The Implausibility of Secrecy

Mark Fenster, *University of Florida*
THE IMPLAUSIBILITY OF SECRECY

Mark Fenster
Cone, Wagner, Nugent, Hazouri & Roth Tort Professor
Levin College of Law
University of Florida

fenster@law.ufl.edu
352-514-7266
THE IMPLAUSIBILITY OF SECRECY

ABSTRACT

Government secrecy frequently fails. Despite the executive branch’s obsessive hoarding of certain kinds of documents and its constitutional authority to do so, recent high-profile events—among them the WikiLeaks episode, the Obama administration’s celebrated leak prosecutions, and the widespread disclosure by high-level officials of flattering confidential information to sympathetic reporters—undercut the image of a state that can classify and control its information. The effort to control government information requires human, bureaucratic, technological, and textual mechanisms that regularly founder or collapse in an administrative state, sometimes immediately and sometimes after an interval. Leaks, mistakes, open sources—each of these constitutes a path out of the government’s informational clutches. As a result, permanent, long-lasting secrecy of any sort and to any degree is costly and difficult to accomplish.

This Article argues that information control is an implausible goal. It critiques some of the foundational assumptions of constitutional and statutory laws that seek to regulate information flows, in the process countering and complicating the extensive literature on secrecy, transparency, and leaks that rest on those assumptions. By focusing on the functional issues relating to government information and broadening its study beyond the much-examined phenomenon of leaks, the Article catalogs and then illustrates in a series of case studies the formal and informal means by which information flows out of the state. These informal means play an especially important role in limiting both the ability of state actors to keep secrets and the extent to which formal legal doctrines can control the flow of government information. The same bureaucracy and legal regime that keep open government laws from creating a transparent state also keep the executive branch from creating a perfect informational dam. The Article draws several implications from this descriptive, functional argument for legal reform and for the study of administrative and constitutional law.
TABLE OF CONTENTS

Introduction

I. Secrecy’s Law and Norms
   A. Secrecy Laws
   B. Secrecy Norms
   C. Secrecy’s Legal and Institutional Limits

II. Institutional and Informal Constraints on Secrecy
   A. Leaks as Deliberate Informational Flows
   B. Leaks as Accidental Informational Flows
   C. Information Flows Outside of the State’s Control
   D. Secrecy as Information

III. Vice President Cheney and the Executive Branch’s Imperfect Information Control
   A. The Information Control Narrative
   B. The Legal Fight Over NEPDG Information
   C. The Limits of Information Control

IV. Redaction Failures: Imperfect Information Control in the Release of Documents
   A. Information Control and Release in Redaction Law
   B. How Redaction Fails
   C. Redaction’s Meaning

V. “Secret History”: The Struggle to Control Information about Covert Operations
   A. Public Secrets and Public History Law
   B. Guatemala’s Secret History

Conclusion: The Implications of Secrecy’s Implausibility
THE IMPLAUSIBILITY OF SECRECY

INTRODUCTION

The federal government keeps an enormous number of secrets—far too many, according to transparency advocates, the press, government commissions, and courts. The volume of classified records rises endlessly, as does the cost of keeping them, resulting in an enormous secrecy program that regulates the flow of information in the executive branch. And yet, the executive branch’s efforts to keep secrets frequently fail, as a series of worried government commissions have concluded over the past several decades. The WikiLeaks episode constitutes the most spectacular

---

2 See, e.g., Editorial, The Dangerous Comfort of Secrecy, N.Y. TIMES, Jul. 12, 2005, at A20 (complaining that “the government's addiction to secrecy is making an unnecessary casualty of the openness vital to democracy”).
4 See, e.g., ACLU v. Dep’t of Def., 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (identifying the “unfortunate tendency of government officials to over-classify information”);
5 See infra notes 31-32 and accompanying text.
unauthorized disclosure of classified information,\textsuperscript{7} while the Obama administration’s ongoing prosecution of leaks stands as an effort to correct an apparently pervasive and perhaps unfixable problem.\textsuperscript{8} At the same time, high-ranking officials regularly leak and plant classified information for political gain, often with explicit or implicit authorization.\textsuperscript{9} The \textit{New York Times’} 2005 disclosure of the National Security Agency’s (NSA) warrantless surveillance of domestic communication appears to support both claims: the George W. Bush administration engaged in extraordinary, seemingly successful efforts to maintain the program’s secrecy—efforts that ultimately failed when the program’s outlines leaked to the press.\textsuperscript{10}

Some commentators have resolved the conflict between these two competing claims by hypothesizing that excessive secrecy \textit{causes} inadvertent leaks—that the government loses classified information precisely because it


\textsuperscript{10} The program remained secret to the public for three years, from its inception in 2002 until its disclosure in the \textit{Times} in 2005, a year after the newspaper had first learned of it. See ERIC LICHTBLAU, \textit{BUSH'S LAW 194-99} (2008); JAMES RISEN, \textit{STATE OF WAR 44-60} (2006); Laura K. Donohue, \textit{The Shadow of State Secrets}, 159 U. PA. L. REV. 77, 145-46 (2010); see also ALASDAIR ROBERTS, \textit{BLACKED OUT 72-78, 232-33} (2006) (describing the unraveling of the Bush administration’s efforts to control information about the invasion of Iraq and of detainee abuses in Iraq and Guantanamo Bay).
classifies too much. Marginal increases in secrecy are nothing new, however—indeed, the complaint that the state hoards too much information has a long history in the U.S. and in critiques of bureaucratic secrecy. The U.S. has also regularly been losing information since its founding. A less secret government might lose proportionally fewer secrets, but it could not stop all secrets from escaping its control. To be sure, the state can protect some information, especially “deep secrets”—the “unknown-unknowns” which the public does not know exist because they circulate within strict limits and benefit from exceptional technological and logistical efforts to confine them. Notwithstanding the state’s enormous precautions, many of

11 See, e.g., Bellia, supra note 7, at 1518-19 (listing overclassification, along with digital technology and the quantity of classified documents and individuals with access to it, as “interrelated factors [that] shape the environment for leaks”); Fuchs, supra note 1, at 139 (arguing that overclassification and excessive secrecy “undermine the effort to keep truly sensitive information secret”); Heidi Kitrosser, Classified Information Leaks and Free Speech, 2008 U. Ill. L. Rev. 881, 889 (“the potential for leaks grows with the number of official secrets and official secret-keepers”). This complaint is also time-honored. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (“when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion”).

12 The fact that unauthorized leaks constitute a grievous problem has been as widely acknowledged as has the fact that the government overclassifies the information it wants to control. For a list of the ten government reports issued between 1956 and 2004 that have addressed and condemned the problem of secrecy and government leaks, see GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 17-20 (2011).

13 For at least the past century, scholars have understood that secrecy in organizations, including government entities, is an inevitable product of the bureaucratic attempt to control information flows. See, e.g., SISSELA BOK, SECRETS 5-6 (1983) (defining secrecy as the intentional concealment of information); GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 345 (trans. & ed. Kurt H. Wolff, 1950) (noting how organizations that control secret information use secrecy to “determine[] the reciprocal relations among those who share it in common”); 3 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 992 (Guenther Roth & Claus Wittich eds., 1968) (“Bureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can.”); Richard W. Wilsnack, Information Control: A Conceptual Framework for Sociological Analysis, 8 URB. LIFE 467 (1980) (attempting to develop a conceptual field for the study of how organizations maintain control over access to information).


15 This phrase is commonly associated with former Secretary of Defense Donald Rumsfeld, who used it to refer to information about Iraq’s effort to develop weapons of mass destruction. Donald H. Rumsfeld, Sec’y of Def., Department of Defense News Briefing (Feb. 12, 2002), President http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636.

its deepest secrets ultimately come to light anyway. As with the NSA’s surveillance program,\textsuperscript{17} the effort to keep deep secrets can delay disclosure, but it often cannot prevent it entirely.\textsuperscript{18}

These secrecy failures occur because of the state’s bureaucratic structure and the difficulties of both storing and communicating information. The state must depend for its internal decisionmaking process on the flow of information from sources dispersed within and outside government.\textsuperscript{19} Like all large organizations engaged in complex tasks, the administrative state neither circulates nor processes information internally in a mechanical, coordinated, fully rational way.\textsuperscript{20} There is no reason to think, therefore, that an organization which cannot perfectly control or manage its internal flow of information can stop information at the borders of its bureaucracy.\textsuperscript{21} Put simply, the effort to control state information requires human, organizational, technological, and textual mechanisms that often fail—sometimes by design, in the checks and balances of a democratic state, and sometimes by the weakness of bureaucratic control. Secrecy of any sort and to any degree is costly and difficult to accomplish, and can only stem the authorized flow of official information.\textsuperscript{22}

\textsuperscript{17} See supra note 10.
\textsuperscript{18} Pozen, supra note 16, at 327-31 (discussing “deep secrets” that later came to light).
\textsuperscript{21} See Halperin et al., supra note 20, at 181-203 (describing the means by which information flows out of the state, and the various motivations of those who allow it to do so).
\textsuperscript{22} This Article considers only government secrecy in the U.S., and makes no claims about the portability of its conclusions to other nations and especially to other political systems. I would note, however, that information still flows even in autocratic and secretive regimes—it just does so more, and often much more, through rumors, gossip, and figurative forms (like the arts) than through a private press or formal civil society institutions. This was particularly the case in the Soviet Union, for example. See Geoffrey A. Hosking, \textit{Rulers and Victims: The Russians in the Soviet Union} 51 (2006); Raymond A. Bauer & David B. Gleicher, \textit{Word-of-Mouth Communication in the Soviet Union}, 17 Pub. Opinion Q. 297 (1953); Thomas Remington, \textit{The Mass Media and Public Communication in the USSR}, 43 J. Pol. 803 (1981).
This is not, however, how the vast majority of reformers, activists, and academics understand the issue. Transparency proponents view secrecy as an inefficient and harmful bureaucratic practice whose overregulation of information flows demands correction. It is a correctable bug in the system, one that the right mix of legal and institutional reforms can fix by allowing information to flow to the public. Secrecy’s proponents view the issue from an opposite, though parallel, position. Their concern for national security, foreign relations, and law enforcement, and for allowing an autonomous, unitary executive to protect the flow of information, leads them to view secrecy as a crucial administrative goal. Like transparency proponents, secrecy proponents frame their dissatisfaction as a solvable legal problem—if only we design laws and institutions to protect the executive’s privilege to control information, we can re-establish a correct balance between transparency and secrecy. For secrecy advocates, excessive disclosure, not the excessive protection of information, is the bug in governance that they trust law to correct.

But perfect information control of whatever sort is in fact an implausible goal. The laws and legal norms that ensure both limited, imperfect secrecy and transparency do not lend themselves easily to legal reform; they are not bugs in the system of governance but part of its operating code. Like the open government laws that cannot always force the flow of information from a sprawling, stubborn bureaucracy, laws that authorize the

26 A preeminent proponent of this position is former Vice President Dick Cheney. See infra Part IV-B.
27 To be clear, this is not an argument that “information wants to be free.” See John Perry Barlow, The Economy of Ideas, WIRED 2.03 (Mar. 1994), reprinted at www.wired.com/wired/archive/2.03/economy.ideas_pr.html (establishing that phrase, and its libertarian implications, in the technophilic lexicon). Information neither wants to be free nor wants to be controlled. It is a thing; it cannot want. Rather, information circulates in a social environment that makes it difficult to control.
government to keep secrets cannot construct a perfect informational dam against the leaks caused by that same bureaucracy. Information can flow as a result of formal legal requirements; it can leak out from sources within government; it can be found in open sources besides the state; and it can become visible due to official mistake. Furthermore, secrecy engenders public speculation about what is being withheld, while the process of keeping secrets, once made public, itself communicates important information about the state and its governance strategy. Under-enforced and often unenforceable laws and regulations, bureaucratic inertia and resistance, and the push and pull of an advanced democracy with vibrant civil institutions render both transparency and secrecy implausible.

This Article critiques some of the foundational assumptions of constitutional and statutory laws that seek to regulate information flows, in the process countering and complicating the extensive literature on secrecy and leaks that rest on those assumptions. Unlike most articles in this area, my concerns are not normative—I am not arguing in favor of transparency or against secrecy, principles that are typically espoused in persuasive rhetoric that finds deep secrecy morally repugnant to a democratic state. Nor am I arguing that efforts to control information are benign or have no ill effect. They can, for example, delay disclosure even when they cannot prevent it permanently. Instead, I focus on why the control of government information that secrecy proponents and critics assume is possible cannot in fact be achieved on a regular and programmatic basis. Outlining the limits to information control and discussing in detail several instances of notable control failures, I contend that secrecy is in fact implausible.

