illegality, nor would such inquiries supplant *Bivens*[347] actions and other vehicles for adjudicating the legality of Executive conduct. Rather, under the framework proposed here, when determining whether a FOIA exemption applies, courts would not declare executive conduct illegal but simply consider whether colorable evidence of illegality warrants exposure of the secret to the public based upon evidence provided by the government about the secret and that in the public record.[348]

In the end, resistance to considering the lawfulness of government action in FOIA disputes is likely less about the workability of such

344. *See Clark*, 289 U.S. at 14.

345. Glynn, *supra* note 342, at 113.

346. *Clark*, 289 U.S. at 15 (internal quotation marks and citations omitted).

347. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a federal cause of action for federal officers' violation of constitutional rights).

348. Since the United States Court of Appeals for the District of Columbia Circuit's decision in *Vaughn v. Rosen*, when the government seeks to withhold information under FOIA, it must disclose to the FOIA requester the basis for the withholding and a description of the information withheld. *See* Vaughn v. Rosen, 484 F.2d 820, 826–28 (D.C. Cir. 1973). FOIA applicants could therefore make their case for disclosure of illegal secrets based upon the contents of the government's *Vaughn* declaration and other publicly available information relevant to illegality. *See* Jaffer, *supra* note 24, at 460–61. Jaffer contends that "some of the government's most vigorously defended secrets are not really secrets at all" but are instead "open secret[s]" or "known unknown[s]." *Id.* He notes that the government frequently tries to conceal information that is already public, whether leaked by whistleblowers, uncovered by investigative reporters, or released by government officials speaking to the press both on and off the record. *Id.* at 461.

inquiries and instead part of a larger pattern of judicial abdication over government "legality" questions more broadly. Indeed, outside of the information-disclosure context, in direct challenges to government action, courts have exhibited a similar hesitancy to consider the lawfulness of controversial and legally suspect national security policies, such as extraordinary rendition and the targeted killing of U.S. citizens through unmanned drone strikes abroad. Courts have instead relied upon a variety of rationales, many purportedly grounded in separation of powers principles, to avoid assessing the lawfulness of Executive actions.[349]

Scholars have persuasively criticized the courts' failure to resolve national security controversies implicating important substantive rights.[350] But even assuming the appropriateness of judicial deference or avoidance of legality determinations in those direct challenges to government action, such deference has little place under FOIA where Congress has mandated judicial review as a deliberate check on the Executive and contemplated the two branches working together to expose executive wrongdoing.[351]

Moreover, Congress has made clear through amendments to FOIA that it intends for the judicial role in evaluating government secrecy to be active and meaningful.[352] Indeed, as Meredith Fuchs has noted, *de novo* review under FOIA is different from the *Chevron* deference typically afforded to agencies or the "arbitrary and capricious" standard applicable

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349. *See, e.g.*, Al–Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (finding challenge to the targeted killing of U.S. citizen abroad was not justiciable in part under the political question doctrine); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (holding that special factors counseled against recognizing constitutional claim under *Bivens* for Canadian man who alleged the United States rendered him to Syria for purpose of torture and interrogation); El-Masri v. United States, 479 F.3d 296, 303–04 (4th Cir. 2007) (dismissing case on the basis of the state secrets privilege after recognizing doctrine's constitutional dimension in light of Executive's exclusive role over military and foreign affairs).

350. *See, e.g.*, Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008) (arguing that in addressing "war on terror" controversies, the judiciary has avoided important substantive questions bearing upon individual rights and instead focused upon process); *see also* Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95 (2013). *But see* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013) (arguing that courts play an important role in shaping national security policy, even though they rarely intervene to substantively resolve a dispute).

351. *See* Samaha, *supra* note 191, at 938–39 (describing FOIA amendments following the Supreme Court's decision in *EPA v. Mink*, and noting "Congress was enlisting the judiciary's help in checking executive control over classified information").

352. H.R. REP. NO. 93-876, at 127 (1974) ("increasing the authority of the courts to engage in a full review of agency action" with respect to classified information, signaling its intent that courts "examine the contents of the records themselves"); 120 CONG. REC. H10864–75 (daily ed. Nov. 20, 1974); 120 CONG. REC. S19806–23 (daily ed. Nov. 21, 1974) (overriding Presidential veto of the 1974 FOIA amendments).

under the Administrative Procedures Act.[353] This starkly contrasts with vehicles for challenging executive legality like *Bivens* actions, which, because they are not congressionally authorized, seek to cabin the judicial role in checking the Executive.[354]

Finally, one might argue that acknowledgment of potentially superseding national security interests within the illegal secrets framework outlined here exposes the approach to the very same dilemma of current law—whereby courts defer nearly wholesale to executive secrecy claims. Indeed, much has been written about the government's tendency to exploit national security claims in order to conceal information beyond its legitimate security interests, including misconduct and illegality.[355] Government claims about the dangers of exposing national security secrets are often exaggerated or even groundless, as demonstrated by several high profile secrecy disputes, including the Pentagon Papers case and the very case first recognizing the state secrets privilege.[356] At the same time, there is, of course, a critical need to protect the nation's legitimate security interests.

To better respond to this persistent dilemma, courts must first recognize their responsibility for oversight over illegal secrets in light of FOIA's First Amendment underpinnings and the judiciary's designated role in a process by which two coordinate branches of government cooperate to check wrongful conduct by the Executive. Heightened engagement with illegal secrets will not alone solve the challenges of balancing national security interests with the need for democratic transparency. But viewing government illegality as irrelevant to government secrecy privileges (as courts currently do) guarantees that the balance will be struck in favor of greater secrecy than is required, given the demonstrated tendency of government officials to shield their wrongful conduct under spurious secrecy pretenses. Once courts accept responsibility for checking illegal secrets in lieu of reflexive deference to the Executive, they might better negotiate government arguments about national security priorities with a healthy amount of skepticism.

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353. Fuchs, *supra* note 108, at 162.

354. *See Arar*, 585 F.3d at 573 ("When the *Bivens* cause of action was created in 1971, the Supreme Court explained that such a remedy could be afforded because that 'case involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress.'") (quoting *Bivens*, 403 U.S. at 396).

355. *See supra* note 168.

356. *See supra* notes 168 & 233.

CONCLUSION

Examining the long relationship between secrecy and illegality, one can easily lament history repeating itself. In light of the lessons about secrecy that the nation appeared to learn after Watergate and the abusive intelligence gathering period of the Twentieth Century, it is troubling that, when faced with some of the most contentious and legally questionable government policies of the current time, the law deems the legality of executive conduct as irrelevant to the question of whether government information should be disclosed. As a result, the Executive can cloak in secrecy both the purported legal authority for legally questionable counterterrorism policies as well as information related to the efficacy and human costs of government action. The unbroken cover of secrecy that results presents a vexing challenge for democracy, given that understanding how the Executive implements policy is often essential to assessing larger questions about the legal authority for such action—the very subject that the government also prefers to keep secret. This undermines the entire conceit of transparent and accountable government that informs First Amendment doctrine and motivates our statutory government disclosure regime. It suggests that when citizen checks and accountability matter most, the system largely fails. Greater skepticism and probing of potentially illegal secrets can begin to reverse this trend.