My purpose is to better understand what information control can and cannot accomplish, and what effects it actually has—and, as a consequence, both the powers and limits of the executive’s ability to govern in a unitary and coordinated fashion. The issue requires a broad consideration of the legal, administrative, and social means by which the state both controls and loses control of information, as well as the ethical and political checks on that control. To that end, Part I of this Article identifies the laws and bureaucratic norms that allow and encourage secrecy, and notes the important but incomplete formal legal limits on secrecy. Part II outlines the various informal impediments—bureaucratic, political, and technological—to the state’s ability to control information.

Understanding this phenomenon also requires a grasp of the very different ways the state can lose control of information. Through case

---

29 This is particularly true in the field of constitutional law. For recent arguments against deep secrecy’s constitutionality, see Heidi Kitrosser, Secrecy and Separated Powers: Executive Privilege Revisited, 92 IOWA L. REV. 489, 522-27 (2007); Pozen, supra note 16, at 305-23.
Parts III through V offer illustrative secrecy failures in instances when the state has tried its very hardest to keep secrets. Part III chronicles the effort by the Bush administration to keep secret Vice President Cheney’s National Energy Policy Development Group (NEPDG), a key pre-9/11 episode that foreshadowed later struggles over executive branch secrecy. Its significance is more than as mere prelude to the broader efforts to control information that followed. The Vice President’s efforts to keep NEPDG’s actions secret relied upon the most well-articulated theory of executive control over information, which Cheney had helped develop in writings that he had overseen and published. Notwithstanding this explicit attempt to deploy the theory of perfect information control in practice, the myriad legal and extralegal ways by which NEPDG information escaped the Vice President’s control illustrate secrecy’s limits and implausibility. Part IV describes the attempted redaction of classified information as a general type of secrecy failure that has occurred in several recent instances. Part V discusses the difficulty that the government faces in controlling even its most prized secrets about covert operations, focusing on one of the most significant such operation in twentieth century U.S. history, the CIA-led coup in Guatemala in 1954, which deposed that country’s popularly elected president.

The Conclusion draws three implications from secrecy’s implausibility: first, that law has limited effects on secrecy’s possible success, leaving politics and ethics as levers that play crucial roles in limiting as well as imposing secrecy; second, that we would be better served to reconceptualize the availability of information in terms other than as a binary between secrecy and disclosure; and third, because secrecy proves increasingly implausible in the long run, reform efforts should focus on express pre-commitments to the timely, if delayed, systematic release of the executive branch’s most prized information.

This Article’s argument asserts that legal and bureaucratic systems of control fail and that information can and will escape in a myriad of ways—even in those cases in which the government tries hardest to protect its secrets. To prove and illustrate this argument, the case study method’s sensitivity to historical specificity and contingency outweighs its limitations in scale and the danger that each case is anomalous. This Article’s three different sets of case studies, which concern varied methods by which the state has sought to control information about domestic policy development, intelligence operations, and covert action, demonstrate the argument’s application across a variety of state actions.
I. Secrecy’s Laws and Norms

The contemporary state keeps secrets—an enormous quantity of them, in fact. In the U.S., government overclassification of information is excessive secrecy’s most obvious and outrageous manifestation. A regulatory regime developed to protect Cold War secrets, information classification has mushroomed to a multi-billion dollar regulatory program—$11.36 billion in fiscal year 2011, a figure that has steadily risen since 1995 and that does not include the enormous costs borne by the major intelligence agencies, whose budgets are themselves classified.31 Thousands of officials with delegated authority classify and then seek to protect documents as secret; hundreds of thousands of documents are classified annually; tens of millions of government documents incorporate classified information and in the process become part of a universe characterized as “derivative classification.”32 The state’s ability to control information to this extent depends not only upon the formal legal doctrines that allow the executive branch to protect secrets, but also the informal institutional norms that impose professional and social obligations on executive branch officers to respect and uphold an agency’s secrecy regime.

A. Secrecy Law

Both explicitly and implicitly, law enables—and even encourages—executive branch secrecy. The Constitution’s construction of separate powers provides the most significant, as well as the most abstract, source of legal authority for the executive’s protection of information. The Supreme Court has found that Article II confers on the President the power to classify and control information regarding national security and foreign policy, especially where Congress has not provided otherwise.33 Congress can only limit presidential control over executive branch information if it does not prevent the President from accomplishing his “constitutionally assigned functions.”34 Congress can, for example, require executive branch agencies to respond to

private individuals’ informational requests and can delegate to the federal courts the authority to resolve disputes between agencies and requesters, but only so long as the documents demanded do not impinge on the President’s privilege to withhold certain types of information.\textsuperscript{35}

This protection from interbranch intrusion provides the President and executive branch with the privilege to hold certain secrets from Congress and against Congress’s wishes.\textsuperscript{36} The privilege’s abstract and highly contested contours appear in a cluster of related doctrines, some of which fall within the formal doctrine of “executive privilege.” The D.C. Circuit has distinguished three separate privileges that compose the doctrine: a classic but somewhat narrow, absolute privilege to withhold information “crucial to fulfillment of the unique role and responsibilities of the executive branch of our government”; a broader privilege to withhold “presidential communications” among the President and his closest advisors, which is subject to a deferential judicial balancing test; and a qualified “deliberative process privilege” protecting information from the process of government decisionmaking.\textsuperscript{37} The concept of privilege extends to include the “state secrets” doctrine, which allows the Department of Justice to bar plaintiffs from access to national security information in tort litigation filed against the military or other government agencies.\textsuperscript{38} And the executive branch can broadly protect its deliberative process by designing or using groups to seek advice in performing its constitutional duties without disclosing information produced by and for them, notwithstanding legislation that seeks to impose openness mandates on advisory committees.\textsuperscript{39} Viewed broadly, “privilege” serves as a legal concept that refers to the executive’s authority to control information; viewed in its strongest form, as the George W. Bush administration advocated more forcefully than its recent predecessors,\textsuperscript{40} the


\textsuperscript{36} See United States v. Nixon, 418 U.S. 683, 705-06 (1974) (recognizing the executive’s “supremacy . . . within its own assigned area of constitutional duties.”)

\textsuperscript{37} In re Sealed Case, 121 F.3d 729, 736-40 (D.C. Cir. 1997).

\textsuperscript{38} United States v. Reynolds, 345 U.S. 1, 10 (1953) (establishing the state-secrets doctrine); see generally Robert M. Chesney, State Secrets and the Limits of National Security Litigation, 75 GEO. WASH. L. REV. 1249, 1270-1308 (2007) (surveying executive branch’s use of doctrine).

\textsuperscript{39} Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 466-67 (1989) (interpreting Federal Advisory Committee Act (“FACA”) narrowly to avoid the “formidable constitutional difficulties” that would arise if it were applied to president’s use of the ABA’s Standing Committee to receive advice on Supreme Court nominations); see generally infra Part III-B (summarizing and analyzing underlying separation of powers issues in dispute over FACA’s application).

Constitution’s textual commitment of, among other authorities, the “Executive Power,” grants the President a “zone of autonomy” from congressional intrusion.\footnote{Brief for Petitioners at 34, Cheney v. U.S. Dist. Ct., 124 S. Ct. 2576 (2004) (No. 03-475) (citing Art. 2, § 1, Art. II, § 2, cl. 1, Art. II § 3, cl. 1); see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 407 (2008) (identifying the Government’s argument in its brief in \textit{Cheney} as a key example of how the Bush administration “staunchly protected the autonomy of the executive branch in the courts”). I discuss the Court’s decision in this case, and the circumstances surrounding the litigation, in Part III, supra.}

Beyond specific doctrines, the privilege concept affects the institutional relationship between the executive and judiciary. Courts defer to executive branch claims or avoid potential constitutional conflicts with the executive branch by construing statutes narrowly.\footnote{Heidi Kitrosser, \textit{Secrecy and Separated Powers: Executive Privilege Revisited}, 92 IOWA L. REV. 489, 501-02 (2007).} In \textit{Nixon v. United States}, in which it rejected the President’s effort to use the deliberative privilege to withhold White House tapes from the special prosecutor investigating Watergate, the Supreme Court used sweeping language to recognize the President’s authority to shield privileged information in certain circumstances.\footnote{43 \textit{Nixon}, 418 U.S. at 705-07 (holding that deliberative privilege loses in a balance against the need for information in a criminal prosecution, while recognizing a broad privilege “to protect military, diplomatic, or sensitive national security secrets”).} \textit{Nixon} can thus be read in two ways, both of which enable secrecy as a matter of law or practice. \textit{Nixon} represents either, as William Van Alstyne characterized it, “an oblique invitation to the President to throttle judicial review by presenting a claim of executive privilege in the cellophane wrapper of ‘national security,’”\footnote{William Van Alstyne, \textit{A Political and Constitutional Review of United States v. Nixon}, 22 UCLA L. REV. 116, 123 (1974).} or it more expressly invites endless political struggles over information between the executive and legislature.\footnote{Louis Fisher, \textit{Congressional Access to National Security Information}, 45 HARV. J. ON LEGIS. 219, 219-20 (2008); Mark J. Rozell, \textit{Executive Privilege Revisited: Secrecy and Conflict During the Bush Presidency}, 52 DUKE L.J. 403, 404 (2002).} Political struggle, which has proven the most frequent means to resolve executive privilege disputes over information,\footnote{Joel D. Bush, \textit{Congressional-Executive Access Disputes: Legal Standards and Political Settlements}, 9 J.L. & POL. 719, 735 (1993).} will favor the political branch that holds the information, giving a great advantage to the executive. If the executive privilege claim is colorable, and if courts slowly and only occasionally resolve disputed instances of its use, a presidential administration can use the doctrine to keep secrets, at least temporarily. Between the President’s occasional successes in the courts, the costs required to challenge exercises of executive authority, and the delays caused by a President’s resistance to...
disclosure, executive privilege grants the President the practical and legal ability to control information.\(^{47}\)

Non-constitutional authorities parallel and extend the constitutional privilege. In its open government legislation, Congress typically respects the President’s authority by protecting certain kinds of documents\(^{48}\) and certain types of government entities\(^{49}\) and advisors\(^{50}\) from disclosure mandates. The classification system, largely developed and overseen by the executive branch itself, enables agencies with classification authority to keep information secret almost indefinitely and without interbranch oversight.\(^{51}\) The Freedom of Information Act (FOIA) explicitly excludes classified documents from disclosure,\(^{52}\) while the Espionage Act criminalizes the knowing and intentional unauthorized disclosure of classified information.\(^{53}\) The Whistleblower Protection Act specifically excludes from its protection personnel in the intelligence community,\(^{54}\) more generally excludes civil servant positions of a “confidential, policy-determining, policy-making, or policy-advocating character,”\(^{55}\) and grants the President authority to exempt any positions when the President finds it “necessary and warranted by conditions of good administration.”\(^{56}\) It explicitly precludes from protection disclosures of information “specifically prohibited by law . . . and specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”\(^{57}\) Congress has thereby created or allowed the creation of laws and executive branch authorities that sanction the regular production and protection of secrets.


\(^{48}\) 5 U.S.C. 552(b)(1)–(9) (exempting certain documents from disclosure under FOIA).

\(^{49}\) Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (holding that FOIA does not apply to close presidential advisors); 50 U.S.C. §403g (exempting the CIA from any law requiring “disclosure of the organization, functions, names official titles, salaries, or numbers of personnel employed by the Agency”).

\(^{50}\) Public Citizen, 491 U.S. at 462-65 (narrowly interpreting FACA to restrain its reach from purely private groups “not formed at the behest of the Executive or by quasi-public organizations whose opinions the Federal Government sometimes solicits”).


\(^{53}\) 18 U.S.C. § 793(d)–(e) (2006); see also infra notes 161–63 and accompanying text.


\(^{55}\) Id. at § 2302(a)(2)(B)(i).

\(^{56}\) Id. at § 2303(a)(2)(B)(ii).

B. Secrecy Norms

No presidential administration welcomes unauthorized leaks, and most—including the allegedly “hermetically sealed”58 administration of George W. Bush—attempt to threaten those officials who leak without authorization with criminal punishment. But threats of criminal sanction are only one means of stopping leaks. Bureaucratic structures and practices also establish norms of official behavior that create and protect secrets. Organizational control of information works to define the organization’s boundaries: those inside enjoy access to the shared, exclusive knowledge that members possess; those outside are excluded from the organization’s secrets.59 Secrecy thereby produces a paradox—it requires communication by members of an organization who share information and also create rules to exclude outsiders.60 A secrecy regime commands an organization’s members to practice quiet and control, but it also demands that they obsess as an organization over information. It requires collective self-discipline built from a strong sense of privileged exclusion.61 Formal legal protections for the maintenance of secrecy must rely heavily on such informal organizational means that government entities use both to protect and to communicate secrets.

These informal means can prove quite powerful. Daniel Ellsberg, who leaked the Pentagon Papers to the press, characterizes such norms as the “psychosocial aspects” of organizational membership. By building self- and professional identity around membership, an organization that holds secrets threatens to exclude those who break their promise not to share information with outsiders.62 Informing outside authorities about an organization’s secrets thus breaches an individual member’s loyalty to the organization and to the organization’s hierarchical authority.63 As a result of their actions, those who tell an organization’s secrets face significant costs to their career, including retaliatory suspension or termination from their jobs and the loss of informational privileges like security access that might be required for their profession.64 Whistleblowers and leakers can irrevocably shatter their

60 Beryl L. Bellman, The Paradox of Secrecy, 4 HUMAN STUD. 1, 8-9, 21 (1981).
63 BOK, supra note 13, at 214-16.
professional and personal lives through their actions, facing exile from the community to which they had belonged, as well as their access to an exciting, exclusive world that enlivened the professional, bureaucratic mundanity of their work lives. Organizational and professional membership pulls individuals into the world of secret information and binds them there, in the process shoring up the formal legal secrecy system by discouraging members from leaking information and, at times, by encouraging them to destroy or keep hidden information from investigators.

C. Secrecy’s Legal and Institutional Limits

Of course, legal and structural restraints on secrecy do exist, even in the face of executive branch resistance. Courts do not always shy away from constitutional clashes over information, and do not always view the zone of constitutional privilege expansively. In the U.S. federal system, Congress has the authority and legal tools to oversee agencies, investigate the White House, and leverage its ability to punish agencies and individuals to lift the veil on executive branch secrecy. It does so through its oversight authority, committee structure, and subpoena and impeachment powers; through its appropriation authority; and using its legislative power to create public rights to executive branch information and to protect whistleblowers from retaliation. Courts, too, limit secrecy in a number of ways beyond high-
profile constitutional disputes. They enforce statutory disclosure mandates, and they oversee the discovery process in criminal prosecution and in private tort suits against the government.

These formal limits on executive branch secrecy are famously imperfect. Congressional oversight, especially of national security matters, is fragmented among numerous committees, variable in strength and focus, and frequently quite deferential. The institutional interbranch rivalry that should theoretically lead the legislature to probe executive branch performance is often overwhelmed by interparty rivalry that colors oversight by producing either overly deferential or politically antagonistic (rather than objectively probing and curious) congressional committees. The open government laws Congress has enacted include exceptions that swallow the statutory mandates whole in some matters. White Houses and the bureaucracies they oversee have failed to perfectly comply with the demands that statutes place on them. At the same time, courts have often proven less than fully fearless in their willingness to enforce legal mandates against resistant government entities, deferring to formal executive privilege claims and more general arguments about the dangers of disclosure to national security. Similarly, as critics regularly complain, whistleblower laws provide insufficient protection to employees who want to disclose information about government malfeasance.

Nevertheless, the assemblage of transparency laws provides a substantive, if imperfect, limitation on government secrecy. Most significantly, it establishes administrative norms from which secrecy is viewed as a departure,

77 See notes 48-50 and accompanying text.
and it constructs a legal and ideological beachhead from which transparency advocates and political minorities and other group seeking to pry information from the state can wage battle. This formal assemblage resembles a patchwork, one whose fabrics have variable weight and strength and cover significant practices and government entities, but that may be too small and frail with too many bare patches to afford complete and comprehensive coverage.

II. INSTITUTIONAL AND INFORMAL CONSTRAINTS ON SECRECY

The bare patches in the formal legal checks on secrecy appear to allow the executive branch to control significant quantities of information. The enormous public funds spent on the classification reveal just how much the state thinks it can control information and how much it is willing to pay to try. But informal constraints on the state’s ability to keep secrets raise the costs of information control and lower the state’s ability to hold secrets. In this Part, I briefly identify and describe four such constraints: the information flows that leaks create from all parts of the state, sometimes as part of an authorized program to achieve institutional political ends, and sometimes by an individual or group acting without authorization that hopes to subvert state policies and harm the current political regime or individual state actors; bureaucratic errors that lead to information becoming public without authorization; open sources that make available putatively “secret” information that the state attempts to protect; and the messages that the state sends in its very practice of keeping secrets. This Part introduces the broad range of informal means by which information moves from the state, means that the remainder of the Article illustrates in detailed case studies.

A. Leaks as Deliberate Informational Flows

Unauthorized disclosure is the most well-known and widely discussed means by which information flows outside the state informally, without either government sanction or legal obligation. “Unauthorized” in this

82 See supra text accompanying notes 31-32.
83 My use of the term “informal” here and elsewhere attempts to distinguish those practices that occur outside of or as an accident of the authority of formal government institutions. This is, admittedly, a rough distinction, and one that does not fit perfectly in every instance, but is intended as a helpful heuristic rather than a technical distinction.
84 Recent works on leaks include Jack Goldsmith, Power and Constraint 51-82 (2012); William E. Lee, The Role of Whistleblowers to Facilitate Government Accountability, 57 AM. U. L. REV. 1453, 1467-70 (2008); and Mary-Rose Papandrea, Lapdogs, Watchdogs, and Scapegoats: The
context can mean quite different things, depending on the leaker’s identity and purpose—a problem that efforts to legislate against leaks must confront. High-ranking officials frequently provide information “off-the-record” or not for attribution to a reporter as part of a coordinated plan to communicate with, cajole, or pressure outsiders—including other agencies and branches of government, political parties, private interests, and the general public, for example. Such leaks are pervasive in Washington, ubiquitous elements in a competitive democratic system served by competitive private news organizations. They are only “unauthorized” insofar as they provide information in an informal manner, outside of official channels and formal disclosure processes. High-ranking officials also leak frequently, usually passing information (including some that is classified) to writers and reporters in order to burnish or solidify their own reputations.

---

These reciprocal relationships between source and press allow officials to trade information in exchange for publicity and status, among other things.90

Unlike the high-level leakers or their agents who bear little or no risk of reprisal or prosecution, informal leaks made outside of the bureaucratic or political command chain—or, worse, in specific opposition to the state or administration—bear some risk of prosecution.91 Government employees enjoy little legal protection from retaliation by their employers when the employees’ actions are not subject to statutory whistleblower protection.92 And when their leaks contain classified information, they may face prosecution under the Espionage Act (prohibiting unauthorized disclosure of “information respecting the national defense”)93 and the Intelligence Agencies Identity Protection Act (prohibiting disclosure of “information identifying [a] covert agent”).94 The First Amendment offers leakers only thin protection, if it provides any protection at all,95 and the reporters to whom they leak enjoy no First Amendment right to shield their sources’ identities—although they may have a common law federal right to do so, as well as statutory rights in some states.96 The news organizations that publish leaks

---

91 David Pozen persuasively argues that the institutional dynamics within the executive branch, which create incentives not only for individuals to leak but excellent reasons for the Department of Justice to underenforce anti-leaking laws, lead to few formal criminal prosecutions of leakers and, as best as he could learn, few formal administration sanctions. Pozen, Leaky Leviathan, supra note 84. Left unclear, however, is the extent to which informal sanctions attach to mid- and low-level employees who leak without authorization—especially if they leak in a way that harms the administration or the agency that employs them.
92 On the limits of whistleblower statutes, see supra notes 54-57, 80 and accompanying text.
93 18 U.S.C. § 792 et seq.
94 50 U.S.C. § 421 et seq.
96 It is unlikely that reporters enjoy a First Amendment right to protect the identity of their leaks against criminal prosecution, and it is unclear if they enjoy a federal common law right to do so. See Branzburg v. Hayes, 408 U.S. 665, 697 (1972) (no First Amendment right to protect identity of sources from a criminal investigation); In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1145-49 (D.C.Cir. 2006) (holding that Branzburg foreclosed a First Amendment right for reporters to shield sources against a grand jury investigation); id. at 1149-50 (noting split opinion among three-judge panel on question of common law
enjoy First Amendment protection against prior restraint, although they may still face prosecution under the Espionage Act for leaks of classified information. But notwithstanding the recent upticks in leak prosecutions by the Obama administration (some of which are being pursued as holdovers from the Bush administration), prosecutions for illegal disclosures are difficult for the government to pursue and to win, although the threat of prosecution and the cost of mounting a criminal defense might be sufficient to deter many from leaking.

And yet—despite minimal legal protection from retaliation and prosecution, and with all of the normative punishments and constraints that further increase the risks and costs that government employees face in leaking information—unauthorized disclosures by mid-level government personnel are common. For decades, internal government reports have regularly complained of the prevalence of classified information leaks—the most embarrassing leaks for the government, and the ones for which leakers face the greatest risks of punishment and prosecution. Indeed, this phenomenon is as old as the nation itself.


See New York Times Co., 403 U.S. at 743–48 (Marshall, J., concurring) (stating that the government can criminally prosecute newspapers after publication); id. at 733, 737 (White, J., concurring) (stating he would have “no difficulty” sustaining a conviction under the Espionage Act after publication).


See Part I-B, supra.

See Kielbowicz, supra note 14, at 478-80. Cf. Pozen, Leaky Leviathan, supra note 84 (arguing that the minimal formal legal protections for leaking belies the DOJ’s practice of underenforcing criminal sanctions).


See Kielbowicz, supra note 14, at 433.

Truly successful bureaucratic secrecy requires powerful group identity and a common cause—and even then, the protected secrets emerge over time.\textsuperscript{105}

Nevertheless, this is not a perfect system for defeating excessive secrecy—indeed, it is not a system at all. The media to whom sources leak information are unregulated and largely unaccountable, except by professional norms of conduct and as market actors.\textsuperscript{106} The personal and institutional competition that drives journalists and their editors towards the “scoop” can render their reporting biased, partial, or even factually incorrect.\textsuperscript{107} Insofar as leaks merely check a system of information control, they do so randomly, and therefore lead to under- and over-disclosure depending upon individual officials’ willingness to risk leaking and the government’s ability to stop them. Nevertheless, leaks commonly and regularly move information from the state, undercutting efforts to control information and raising the costs and risks of secrecy.

\textbf{B. Leaks as Accidental Informational Flows}

Bureaucracies can also simply fail to hold information. Lax security, for example, has resulted in unauthorized information disclosure by allowing dissidents to access, remove, and copy secret material. This occasionally results in the equivalent of leaks, though on a massive scale—most famously, in the cases of Daniel Ellsberg and Bradley Manning’s thefts of physical and digital documents, which produced the massive Pentagon Papers and WikiLeaks disclosures respectively.\textsuperscript{108} In each instance, the state had granted or enabled access to information to officials; the officials grew disillusioned; and both took advantage of their access to copy classified documents, which their superiors and the information security system failed to notice. Although the leaks were intentional, they were the consequence of mistakes—especially in Manning’s case—that expanded access to supposedly dreadful military secrets to individuals who betrayed them quite willingly.\textsuperscript{109}

\textsuperscript{105} See, e.g., CHRISTOPHER GREY, DECODING ORGANIZATION 121-32 (2012) (describing the role of secrecy in Bletchley Park, Britain’s highly successful World War II cryptographic unit, as well as its ultimate disclosure).


Mistakenly allowing malfeasance is just one bureaucratic failure; sometimes, officials disclose information by simple mistake or inadvertence. As *Washington Post* reporters Dana Priest and William Arkin have documented, large quantities of classified and sensitive information are available via simple web searches and peer-to-peer file sharing software, often as a result of government employees’ insufficient security measures. In one recent example, the NSA mistakenly posted an unredacted version of a classified internal research article and then hastily declassified it in order to cover up the agency’s error; in another, a contractor hired by the Food and Drug Administration mistakenly posted on a public website documents produced in a vast surveillance program that the agency had undertaken to monitor the email traffic of several dissident employees. As the number of government employees and private contractors with security clearance expands, the likelihood that more such massive leaks of electronic documents will occur also expands. In addition, in a reverse of the “mosaic theory” under which the government argues that otherwise non-classified information cannot be released under the FOIA because enemies can use it to piece together classified information, government officials can unknowingly provide small pieces of information that a reporter can piece together to form an accurate accounting of secret government action without an actual “leak.” Disclosures can appear in such disparate forms as spy novels—even those published outside the U.S.

Mistaken and inadvertent disclosures are not systematic, and many of them are never spotted or exploited, but in the aggregate they undercut government efforts to keep information secret. Whether kept in electronic

---

110 Id. at 263-66.
114 See MARTIN LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 170-71, 192 (1986); see, e.g., FEDERAL RESERVE, TRANSCRIPT OF MEETING OF THE FEDERAL OPEN MARKET COMMITTEE ON OCTOBER 30–31, 2007, at 4, available at http://www.federalreserve.gov/m injects/monetary/files/FOMC20071031meeting.pdf (transcribing the complaints of Federal Reserve Chairman Ben Bernanke about the disclosure of confidential Federal Reserve policy as a result of a journalist’s having had many individual conversations with official sources, each of whom gave him “a little bit of the story”).
form and therefore vulnerable to easy transfer by mistake or theft, or stored in someone’s memory and capable of being spoken, information is akin to liquid—capable of flowing from the place it is stored in directions and at a speed that are not capable of being fully controlled.\footnote{116}{JOEL BRENNER, AMERICA THE VULNERABLE 207-09 (2011).}

C. Information Flows Outside of the State’s Control

The universe of information that constitutes the “secrets” that the state protects includes information that is available from non-state sources. Indeed, the intelligence community has increasingly relied on, and made public its reliance upon,\footnote{117}{Robert E. Barnsby, So Long, and Thanks for All the Secrets: A Response to Professor Telman, 63 ALA. L. REV. 667, 686-87 (2010); Danley K. Cornyn, Note, The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers’ Right of Free Speech, 87 TEX. L. REV. 463, 464 (2008).} what is called “open source intelligence”—information gathered from widely available sources, including mass media, government entities, and academic and professional journals.\footnote{118}{RICHARD A. BEST, JR. & ALFRED CUMMING, CONG. RES. SERV., NO. RL34270 OPEN SOURCE INTELLIGENCE (OSINT): ISSUES FOR CONGRESS 6 (2007), available at http://www.fas.org/sgp/crs/intel/RL34270.pdf. The military and intelligence community had previously relied heavily on open source intelligence. See Stephen C. Mercado, Sailing the Sea of OSINT in the Information Age, 48 STUD. INTEL. 45 (2004), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol48no3/article05.html.} The fact that it is “open,” however, does not keep it from becoming “secret.” The government has argued, with some success in the courts, that the open information that it gathers can become secret when it is classified as a source, on the theory that disclosure of the state’s use of that information for national security purposes would allow the state’s enemies to learn its sources and piece together its knowledge and methods.\footnote{119}{See sources cited in supra note 113.} No matter how one views the government’s claim that it can transform the open into the secret merely by possessing it, the existence of open source intelligence makes plain a salient fact: a great deal of valuable information exists and flows outside of the state’s ambit, and many of the state’s secrets are themselves based on public information.\footnote{120}{See ROBERTS, supra note 10, at 38-39 (2006). For example, environmental and geospatial information that the federal government sought to remove from the Internet after the September 11 attacks was nevertheless available from “industry and commercial businesses, academic institutions, NGOs, state and local governments, international suppliers, and even private citizens who publish their own relevant materials on the Internet.” JOHN C. BAKER ET AL. MAPPING THE RISKS 124 (2004).}

Covert operations, for example, are the most secret of a state’s actions, and the actions that the state most assiduously attempts to keep secret. They
will produce an enormous number of internal documents sent by and to management and operations personnel that the state can at least theoretically control. But the state cannot easily control official information that it does not possess. A covert operation will have real world effects that civilian witnesses and the local news media can observe (which may provide the basis for reports and investigations by broader media sources that receive international distribution), and that government officials whose rule is being challenged and officials of other states can discover. Journalists and then the public first learned about the CIA’s post-9/11 “rendition” program, by which suspected terrorists were flown to various locations on private jets, through foreign newspapers, private websites run by aviation enthusiasts, and human rights advocates, all of them relying on public sources of information and eyewitnesses. Any informational sources outside of the state’s control that duplicate a “secret” state document or make available its content, or that allow outsiders to infer some secret, lessens the state’s ability to keep secrets.

D. Secrecy as Information

Finally, the very act of publicly keeping secrets—that is, of controlling information in a manner that allows the public to know of the secrecy process—cannot stop the flow of information about secrecy, as well as speculation about what the secrets contain. To help understand these phenomena, assume the existence of both known and unknown secrets. In the first category (“known-unknowns”) is information that the government is known to possess; all that is secret is the precise content of the information. A publicly declared military operation will have numerous operational secrets; the public knows that such operations will exist and assumes the existence of secrets regarding those operations. Indeed, controlling such secrecy is a long and widely accepted prerogative of the President—it is as clear an application of the privilege doctrine as exists. Nevertheless, the content of such secrets can be the subject of speculation, as can the steps the military and government take to control information about their operations.

121 See Galnoor, supra note 90, at 34-35.
122 See, e.g., infra Part V-B (analyzing a covert operation where multiple sources of information were available to contemporary observers and to historians after the fact).
123 BRENNER, supra note 116, at 168-69.
124 See infra Part IV-B (providing case studies of redacted documents whose “secret” contents were available through public sources).
125 See supra notes 15-18 and accompanying text.
126 See Near v. Minnesota, 283 U.S. 697 (1931) (“No one would question but that [at time of war] a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.”); N.Y. Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (quoting Near).
In the second category (“unknown-unknowns”) is information whose very existence is unknown, such as a successfully covert operation of which the public has not become aware. The secrecy of such a program is complete and deep—the public is not even aware of its own ignorance, and thus cannot speculate about its context.\(^{127}\)

Now, assume that at some point after the covert operation’s completion, the public learns of its existence, whether from official, authorized disclosures or via leaks or open sources. It is my contention that many if not most such deep secrets migrate to the known-secrets category over time by the means that this Part and the previous one identified (legal disclosure mandates, leaks, mistakes, and open sources).\(^{128}\) The once-covert operation is now known, and at least some of its secrets have been disclosed; other formerly unknown-unknown secrets have now become known-unknowns, or secrets about a known event, and some of them can be inferred from disclosed information. Having learned of this covert operation, the public has also become aware of the government’s willingness to keep information secret and capability of doing so.

Two consequences flow from this. First, informed members of the public, including especially the press, will infer both from the fact of the past covert operation and the fact that certain kinds of secrets were kept that the government might have engaged in or might be developing similar operations. Some investigative reporters and interested individuals will try to uncover any such additional operations. Their efforts might prove easier now that the first operation has become public. Some government officials who are troubled either by another operation or by its secrecy might be more willing to leak information to the press about the additional operation(s), while reporters will now have a better sense not only of what to look for but of where to look and whom to ask. Perhaps the operation’s previous success at maintaining control over information proves difficult to repeat, or the circle of individuals included in the covert group widens, increasing the likelihood of leaks and mistakes. The unknown-unknowns will thereby become more difficult to keep secret.

Second, now that the broader, less-informed public knows that such secret programs exist, some of them, and particularly those opposed to the current government, will begin to speculate about additional secret programs. Their speculation might be wrong, perhaps even wildly wrong, but it can

---

\(^{127}\) This secrecy does not preclude the President’s required reporting of his finding that the action “is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States” to congressional intelligence committees in at least a “timely fashion.” 50 U.S.C. § 413b(a)-(c). Congressional access to the information is strictly limited by statute. 50 U.S.C. § 413b(c).

\(^{128}\) On the temporary nature of most deep secrets, see supra text accompanying note 18.
affect the government’s broader legitimacy, and especially the legitimacy of its secret programs. \textsuperscript{129} As the sociologist Georg Simmel’s wrote, “The natural impulse to idealization, and the natural timidity of men, operate to one and the same end in the presence of secrecy; viz., to heighten it by phantasy, and to distinguish it by a degree of attention that published reality could not command.” \textsuperscript{130} Secrecy thus cannot stop the production of information and of meaning about government actions. It can control information about “deep secrets” of which the public is fully ignorant, but its success in doing so may prove only temporary. Once its extraordinary efforts to retain secrets are revealed—that is, once the government can no longer control information about its own secrecy—the state faces greater resistance against its further efforts to control the flow of government information, and must satisfy a more skeptical public that is more prone to speculation and investigation. \textsuperscript{131}

In this regard, the practice of keeping secrets itself constitutes information.

These are broad categories of the ways that secrecy fails. I have presented them here to lay the groundwork for the case studies below, which illustrate the complex ways, both formal and especially informal, by which secrecy is difficult to maintain. Each case exhibits a similar pattern, in which the state fails to keep secrets despite its extraordinary, legally permissible efforts to control information.


\textsuperscript{130} Georg Simmel, \textit{The Sociology of Secrecy and of Secret Societies}, 11 AM. J. SOC. 441, 465 (1906).

\textsuperscript{131} In one recent episode, the Obama administration has continued to claim that its use of drone aircraft to attack terrorists in foreign countries is classified and therefore exempt from the Freedom of Information Act long after members of the administration have bragged of the program’s successes. See Conor Friedersdorf, \textit{The Increasingly Absurd Conceit That Drone Strikes Are Secret}, \textit{The Atlantic}, June 22, 2012, http://www.theatlantic.com/politics/archive/2012/06/the-increasingly-absurd-conceit-that-drone-strikes-are-secret/258842/. It has done so despite the fact that the program’s existence was extensively documented in a largely flattering portrayal in a prominent national newspaper. See Jo Becker & Scott Shane, \textit{Secret “Kill List” Proves a Test of Obama’s Principles and Will}, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-Qaeda.html. The administration’s unwillingness to concede the program’s existence officially by declassifying relevant documents has delegitimized its efforts to keep secrets about other programs, as well as its commitment to transparency.
III.
VICE PRESIDENT CHENEY AND THE EXECUTIVE BRANCH’S
IMPERFECT INFORMATION CONTROL

This Part proceeds from the uncontroversial assumptions that the George W. Bush administration attempted to protect Executive Branch information more closely than any president since Richard Nixon, and that within the Bush White House no figure appeared more obsessed with controlling information than Vice President Cheney. Although the administration and Vice President ultimately hitched their obsession to the fast-moving expansion of military and intelligence operations in response to the 2001 terrorist attacks, they had begun to limit public and congressional access to information well before then. During the first months of Bush’s first term, Cheney sought to establish tight control over Executive Branch information in his management of the administration’s energy policy, the episode that this Part concerns. Cheney won this legal battle, as the formal mechanisms intended to limit secrecy could not contain the formal mechanisms that allow it. I begin with a narrative telling of this control, which includes a sketch of the theoretical justification that Cheney, among others, developed for it. But the Vice President’s formal legal victories could not foreclose the seepage of information from the executive branch. The balance of this Part describes the complex set of leaks, along with journalists’ and advocates’ informed and uninformed inferences about the work Cheney oversaw, that undercut the ideals that the Vice President’s theory of executive privilege presumes, and reveal how Cheney’s effort functionally lost the battle he launched to control information.

134 Biographical studies of Cheney offer a general introduction to the episode, as well as an inside glimpse of Cheney and the Office of the Vice President’s work on the energy policy task force. See Barton Gellman, Angler: The Cheney Vice Presidency 81 –82, 90–94, 104–07 (2008); Stephen F. Hayes, Cheney: The Untold Story of America’s Most Powerful and Controversial Vice President 310–18, 323–27 (2007).
135 Expansive treatments of the legal and political issues in this episode, which are uniformly critical of the Administration and especially of the Vice President, include Fish, supra note 47, at 183–96; Eric R. Dannermaier, Executive Exclusion and the Cloistering of the Cheney Energy Task Force, 16 N.Y.U. ENVTL. L. J. 329 (2008); Mark J. Rozell & Mitchel A. Sollenberger, Executive Privilege and the Bush Administration, 24 J.L. & POL. 1, 12–27 (2008).
A. The Information Control Narrative

George W. Bush established the innocuously titled National Energy Policy Development Group (NEPDG) soon after his inauguration. Intended, as its name declared, to organize the incoming administration’s development of a comprehensive national energy policy, the task force was chaired by Vice President Cheney and run by members of Cheney’s staff. The project did not begin from a blank slate. One of the Bush campaign’s early key policy goals was to prioritize energy development over environmental concerns, while a unit of President Bush’s post-election transition team had begun to develop an energy policy for the incoming administration. Nevertheless, the administration clearly viewed NEPDG’s formation as a key moment in its early days. Its membership included presidential cabinet members who directed the agencies that would implement many of the Group’s recommendations, as well as high-ranking appointees in the Executive Office of the President who would oversee and organize presidential oversight of the resulting energy policy. The Vice President would ultimately lead a centralized, top-down policy development process in which the President’s and especially the Vice President’s preferences would drive the committee’s deliberations and conclusions.

The task force only briefly existed, disbanding when its final report was released four months after its formation. During that period, however, its principals met with hundreds of corporate executives and interest group representatives, the vast majority of whom represented the energy industry and especially the extractive industries. Task force members and staff almost entirely ignored environmental organizations, and any access the latter

139 NEPDG REPORT, supra note 136, at v.
enjoyed to NEPDG was pro forma. Indeed, the final report’s most significant prescriptions reflected the extractive industries’ preferences. It advocated efforts to seek new domestic sources of oil and gas, including on public lands (such as the Arctic National Wildlife Refuge) and offshore; regulatory support for the expansion of nuclear power generation; and diplomatic and commercial efforts to forge global trade alliances that would expand America access to foreign oil. Although its prescriptions may have proved politically controversial and widely contested as a matter of policy, particularly for environmental groups opposed to many of NEPDG’s priorities, the report’s substantive conclusions and influence on policy seemed to represent the standard stuff of policy development for a first-term Republican president. They could not have surprised anyone.

The task force’s intentional and well-planned commitment to secrecy, however, was both controversial and surprising. NEPDG did not open its meetings and deliberations to the public, nor did it provide a list of the private entities and individuals with whom it met to the public, press, or even Congress. The Vice President also directed the energy industry executives with whom he and NEPDG met not to mention their involvement in the NEPDG to the press or public.

This informational strategy was itself part of Cheney’s strong commitment to implementing a constitutional theory of unitary executive power. The theory began to emerge as a prevailing concept in contemporary conservative constitutional theory with then-Representative Cheney’s direction of the Minority Report to Congress’s formal investigation of the Iran-Contra affair, which concerned the Reagan administration’s covert operation to evade legislative restrictions on supporting Nicaraguan Contra rebels through secret arms sales to Iran.

---

142 Id.
145 See SUSKIND, supra note 140, at 143–44.
146 See GELLMAN, supra note 134, at 92.
147 ROBERTS, supra note 10, at 62-64.
Focusing largely upon the extent of the President’s sole authority over foreign affairs, the Minority Report discussed why the President must be free from extensive congressional intervention—whether from direct congressional oversight or from legislation that would force the Executive Branch to open itself to public view. Its claim did not tie the President’s prerogative to a particular, well-defined legal authority or doctrine, nor did it limit its reach to trump particular legislative enactments that constrained the President; rather, using an amorphous ideal of separate powers, the Minority Report reasoned both formalistically and tautologically that the President has the inherent power within his separate and distinct sphere of authority because he is the President, the elected leader of an essential, wholly independent unit with muscular, well-defined powers.

An integral element of this concept is the President’s legal and political control over executive branch information—an argument Cheney had pressed while a White House aide during the Ford administration. The President must be able to have significant control over when and how the information on which he relies and the information that he produces is disclosed, as he is best suited to take decisive action with “decision, activity, secrecy, and dispatch” that foreign policy and other key tasks delegated by the Constitution to the President often require. The multi-headed, fractious Congress, by contrast, can neither act decisively nor keep secret its plans or the information that it receives, and therefore should have limited access to certain kinds of information and no authority to undercut

149 IRAN-CONTRA AFFAIR REPORT, supra note 148, at 457-469.
150 Id. at 387–92, 457–58 (citing THE FEDERALIST NO. 48, at 333 (Alexander Hamilton, James Madison, and John Jay) (Jacob Cooke ed., 1961)).
154 IRAN-CONTRA AFFAIR REPORT, supra note 148, at 459-460 (quoting THE FEDERALIST NO. 70, at 471-72 (Alexander Hamilton, James Madison, and John Jay) (Jacob Cooke ed., 1961)); see also id. at 468 (citing THE FEDERALIST NO. 64, at 434-435 (Alexander Hamilton) (Jacob Cooke ed., 1961) (advocating that the President, not the Senate, should have the sole power to negotiate foreign treaties because of his ability to maintain secrecy).
the President’s ability to keep secrets.155 And it was in the struggle over energy policy information that Cheney began his effort from within the White House to establish this theory’s preeminence in the executive branch and in the courts.

B. The Legal Fight Over NEPDG Information

In April 2001, in response to a request from two Democratic members of Congress, the Government Accountability Office (GAO) began to investigate the membership of NEPDG.156 Using its broad statutory authority to investigate Executive Branch expenditures,157 the GAO formally requested NEPDG’s records in early May.158 Cheney and his legal counsel, David Addington, denied the GAO’s request, declaring first to the GAO and then ultimately to Congress that such congressional demands for information “intrude into the heart of Executive deliberations,” and that the documents were constitutionally privileged.159 The denial provoked the Comptroller General, who leads the GAO, to take the unprecedented step of filing suit against the Vice President to demand the records’ disclosure.160

The Vice President deployed the same strategy to defeat claims that the NEPDG owed any duty to reveal information directly to the press and public. Executive branch control had been intentionally embedded in NEPDG’s structure and organizational DNA, as Addington had specifically designed NEPDG to avoid falling within the purview of the Federal Advisory Committee Act (FACA),161 the federal statute that imposes open record and open meeting obligations on advisory committees within the Executive Branch not entirely composed of federal employees.162 In June 2001, while the Vice President was in the midst of his dispute with the GAO over disclosures to Congress, Judicial Watch, a conservative governmental watchdog group, and the Sierra Club, an environmental group, submitted requests under the FOIA and FACA for the same documents that the GAO

---

155 Id. at 437–438, 576–79.
160 See Walker, 230 F. Supp. 2d at 54.
162 GELLMAN, supra note 134, at 91; HAYES, supra note 134, at 313–14.
sought. After their requests were denied, these groups separately filed suit against NEPDG and a panoply of officials associated with it, claiming, among other things, violations of the FOIA and FACA.

The Vice President ultimately won all of his legal battles to keep NEPDG’s internal records secret. The GAO litigation ended in December 2002 after the trial court granted Cheney’s motion to dismiss the Comptroller General’s complaint, ruling that he lacked standing to sue under Article III. Defeated during the post-9/11 period and following a midterm election that saw the Administration’s political popularity and governmental authority rise to great heights, the GAO decided not to appeal, although it has continued to assert that the court’s decision was incorrect.

Though more legally and procedurally complicated, the Judicial Watch and Sierra Club suits, which were consolidated and concerned requests for documents from officials affiliated with NEPDG besides the Vice President, met a similar fate as the GAO’s suit. Having defeated some defendants’ motions to dismiss in district court, the plaintiffs appeared poised to begin receiving through civil discovery the NEPDG documents that they hoped would assist them in their claim that FACA applied to NEPDG. The Vice President immediately sought a writ of mandamus from the D.C. Circuit that would halt the District Court’s discovery order on the grounds that it constituted a breach of executive authority and privilege that violated the constitutional separation of powers. Although he lost in the D.C. Circuit, Cheney prevailed in the U.S. Supreme Court. The Court held both that the D.C. Circuit could issue a writ of mandamus, and that the District Court’s discovery order to assist plaintiffs in pursuit of their claims was not narrow enough. On remand, the D.C. Circuit, sitting en banc, issued the writ and directed the case’s dismissal. Strictly construing FACA in light of the separation of powers concerns, the court held that the group was not an advisory committee subject to FACA because only its official members, all of

164 Id. at 26.
165 See Walker, 230 F. Supp. 2d at 74–75.
168 In re Cheney, 334 F.3d 1096, 1108 (D.C. Cir. 2003).
170 Id. at 382, 391.
171 Id. at 387.
172 In re Cheney, 406 F.3d 723 (D.C. Cir. 2005) (en banc).
whom were government employees, could vote on matters before the NEPDG.\textsuperscript{173}

Cheney had emerged victorious from his battles with Congress and the public interest groups that sought to open the energy policy he oversaw. His success seemed to validate his long-term strategy of establishing control over Executive Branch information, which he carried out through NEPDG’s institutional design and the aggressive litigation strategy that turned initial legal setbacks into ultimate triumph. Cheney prevailed by brandishing an expansive ideal of executive privilege over information. His victory over Congress and public interest environmental groups sent a signal to opponents: the White House would use its vast financial, legal, and political resources any effort to resist the release of any information that it did not want to disclose.\textsuperscript{174}

\textbf{C. The Limits of Information Control}

Cheney’s victories seemed to confirm his constitutional and political theory of the executive branch’s paramount authority to control information. It helped, of course, that his theory had already gained significant purchase through Republican appointments to the federal bench\textsuperscript{175} and its circulation by conservative public law scholars in the legal academy.\textsuperscript{176} But an administration cannot achieve full control over the complex network of Executive Branch agencies that interacted with the NEPDG merely through

---

\textsuperscript{173} Id. at 728.

\textsuperscript{174} See GELLMAN, supra note 134, at \textit{93–94}.

\textsuperscript{175} The separate Supreme Court opinions in \textit{Cheney v. U.S. District Court}, 542 U.S. 367 (2004), line up to some degree along a continuum, with Justices Ginsburg and Souter in dissent, Justice Stevens offering a much more limited concurrence, a four justice plurality (with, to be sure, Justice Breyer joining), and Justices Thomas and Scalia providing a partial concurrence that emphasized the serious constitutional concerns for the separation of powers and the relative autonomy of the executive branch if the public interest groups could proceed with discovery. \textit{See id.} at 392 (Stevens, J., concurring); \textit{id.} at 393-94 (Thomas, J., concurring in part and dissenting in part); \textit{id.} at 396 (Ginsburg, J. dissenting). More strikingly, Republican appointees decided the key lower court decisions in the administration’s favor. \textit{See Judicial Watch, Inc. v. Department of Energy}, 412 F.3d 125, 130–32 (D.C. Cir. 2005) (Ginsburg, J., Reagan appointee); \textit{In re Cheney}, 406 F.3d 723 (D.C. Cir. 2005) (\textit{en banc}) (Randolph, J., George H. W. Bush appointee); Walker v. Cheney, 230 F.Supp.2d 51, 55 (D.D.C. 2002) (Bates, J., George W. Bush appointee).

the support of a majority of appellate judges in high-profile cases. The Bush administration had lost a number of battles along the way to winning the various lawsuits seeking information. By the time of the D.C. Circuit’s dismissal of the public interest groups’ lawsuit under the FOIA and FACA, several agencies had already complied with the District Court’s discovery orders, in the process releasing some documents that the Vice President continued to withhold to the plaintiffs and therefore to the public. The National Resources Defense Council was able to obtain documents in early 2002 through a suit against the Department of Energy that showed pervasive industry influence over the resulting administration energy policy. Along with communications between oil and gas lobbyists and NEPDG officials that demonstrated the Group’s close relationship to industry, Judicial Watch had obtained from the Department of Commerce a series of maps documenting oil fields and prospects for contracts and projects to extract oil in the Middle East, including Iraq.

Other sources also allowed information to seep out. While the NEPDG worked, major print media frequently discussed the administration’s ties to the energy industry, and predicted that these favored interests would gain from Bush’s energy plan. At the same time, NEPDG’s plans for its report were leaked to the press, which reported that energy industry

177 Mark Fenster, Seeing the State: Transparency as Metaphor, 62 ADMIN. L. REV. 617, 636-37 (2010) [hereinafter Fenster, Seeing the State] (noting how the sprawling complexity of the federal administrative state makes transparency difficult to impose).
178 In re Cheney, 406 F.3d 723, 727 n.1 (D.C. Cir. 2005) (en banc).

Cheney’s failed efforts to control information paralleled the NEPDG’s failure as a political entity. Vocal and institutional opposition to what many suspected would emerge as the administration’s energy policy coalesced soon after the NEPDG’s formation, raising doubts about whether the administration would offer anything more than industry’s preferred policies.\footnote{See Jeanne Cummings, \textit{Power Politics: Energy Crisis Offers Clues to the Workings of Bush Administration}, \textit{Wall St. J.}, Feb. 16, 2001, at A1; John J. Fialka & Jeanne Cummings, \textit{White House Sets Cabinet-Level Study to Develop a National Energy Policy}, \textit{Wall St. J.}, Jan. 30, 2001, at A6; Kahn & Sanger, supra note 182, at A1.} The NEPDG Report did not influence Congress, as a bill that the administration supported and the Republican-controlled House had passed failed in the Senate, which had a bare majority of Democrats, while the Senate passed its own energy bill.\footnote{Eric Pianin, \textit{A Stinging Repudiation, Engineered by 3 Democrats}, \textit{Wash. Post}, Apr. 19, 2002, at A09. The Republican-controlled House of Representatives had introduced and passed a bill
Bush’s reelection and with larger Republican majorities in both houses of Congress, that Congress finally enacted a new energy bill—one that, notably, did not include some of the most controversial NEPDG proposals, such as opening the Arctic National Wildlife Refuge to drilling.\textsuperscript{191} Public opinion polls taken soon after the Report’s release suggested that the Report also failed to persuade the public that its prescriptions were objectively wise and worth pursuing, as many Americans thought that Bush was “too closely tied to the energy industry and insufficiently devoted to conservation.”\textsuperscript{192} The Group’s substantive prescriptions might have proved so unpopular and politically untenable that even the most transparent and accessible advisory committee that offered the same prescriptions would have suffered the same fate. But secrecy certainly did not help the administration’s efforts to sell its policy and might well have hurt them—a hypothesis that even some members of the administration have espoused.\textsuperscript{193}

Environmental non-governmental organizations likely agreed, as they used the NEPDG’s secrecy, and their legal challenges to it, as both symbol and evidence of the administration’s capture by oil and gas interests. The Sierra Club, for example, trumpeted its litigation efforts to its donors, using it as an opportunity to demonstrate its essential role in fighting what it characterized as the Vice President’s secretive, lawless behavior.\textsuperscript{194} As one commentator sympathetically noted about the environmental groups opposed to the Bush Administration, the Sierra Club and the National Resources Defense Counsel seemed more exorcised about the secretive and exclusionary process by which the energy policy had been developed than


\textsuperscript{193} \textit{See} GELLMAN, \textsuperscript{ supra} note 134, at 93; HAYES, \textit{ supra} note 134, at 324. \textit{Cf.} SAVAGE, \textit{ supra} note 152, at 90 (quoting associate White House counsel as acknowledging that the documents sought in the litigation contained “nothing of interest”).

The stealth process, environmental groups argued, suggested that more than mere policy was at stake in the energy debate. Administration critics generally viewed the NEPDG episode through such inferences. The authors of *Vice: Dick Cheney and the Hijacking of the American Presidency* characterized the NEPDG as “a government-sanctioned industry cabal” that had drawn up a self-dealing and destructive energy policy, and that had worked in secret to cover up the corrupt enterprise. Some critics accused Cheney of trying to hide his efforts to enrich his friends in the energy industry. Some imagined far worse, particularly when viewing the NEPDG retrospectively through the lens of the 2003 invasion of Iraq. Both the existence of the Iraq oilfields map that was disclosed in discovery, along with the fact that it had been kept secret, revealed to critics that the war in Iraq and the administration’s hawkish, neoconservative foreign policy were products of the administration’s energy policy. Worse still, according to those who believe the administration either knew or was involved in the 2001 terrorist attacks, the entire episode unveiled the administration’s secret conspiracy to achieve global domination for an imperial America. Such theories no doubt would have developed even in a more information-rich environment where authoritative official documents and their provenance were available and widely acknowledged. But they positively blossomed in conditions that were defined by the struggle to obtain documentary evidence and the great drama around that struggle.

The Vice President may have thought he was controlling access to information—an assumption that his most vociferous critics share—but he could not contain either the circulation of information or the interpretation of that which circulated. The most significant pre-9/11 battle over government secrecy and the executive branch’s authority to control information demonstrated the power of laws protecting executive privilege, the potential of formal laws and legal processes to force the disclosure of

---

195 *See* Dannenmeier, *supra* note 134, at 375–76.
198 *See* supra text accompanying *supra* note 181.
information and to focus political pressure on the government, and, ultimately, the difficulty of keeping secrets.

IV. REDACTION FAILURES: IMPERFECT INFORMATION CONTROL IN THE RELEASE OF DOCUMENTS

Vice President Cheney sought to maximize the executive branch’s legal authority to control executive branch information; by contrast, some executive branch secrecy practices work within limits that the Constitution and Congress set on the state’s ability to keep information from the public. When it releases documents from which text has been “redacted” (that is, obscured with a black mark or erased) for security purposes, the executive branch simultaneously discloses information and quite explicitly and clearly keeps it secret. The public can see the document, it just cannot see every word—or perhaps any word at all, if the entire document or page has been redacted. Sometimes, an agency redacts a document that it is otherwise required to release under a legal mandate; alternatively, an agency may not have been obliged to release the document but decided to declassify or make it public in an effort to meet public expectations or enhance public understanding of an issue. As a surgical removal of privileged information, redaction constitutes a compromise, a second-best alternative to complete secrecy that is better than nothing in this regard. But by making visible that which is kept secret, redaction reveals secrecy’s machinery in ways that the complete refusal to release a document does not. Paradoxically, redactions allow citizens to see precisely what they cannot know.

This Part demonstrates that understanding redaction as selective but complete censorship proves to be only partially correct, given the myriad ways in which redaction can fail. It begins with a discussion of how laws enable government to use redactions as a strategy to retain control over information, then it illustrates the ways that redaction has failed in recent high-profile cases. It ends by demonstrating how even redaction’s textual erasure still produces meaning.

A. Information Control and Release in Redaction Law

Government agencies redact information most frequently in response to FOIA requests and as part of the review process of certain employees’ publications. The Freedom of Information Act requires federal agencies to provide “[a]ny reasonably segregable portion of a record” of documents when they rely upon one of FOIA’s exemptions to deny a document
request.\textsuperscript{201} Agencies must make their redactions explicit and obvious by indicating the amount of deleted information, the exemption that authorized the deletion, and, when possible, where in the document the deletion occurred.\textsuperscript{202} Courts occasionally play an active role in the redaction process.\textsuperscript{203}

The pre-publication review process that intelligence agencies use for the public writings of their current and former employees also results in the disclosure of redacted documents.\textsuperscript{204} The CIA has long required employees to sign secrecy agreements as a condition of employment.\textsuperscript{205} These agreements include provisions that require the employees to submit written manuscripts they plan to publish prior to publication.\textsuperscript{206} The CIA delegates manuscript review to its Publications Review Board (PRB), which must respond to the author within thirty days with proposed deletions.\textsuperscript{207} Although the PRB’s approach has varied over time as different agency directors use

\textsuperscript{201} 5 U.S.C. § 552(b); Center for Auto Safety v. E.P.A., 731 F.2d 16, 21 (D.C. Cir. 1984) (“The ‘segregability’ requirement applies to all documents and all exemptions in the FOIA.”).

\textsuperscript{202} 5 U.S.C. § 552(b).

\textsuperscript{203} See, e.g., Am. Civil Liberties Union v. U.S. Dept. of Homeland Sec., 738 F. Supp. 2d 93, 110-11 (D.D.C. 2010) (finding that the agency did not sufficiently support full redactions of e-mails and ordering the agency to “re-evaluate this document to ensure that only properly withheld information has been redacted and either make greater disclosure of the content of the e-mail to the plaintiff or provide a more detailed rationale” for withholding text). The fact that courts can inspect documents affected by agency redactions and of which an agency denied disclosure does not require them to do so. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978). The D.C. Circuit in particular grants trial courts broad discretion to decide how and to what extent they will conduct in camera review. See Allen v. Central Intelligence Agency, 636 F.2d 1287 (D.C.Cir. 1980).


\textsuperscript{206} See, e.g., Berntsen v. CIA, 618 F.Supp.2d 27, 28 (D.D.C. 2009) (reproducing a pre-publication review provision from an employment contract).

their discretion to set their secrecy policy preferences, some authors and critics of the CIA have argued that the PRB over-redacts information, especially when it is critical of CIA performance and policy. Frustrated employees have challenged agency efforts to enforce the secrecy agreements on First Amendment grounds, as well as on the grounds that the redacted information is in fact classified, or had been officially disclosed previously, or had been properly classified—but such challenges do not often prevail.

Redaction’s legal authorities thus assume the following: Disclosure is appropriate, within reason, as is secrecy. The two can be reconciled through an agency’s precise control of information, down to the page, line, and word whose redaction will keep secret dangerous content. Wielding its black pen or eraser, the government can limit disclosure’s ill effects.

B. How Redaction Fails

Redaction can fail in a variety of ways, however. The information that it tries to suppress might already be in the public domain. The information can also subsequently leak out or can be inferred from the document or the context in which the redaction appears. The redactions might not


210 Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (upholding the CIA’s pre-publication review process as a “reasonable means” of restricting an employee’s ability to speak not only because of the voluntary nature of the secrecy agreement that its employees sign, but also due to the agency’s “compelling interest” in protecting classified intelligence information essential to national security).

211 McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983)

212 Wolf v. C.I.A., 473 F.3d 370, 378 (D.C.Cir. 2007); Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy, 891 F.2d 414, 421 (2d Cir. 1989)


214 See infra text accompanying notes 277-286 (providing examples).

215 For example, the New York Times obtained an unredacted copy of an internal government history of U.S. efforts to capture Nazis after World War II; the copy revealed significant amounts of information that the Justice Department had redacted in a version it released in response to FOIA litigation. See Eric Lichtblau, Nazis Were Given “Safe Haven” in the U.S.,
successfully suppress information due to bureaucratic conflict and sometimes due to a technical error.\textsuperscript{216} Agencies cannot extend the black marks that they are authorized, by law and contract, to place on redacted documents on the documentary world outside their control. As this section illustrates, despite its status as an explicit form of information control, redaction often reveals secrecy’s malfunction. Redaction’s failure thus both illustrates the difficulty of maintaining secrecy and calls into question the effort to protect information.

Consider first the redactions to former CIA agent Valerie Plame Wilson’s bestselling memoirs.\textsuperscript{217} Wilson’s career had ended when unauthorized leaks to news agencies by members of the Bush administration identified her as a covert agent in an effort to disparage her husband, a former diplomat who publicly challenged evidence proffered by the administration of Saddam Hussein’s efforts to build weapons of mass destruction.\textsuperscript{218} The resulting scandal paradoxically transformed Valerie Plame Wilson from secret spy to public celebrity, and she sold the rights to her memoirs to a major publishing house for $2.5 million.\textsuperscript{219} Upon reviewing her manuscript prior to publication, the CIA’s PRB required significant redactions, including of factual information about Wilson’s career that had been published in popular


\textsuperscript{217}VALERIE PLAME WILSON, \textit{FAIR GAME} (2007).

\textsuperscript{218}See Wilson v. Libby, 553 F.3d 697, 701-02 (D.C. Cir. 2008); In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1143-44 (D.C.Cir. 2006); GELLMAN, supra note 134, at 360-64.

news accounts and in an unclassified letter from a CIA official that was published in the Congressional Record.\footnote{Wilson gives a full account of the PRB process in the memoir. See WILSON, supra note 217, at 264-81.} After losing her administrative and legal appeals of the redactions,\footnote{See Wilson v. C.I.A., 586 F.3d 171 (2d Cir. 2009) (dismissing Wilson’s claims that because the CIA’s redactions included information in the public record, the redactions violated the First Amendment and the Administrative Procedure Act).} Wilson and her publisher decided to release the book with large portions of the text hidden behind dull grey lines that represented the censored material. The book’s main text thus has whole pages of redactions, as well as pages that combine visible text and single-word or line-by-line redactions. Two chapter titles are blacked out. Parts of Wilson’s life story, including her husband’s courtship of her and parts of her account of the PRB process itself, are so thoroughly edited as to be almost incomprehensible.\footnote{See Laura Rozen, Afterword, in WILSON, FAIR GAME, supra note 220, at 307-89; see also WILSON, FAIR GAME, supra note 220, at ix (explaining Rozen’s “Afterword”).} The book’s redactions stand in protest of a secrecy policy to which Wilson objected, forcing the reader to make sense of an explicitly censored text. They make plain that Wilson had lost control of the telling of her own life.

But the book also demonstrates the absurdity and imperfections of the government’s censorship efforts. Much of the content that the CIA had forbidden Wilson to publish appears in an afterword written by Laura Rozen, a foreign policy and intelligence reporter who relied for her nearly 100-page contribution on open source materials and personal interviews of others who knew Wilson.\footnote{See id. at 319-31.} The CIA could not limit Rozen’s access to her sources, and it had no mechanism to censor her use of them in the afterword. For example, one of the most significant pieces of information redacted from the main text was the country where Wilson worked undercover and any details that would allow a reader to identify the country; indeed, chapters 2 and 3, which cover her early years in the agency, are among the most heavily redacted. As we learn in Rozen’s afterword, however, Wilson spent six years undercover in Greece, a fact that was known to Wilson’s family (though they did not know she worked for the CIA at that time), and one that had been widely reported in the news.\footnote{Id. at 351-52; JOSEPH C. WILSON, THE POLITICS OF TRUTH 239-43 (2004).} The reader can learn from Rozen’s afterword that the information about how she met and ultimately married her husband had appeared in Joseph Wilson’s memoir, which had been published three years earlier.\footnote{See id at 319-31.} Fair Game also included an appendix that reproduces public documents, including correspondence between the CIA’s PRB and her attorneys, court filings, and entries from the Congressional Record that included...
information Wilson could not get past the PRB’s censors.\textsuperscript{226} The documents provide further details about Wilson’s service in the CIA and the PRB review process that were redacted in her portion of the memoirs. Readers thereby have access to much of the information that the agency had sought to redact.\textsuperscript{227}

Bureaucratic indifference and conflict rather than absurdly excessive censorship caused another recent redaction failure. \textit{Operation Dark Heart}, Anthony Shaffer’s memoir of his experiences as a Defense Intelligence Agency (DIA) officer in the war in Afghanistan, initially went to press without significant censorship after prepublication review by the Army.\textsuperscript{228} As the book was set to be released, however, the DIA and other intelligence agencies sought to stop its publication, asserting that it contained classified information whose release could be harmful to national security. The Pentagon purchased and destroyed 10,000 printed copies of the book’s original edition, while the book’s publisher arranged to publish a second edition with the newly required redactions.\textsuperscript{229}

The censorship failed, however, because a limited number of advance copies of the original edition were already in circulation.\textsuperscript{230} Those with both copies could identify precisely what the DIA had redacted. An investigative news website posted numerous pages from both editions for a side-by-side comparison, revealing many of the classified “secrets” that the DIA hoped to hide.\textsuperscript{231} By January 2013, the Department of Defense had partially reversed course again, declaring that many of the redactions had subsequently been declassified while retaining classification for many of the others.\textsuperscript{232}

As with the Wilson memoir, the state could not successfully keep secret everything it sought to suppress, some of which had already become public anyway. In its afterword and appendix, \textit{Fair Game} makes this explicit by revealing some of the redacted information. Similarly, a reader who knows or

\textsuperscript{226} See WILSON, FAIR GAME, supra note 220, at 392-402.

\textsuperscript{227} See Janet Maslin, \textit{Her Identity Revealed, Her Story Expurgated}, N.Y. TIMES, Oct. 22, 2007 (book review describing dispute with CIA, and characterizing the afterword as “fill[ing] in some of the gaps” created by the redactions).


\textsuperscript{229} Scott Shane, \textit{Secrets in Plain Sight in Censored Book’s Reprint}, N.Y. TIMES, Sept. 17, 2010 [hereinafter Shane, Secrets in Plain Sight].

\textsuperscript{230} Id.


stumbles upon the story behind *Operation Dark Heart* can more directly and literally find the unredacted text online. To be sure, these are exceptional cases—though not unique ones. They reveal the difficulties that the state confronts as it complies with formal statutory and constitutional limitations on secrecy, and as it must also overcome the informal checks on secrecy—official and unofficial leaks, intrepid investigative reporting, the activities of political opponents, and bureaucratic conflict and bungling.

C. Redaction’s Meaning

Redaction not only can fail to keep the actual text hidden under the redactions from the public—it also fails to stop the public from reading, and reading into, the covering lines themselves, which themselves produce meaning and, as the anthropologist Michael Powell has written, “transforms the way we read these documents, sparking curiosity and often stirring skeptical, critical, and even cynical readings.” Few readers will share Valerie Wilson’s personal sense of betrayal and outrage at the CIA’s PRB process of *Fair Game*, but many will wonder at the CIA’s motivations and rationality in attempting to redact information that was readily available. Readers are also likely to speculate, whether in an informed or uninformed manner, about what lies under the black marks and about the government’s motivations in redacting the text. Sometimes informed speculation will prove accurate; sometimes it will lead the public to imagine the worst, perhaps by assuming the existence of a conspiracy or official incompetence where neither existed (or where the state in fact has done something equally, though differently, culpable). Even when redaction successfully censors information, it cannot obstruct the process of meaning-production about the text that it hides.

Black blots on a document divorced from consideration of the content that they hide can also create meaning separate from the hidden content, as contemporary artists have shown by playing with redaction’s signification in their work. In his *FBI Files* series (2000-02), the painter Arnold Mesches used documents that he obtained from the investigatory files the FBI had produced in their surveillance of his political activities in the 1950s and 1960 to create collages that comment on the state that surveilled and infiltrated his life. Jenny Holzer’s recent series *Redaction Paintings* painstakingly reproduce,

---


234 Michael G. Powell, *Out, BELIEVER #72*, at 23, 24 (June 2010).

235 See infra Part V-B.2 (describing historians’ efforts to infer the meaning of redactions).

236 See supra note 129.

in oil paint on linen and in larger size than the original paper, declassified, redacted documents about detainee abuse obtained through FOIA requests filed by the ACLU. Mesches and Holzer incorporate redactions both to protest censorship and the official acts that the redactions can only imperfectly hide, and to comment on the aesthetics of the black marks themselves. A novel by former CIA agent Joseph Weisberg, An Ordinary Spy (2007), includes extensive self-redactions that attempt not only to heighten the book’s authenticity but also to increase the reader’s pleasure and sense of the novel’s accurate portrayal of the spy’s daily life, even as it blacked the details of that life out. Just as the Wilson and Shaffer books illustrate how redaction cannot fully censor the information it seeks to control, so these artists illustrate how redactions create meaning even as they attempt, imperfectly, to control official information’s flow.

V.

“SECRET HISTORY”:
THE STRUGGLE TO CONTROL INFORMATION ABOUT COVERT OPERATIONS

By definition, covert state actions are secret—as a means by which the President and intelligence community attempt to change the course of history without leaving any historical traces, they are designed and executed in order to be the most unknown of the unknowns. The issue of whether the state should make later disclosures of their existence and details generates fierce debate between historians and members of the intelligence community. As the next section explains, the U.S. government has committed itself to disclose some of its past covert activities. But these

efforts to make historical documents available have faced formal and informal resistance through law and bureaucratic recalcitrance that protect some degree of secrecy about the official past. After introducing the various means by which the federal government attempts to keep some of its historical secrets while making others public, this Part offers as a case study the complex struggle that the executive branch and especially the intelligence community have undertaken to keep secret the U.S.’s covert role in directing the 1954 coup in Guatemala, a key moment in American Cold War history. This “secret history” reveals the difficulty and even implausibility of controlling information about past covert actions.

A. Public Secrets and Public History Law

The U.S. has long tried, for different reasons and to varied effect, to make public its secret history. The State Department has published the Foreign Relations of the United States series (“FRUS”), an official documentary record of foreign policy decisions and diplomatic activity, more or less continuously since 1861, carrying on a longstanding tradition of State Department documentary reports to Congress that dates back to the early Republic. Since World War II, however, the FRUS has faced a more complicated political environment, while at the same time it has needed to document America’s greatly changed geo-political position and its vastly larger State and Defense Departments and intelligence services. This has resulted in a FRUS publication process fraught with political and bureaucratic conflict. To address these concerns, the State Department formed a permanent advisory committee composed of academic historians in 1957, and, more recently, Congress enacted legislation requiring the State Department to engage more thoroughly with academic historians and to declassify documents on a scheduled basis. Congress’ interest in FRUS was itself part of a broader

245 See Botts, supra note 244, at 15-27 (describing conflicts over FRUS during the Cold War).
legislative efforts to advance the declassification of documents concerning particularly controversial historical events.\textsuperscript{248}

Another statute, the Presidential Records Act (PRA),\textsuperscript{249} clarified an uneven and informal practice of making the papers of a departing President publicly available.\textsuperscript{250} Enacted at the tail end of the post-Watergate period of open government statutes, the PRA addressed the issue that arose from former President Nixon’s efforts to control the documents from his presidency, when it became clear both that former presidents could not be trusted to allow public access to their historical papers and that there was wide public demand for such access.\textsuperscript{251} The statute allows for public access to presidential records through the FOIA beginning five years after the end of the Administration, but allows the President to invoke as many as six specific restrictions to public access for up to twelve years.\textsuperscript{252}

These efforts to open the historical record have faced significant resistance. Every struggle over the receding past takes place in the shadow both of an underlying constitutional conflict over presidential privilege,\textsuperscript{253} and of the bureaucratic barriers that the classification system creates.\textsuperscript{254} The FRUS volumes have come more slowly and sporadically as a result, especially due to long delays in declassifying documents.\textsuperscript{255} Nor does the PRA provide unfettered access to the historical record, as presidential records continue to fall within FOIA’s exceptions even after the twelve-year period that allows


\textsuperscript{252} 44 U.S.C. § 2204.


\textsuperscript{254} Anne Van Camp, \textit{Trying to Write “Comprehensive and Accurate” History of the Foreign Relations of the United States: An Archival Perspective}, in ARCHIVES AND THE PUBLIC GOOD, supra note 67, at 229, 241. (noting the key role of the State Department and other agencies in delaying the issuance of FRUS volumes).

\textsuperscript{255} Botts, supra note 244, at 30-31.
former presidents to place additional restrictions on public access,\(^{256}\) and presidential administrations vary in the extent of their willingness to comply with the statute’s spirit and letter.\(^ {257}\) The legal and bureaucratic machinery of secrecy can, at least in theory, continue to hide the state’s covert actions.

**B. Guatemala’s Secret History**

As in the other case studies in this Article, however, the executive branch’s ability to exercise control over the flow of information by overriding formal legislative efforts to open archives is itself frequently undercut by informal means. In the case of information about past American covert operations—among the most controversial and secretive acts in which the nation’s intelligence community, diplomatic corps, and military engage—informal disclosure occurs because the operations inevitably have real-world effects that leave a public record and create a public memory in those countries where the operation took place.

The struggle over information about American involvement in Guatemalan history perfectly illustrates this dynamic. The CIA’s covert operation resulting in the 1954 coup that deposed the popularly elected Guatemalan President Jacobo Arbenz became the model for many similar secret interventions that followed, including the failed Bay of Pigs invasion in Cuba in 1961, and the operation had long-term devastating effects on Guatemala’s political and social stability.\(^ {258}\) Although direct and extensive American involvement in the coup was widely recognized throughout Latin America and Europe at the time and subsequently,\(^ {259}\) the Eisenhower administration portrayed the coup as a popular Guatemalan uprising and, with the complicity of U.S. news editors and publishers, kept the CIA’s role

\(^{256}\) 44 U.S.C. § 2204(c)(1). On FOIA’s exceptions, see supra notes 48-52 and accompanying text.


relatively secret from the American public. The coup continues to float in a kind of historical twilight, at once well-known in Latin American and among historians and Americans well-versed in Central American history, but shrouded in the impenetrable mystery that clings to controversial CIA Cold War covert operations. Numerous monographs on Guatemalan history, memoirs from coup participants, and books that more broadly treat covert American interventions in the post-war era have brought the American role in sponsoring and assisting the coup to at least some light. Nevertheless, several historians have complained that the event’s details have been lost or remain locked inside government archives.

Historians’ work has been made more difficult because the CIA’s files remained off-limits to researchers into the 1990s, not least because a 1983 *FRUS* volume, putatively concerning Guatemala, included no documents suggesting CIA involvement in the coup. In 1992, however, as part of an “openness” initiative following the Soviet Union’s collapse, the CIA commissioned Nick Cullather, a recently-minted history PhD and new member of the agency’s History Staff, to use full access to the agency’s classified files to write an insider history of the CIA’s role in the 1954 coup. The agency intended the resulting account to serve as a training manual for future covert operatives rather than as a full or official account of the operation; nevertheless, the agency planned ultimately to release Cullather’s text to the public, along with some of the documents on which Cullather relied. The openness proved temporary, however, and Cullather’s report, completed in 1993, remained classified until it was declassified and deposited in government archives.

---

260 IMMERMAN, supra note 258, at 4-5 (1982); SCHLESINGER & KINZER, supra note 258, at 153-56. For an account of how the CIA and State Department persuaded the *New York Times* to stop reporting on the coup in order to keep the CIA’s involvement from Americans, see HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR 478-83 (1980).


262 GLEJESES, supra note 261, at 4 (1991); Coatsworth, supra note 258, at xi.

263 One of the earliest critical histories of U.S. involvement in the 1954 coup relied heavily on documents received via the FOIA—although, notably, not from the CIA, which refused to make disclosures under FOIA. See SCHLESINGER & KINZER, supra note 258, at xxxvii.


265 See James X. Dempsey, The CIA and Secrecy, in CULTURE OF SECRECY, supra note 246, at 53-55 (on the CIA’s interest in openness in the early 1990s).

266 CULLATHER, supra note 259, at vii-x, xiv.
in the National Archives in 1997. Stanford University Press subsequently published it in 1999 with the title *Secret History: The CIA’s Classified Account of Its Operations in Guatemala, 1952-1954*, retaining the same redactions the CIA had made upon the manuscript’s declassification.

In theory, *Secret History* could constitute a milestone text in the disclosure of American Cold War secrets—an institutional CIA history of a key covert operation that had proved enormously influential, not only in Guatemala but throughout the Western Hemisphere, while it has remained largely unknown to most Americans. Through no fault of Cullather, however, it did not. The declassified version of his manuscript was extensively redacted, with not only names but also parts of the operation removed—including, ironically, a passage on how the Eisenhower administration kept news of the CIA’s involvement in the coup secret from Americans. The scope of the project did not lend itself to serving as a comprehensive history anyway, and the documentary release that the CIA originally stated would accompany Cullather’s report included a limited amount of materials. *Secret History* only serves as a partial disclosure, then, because the bureaucratic apparatus of the clandestine service appears to have proven capable of retaining history’s secrets long after the Guatemala coup it engineered.

Indeed, the historic record remains contested regarding details, personal identities, and especially the larger historiographical questions regarding American motives and the relative moral purity of the nation’s intent. Was the U.S. motivated by the desire to protect the United Fruit Company, a powerful American corporation, from nationalization and land reform? Or to save Guatemala from communist and especially Soviet influence? Or simply to protect national, and perhaps neo-colonial, American interests? These questions remain “secret,” in the sense that answers, if they exist, may live buried in some file cabinet in CIA headquarters. Having incrementally increased the historical record, Cullather’s account provided confirmation

---


268 CULLATHER, supra note 259, at iii-xv, xvii.


270 CULLATHER, supra note 259, at xiv-xvi; Press Release, Center for the Study of Intelligence, Release of Records on 1952-54 Guatemala Covert Actions (May 23, 1997) (on file with author).


272 See SCHLESINGER & KINZER, supra note 258, at 106.

273 See IMMERMAN, supra note 258, at 68, 82.

274 See GLEIJESES, supra note 261, at 7.
about some aspects of existing historical hypotheses but could not rule out competing ones or lay bare the full truth. Viewed this way, the secrecy apparatus won—some of the operational specifics and the larger motivations of the Guatemala coup remain as buried today as they were in the coup’s immediate aftermath.

But this view of Secret History and the Guatemala coup is incomplete for two reasons this Article identified in previous parts. Despite the CIA’s broad use of its classification authority, general and specific information about American involvement was immediately available and in fact known within Guatemala and throughout western Europe, and it became more widely known in the U.S. through incidental disclosures and responses to FOIA requests beginning in the 1970s. The intervening decades have seen the disclosure of more information. In 2003, nearly fifty years after the coup, the State Department issued a FRUS volume with a more expansive collection of documents about the coup, and the CIA has made thousands of documents (many of them redacted) available via its website. Additional documents had previously come to light during Guatemala’s truth and reconciliation process, in aid of which the Clinton administration declassified thousands of documents and the National Security Archive produced a documentary history tracing American involvement in Guatemala from the coup through the 1990s. Formal and informal mechanisms of information disclosure and circulation have curtailed the secrecy that elements of the state continue to try to impose.

276 See Immerman, supra note 271 (complaining of the CIA’s “behavior” in refusing to release unredacted versions of classified documents that could conceivably resolve significant historical disputes).
277 See GleiJeses, supra note 261, at 3-7.
279 Cullather, supra note 259, at 119-23; Schlesinger & Kinzer, supra note 258, at ix-xi, xxxvii-viii.
Secret History thus has become part of the broader unveiling of the secret history of the U.S. role in Guatemala’s 1954 coup, some of which has been the consequence of official state action. Much of the CIA’s prized secret history.282 This is not to defend the CIA’s effort to keep secrets, nor is it to deny the value of disclosure and the more complete picture that further access to documents can bring. The CIA’s resistance to making the historical record of its operations available to the public within a reasonable period of time is inexcusable. But my argument has been that secrecy proves much more difficult to maintain than its proponents assume. The CIA could only exert its full control over its own secret history, not the history to which the public gained access through other sources and authorities. At the same time, its secrecy merely increased the CIA’s mythological status in the U.S. as a preeminent tool of American foreign policy, and its status elsewhere as a representative of American imperialism.283 If most Americans remain ignorant of their nation’s sordid history in Guatemala, the cause is as much ideological as it is the public’s difficulty in obtaining information about it.284

In the second edition of Secret History, published in 2006, Cullather suggests a second way that secrecy has proven implausible. In explaining his decision to keep the original redactions imposed by the CIA untouched, even though he could have inserted them with information gleaned from open sources, Cullather wrote:

I have received more compliments on the eloquence of the gaps than on any of the legible passages. Readers have found they can check their speculations for fit, and search the blank spaces for clues on the aspects of the operation that the agency, even after 50 years, prefers to cloak in “plausible deniability.”

Redactions might impose secrecy, Cullather’s readers told him, but they do not foreclose the effort—informed by other sources—to find the hidden meaning that the state has tried to conceal. “Eloquence” suggests that the empty spaces speak both of the missing content and of what those empty spaces say about the state that has removed their content.285 Secrecy law and

---

282 See Immerman, supra note 271.
283 On the CIA’s mythological status both before and after the mid-1970s disclosure of the checkered history of its covert operations, see Olmsted, supra note 242, at 13-15, 186-89.
286 The CIA’s redactions of Cullather’s original manuscript literally erased text and left square brackets surrounding empty space; the university press edition repeated this technique.
practice can render history “secret,” but it cannot fully control historical information, practice, and knowledge.\textsuperscript{287}

**CONCLUSION:**

**THE IMPLICATIONS OF SECRECY’S IMPLAUSIBILITY**

Deep, long-lasting secrecy proves quite difficult to accomplish in practice. The formal legal limits on secrecy, as well as the informal means by which information flows out of the state, perform the crucial service of making the state more visible. We should not, however, mistake this movement of information for “transparency,” or even for a step towards a gloriously transparent state. As I have argued elsewhere, we can never achieve a perfectly visible government—and, in fact, we would not even want one if it were achievable.\textsuperscript{288} The concept of “transparency,” like the concept of “secrecy,” assumes the law’s ability to control information, an assumption belied by decades of frustrating experience with open government laws.\textsuperscript{289} Both concepts are implausible.

This is no reason to despair. Here, I note three implications of this implausibility for understanding and responding to government secrecy—recognizing it as a political practice subject to political accountability, conceding law’s limits as a means to control information, and developing legal reforms that can hasten official disclosure.

First, secrecy is, paradoxically, a very public issue, and one for which excessively secretive officials can be held politically accountable. As Vice President Cheney has himself noted, secrecy can both fail, revealing the information it sought to hide, and be exposed and criticized as an undemocratic practice. In the “leaky city” of the nation’s capitol, Cheney


\textsuperscript{288} Fenster, *Seeing the State*, supra note 177, at 671-72.

\textsuperscript{289} Fenster, *Opacity*, supra note 28, at 914-19.
wrote in an essay published three years after Iran-Contra, no secret stays buried too long, and no president’s failed cover-ups go unpunished.\textsuperscript{200} Indeed, the \textit{Minority Report} itself conceded that President Reagan was forced “to pay a stiff political price” not only for his appointees’ illegal actions in Iran-Contra, but also for their secrecy and attempted concealment of the program.\textsuperscript{291} The more secrets, and the deeper they are kept, the greater the risk that the President takes in keeping them—a risk that can prove effective as an alternative to formal laws and legal proceedings in disciplining the executive branch. Such political costs cannot replace the formal legal limitations on secrecy that open government laws (not to mention, for criminal conspiracies and perjury, criminal laws) provide, but they serve as a mechanism by which the informal limits on secrecy can punish wrongdoers.

This understanding of secrecy as a tool whose use has potential political costs suggests a more foundational informal check on information control. If “the cover up is worse than the crime,”\textsuperscript{292} as the conventional wisdom teaches about Watergate, then secrecy appears to have an ethical dimension based upon a widely-shared, intuitive distinction between legitimate and illegitimate secrecy. Although it lacks precise meaning, the concept of “transparency” functions as a nearly universal liberal democratic value, as is the notion that some secrets are too dangerous to a nation and society to warrant disclosure.\textsuperscript{293} Partisans might disagree about whether an individual instance of secrecy is excessive, but in doing so they must frame their arguments in widely-acknowledged and –used terms. The NEPDG episode illustrates this well: NEPDG’s policy development process appeared absurdly secretive, as opponents and even members of the administration noted, and its secrecy provided the administration no political benefit and likely exacted political costs.\textsuperscript{294} The more significant and pervasive secrecy that followed in the Bush administration’s post-9/11 anti-terrorism campaign, which the NEPDG episode launched and rehearsed, proved more temporarily effective at controlling information. But information about many of the administration’s programs, from the torture of prisoners and detainees to the warrantless wiretaps of domestic communications, ultimately leaked to the public over the course of the administration’s second term.\textsuperscript{295} By the end of

\begin{itemize}
\item \textsuperscript{200} Cheney, \textit{supra} note 150, at 116.
\item \textsuperscript{291} \textit{IRAN-CONTRA AFFAIR REPORT}, \textit{supra} note 148, at at 452.
\item \textsuperscript{292} David Johnston, \textit{Coverup: Watergate’s Toughest Lesson}, N.Y. TIMES, Feb. 15, 1998, § 4, at 5 (“Watergate bequeathed many things to history, including this famous cliche: The cover-up is worse than the crime. Politicians haven’t necessarily absorbed this lesson, but the legal system has.”); Frank Rich, \textit{We’re Not in Watergate Anymore}, N.Y. TIMES, July 10, 2005, § 4, at 12 (“[T]he most basic lesson of Watergate: [T]he cover-up is worse than the crime.”)
\item \textsuperscript{293} Fenster, \textit{Seeing the State}, \textit{supra} note 49, at 624-26.
\item \textsuperscript{294} See \textit{supra} text accompanying notes 189-195.
\item \textsuperscript{295} Baker, \textit{supra} note 58.
\end{itemize}
the Bush presidency, the administration—and especially Vice President Cheney—had become quite politically unpopular, at least partially because of the seemingly unethical nature of its excessive secrecy. Barack Obama explicitly included open government as a platform in his 2008 campaign, in part to contrast himself with the Bush-Cheney White House. The first implication of secrecy’s implausibility, then, is that it reveals the political nature of information control, and it demonstrates how politics serves both as a key motivation to use secrecy and as a crucial check on its overuse. It also reveals the necessity of these informal means of secrecy, and the importance of avoiding draconian leak laws and excessive prosecution of those who do leak.

A second implication of secrecy’s implausibility is the shift it suggests for the study of secrecy and transparency away from a binary, black-and-white conception of the state as either open and transparent or closed and opaque. As Part V illustrated in its description of historic covert operations, events that are kept in deep secrecy become known as their details leak out over time, whether through formal or informal channels. Most events exist in a gray world of partial secrecy and partial disclosure, where even information about events whose existence the government denies is available from open sources, and where even events about which the government has made

---


297 I make this point more explicitly in Fenster, Transparency Fix, supra note 24.


300 One famous example of this phenomenon is the case of the Glomar Explorer, a ship that the CIA attempted to use to recover a sunken Soviet nuclear submarine whose existence the CIA continued to try to keep secret despite numerous leaks and front-page stories in major newspapers. See, Matthew Aid, Project Azorian: The CIA’s Declassified History of the Glomar Explorer, NAT’L SEC. ARCHIVE, Feb. 12, 2010, http://www.gwu.edu/~nsarchiv/nukevault/ebb305/.
broad disclosures remain somewhat secret and mysterious.\textsuperscript{301} Government information is not subject to control via an on-off switch; instead, it appears incrementally over time, both around and in spite of the literal and figurative black marks of government efforts to control its spread.

Third, and as a consequence of the shift from a binary understanding of secrecy and disclosure, legal reform should focus on temporal commitments to disclosure that force the state to recognize the decreasing value of once-secret information and require the state, as a default duty, to release documents after a certain interval.\textsuperscript{302} This would formalize and hasten a process that is likely to occur in any event. Laws and regulations have moved in this direction, albeit with varying degrees of success. These include the mandatory declassification of most documents after a certain time period under the current Executive Order establishing the classification system,\textsuperscript{303} and the staged release of presidential documents under the Presidential Records Act.\textsuperscript{304}

The fact that neither commitment has proven entirely successful suggests (as ever) the stubborn tendency of the administrative state and the constitutional privilege granted to the executive to resist the disclosure of information.\textsuperscript{305} Recall, however, the formal and informal means that enable a President and executive branch to control information in certain circumstances for a period of time.\textsuperscript{306} This authority, whose logic is entrenched in the Constitution, will not disappear. If they are properly

\textsuperscript{301} See supra text accompanying notes 269-281.


\textsuperscript{304} See supra text accompanying notes 249-252.


\textsuperscript{306} See supra Parts I & II.
implemented and enforced, time-based reforms can help compel the regular release of records and force the executive branch to recognize disclosure’s inevitability. Law can neither perfect secrecy nor cure its excesses, but—working in a manner consistent with secrecy’s implausibility and the difficulty of information control—it might ameliorate some of its ill effects.