
THE PROCEDURAL EXCEPTIONALISM OF NATIONAL SECURITY SECRECY

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National security secrecy claims arise in civil, criminal, and even administrative proceedings. Despite the disparate doctrinal underpinnings of the default procedures in these various areas, courts similarly treat as exempt from normal process assertions of secrecy on the basis of national security. Moreover, because these claims so often arise as threshold issues, courts' failure to police the boundaries of national security secrecy presents a secondary problem: secrecy decisions prevent litigants from reaching the merits of the dispute.

Treating national security secrecy claims as procedurally exceptional presents problems for both accuracy and legitimacy. Judicial outcomes are less accurate because, without rigorous judicial oversight, courts validate excessive secrecy claims. And the judiciary loses legitimacy for at least two reasons. First, the procedures currently employed are so facially inadequate that the general public perceives the process as flawed. Second, because courts treat these claims as procedurally exceptional across contexts, often no avenue exists for challenging particular government conduct, insulating it from review.

Remedies should go beyond mere admonishment that courts exercise more stringent oversight. Reforms must alter the litigation dynamics sufficiently to overcome the decision-making heuristics that affect judges' ability to engage fully with national security secrets. Those remedies include both additional processes designed to elicit evidence and arguments not currently available for consideration, and procedures that would shift the cost of secrecy, in appropriate circumstances, from the individual litigant to the government.

INTRODUCTION

When Daniel Ellsberg leaked to *The New York Times* the now-infamous Pentagon Papers, a 7000 page top-secret report documenting the history of U.S.-Vietnam relations, the government's response was swift: two days after the *Times* first published a story based on the leaked records, the United States sued the paper to enjoin further publication of the report's contents.¹ Solicitor General Erwin Griswold, representing the United States before the Supreme Court, was tasked with convincing the Justices that disclosure would result in serious harms to national security.² To that end, he submitted a secret brief to the Court under seal that documented the eleven items contained in the Pentagon Papers likely to produce the most serious harm.³ Despite his best efforts, he lost the case and the Pentagon Papers became public.⁴ Yet, he later

¹ John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 355-57 (1993).

² *Id.* at 371.

³ *Id.*

⁴ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

admitted: “I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat.”⁵

Much more recently, in 2005, *The Washington Post* relied on leaked information⁶ in reporting the existence of a secret Central Intelligence Agency (“CIA”) detention program used to house and interrogate suspected terrorists abroad.⁷ Immediately thereafter, congressional leadership called for an investigation, citing the leak’s potentially “long-term and far-reaching damaging and dangerous consequences” and claiming that it “will imperil our efforts to protect the American people and our homeland from terrorist attacks.”⁸ Nine years later, however, the Senate Select Committee on Intelligence released a more than five-hundred-page report detailing specific findings from its investigation of the program, now known as the Senate Torture Report.⁹ According to that report, the secrecy of the program hid various improper, illegal, and unethical actions, including “interrogation techniques that had not been approved by the Department of Justice or . . . authorized by CIA Headquarters” and the confinement of “individuals who did not meet the legal standard for detention.”¹⁰ In fact, the Obama Administration had long since ended the CIA program, and President Obama himself has admitted that “we tortured some folks” held under its auspices.¹¹ Remarkably, the Senate Torture Report concluded that the existence of the program—rather than the publicity of it—caused harm to the standing of the United States among foreign nations.¹²

Without doubt, some matters are legitimately withheld from the public on the basis that their disclosure would pose a threat to national security. It is easy to imagine harms that would likely result from the identification of undercover

⁵ Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25 (arguing “that there is massive overclassification” to avoid embarrassing the government and that “there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past”).

⁶ Katherine Shrader, *CIA Moves Towards Probe of Prisons Story*, WASH. POST (Nov. 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801428_pf.html [https://perma.cc/W5MH-8UY4].

⁷ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

⁸ Shrader, *supra* note 6.

⁹ S. REP. 113-288, at 1 (2014) [hereinafter SENATE TORTURE REPORT].

¹⁰ *Id.* at xxi.

¹¹ Carl Hulse & Mark Mazzetti, *Obama Expresses Confidence in C.I.A. Director*, N.Y. TIMES, Aug. 1, 2014, at A13.

¹² SENATE TORTURE REPORT, *supra* note 9, at xxv.

agents operating abroad,¹³ the disclosure of the particulars of how weapons systems operate, the current or planned movement of troops during a battle, or the specifics of an ongoing investigation of a suspected terrorist.¹⁴ Nonetheless, the poignant examples of the Pentagon Papers and the Senate Torture Report remind us that the government's assertion of a need for secrecy based on potential national security harms that would result from disclosure should not be unquestioningly accepted.

One locus in which national security secrecy claims arise with regularity is litigation. In fact, courts may be especially important institutions in curbing excessive executive branch secrecy precisely because of their independence from the political process.¹⁵ This role is heightened in light of Congress's notorious failure to exercise vigorous oversight; even when Congress has made forays into extending oversight, it has often been met with resistance if not outright deception by executive branch officials.¹⁶

Courts, moreover, are no strangers to evaluating all sorts of secrecy claims that arise, precisely because litigation is a public process in which liberal discovery is meant to provide wide (though not unfettered) access to

¹³ For example, the revelation of Valerie Plame's identity was widely condemned on this basis. *E.g.*, Todd S. Purdum & David E. Sanger, *The Struggle for Iraq: The Administration; An Accusation and a Bush Memo Coming at an Especially Bad Time*, N.Y. TIMES, Oct. 1, 2003, at A11.

¹⁴ See Mary-Rose Papandrea, *Balancing and the Unauthorized Disclosure of National Security Information, A Response to Mark Fenster's Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. BULL. 94, 110 (2012) ("Most people agree that disclosures revealing the movements of troops or ships or uncovering the identity of intelligence operatives, sources, and methods undermine their effectiveness."); Alan M. Dershowitz, *Who Needs to Know?*, N.Y. TIMES, May 30, 2010, at BR13 (reviewing GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW (2010)) ("No reasonable person can dispute the reality that there are 'necessary secrets,' like the names of spies, the movement of troops, the contents of codes and ciphers, the location of satellites and the nature of secret weapons.").

¹⁵ See, *e.g.*, S. REP. NO. 88-1219, at 10 (1964) (critiquing the original Administrative Procedure Act disclosure provision on the grounds that there was no judicial review, and thus no remedy for wrongful withholding); 112 CONG. REC. 13,658-59 (1966) (statement of Rep. Gallagher) (noting that the Freedom of Information Act's strong judicial review provision was one of the most important elements of the law).

¹⁶ In fact, the Senate Torture Report is telling in this regard. The report itself found that the CIA "actively avoided or impeded congressional oversight of the program." SENATE TORTURE REPORT, *supra* note 9, at xiv. Even in the course of issuing the report itself, the CIA interfered with the computers used by the Senate Select Committee on Intelligence to review classified materials, resulting in a public apology from the CIA to the Senate. Eyder Peralta, *CIA Chief Apologizes to Sens. Feinstein, Chambliss over Computer Intrusion*, NPR (July 31, 2014, 12:28 PM), <http://www.npr.org/sections/thetwo-way/2014/07/31/336855226/cia-chief-apologizes-sens-feinstein-chambliss-over-computer-intrusion> [https://perma.cc/YH6H-7REV].

underlying evidence in an effort to discover the truth of the disputed matter.¹⁷ The most familiar secrecy claims in litigation are claims of traditional privileges, such as attorney-client privilege or doctor-patient privilege.¹⁸ These privilege claims, if upheld, allow a litigant to withhold otherwise relevant information from the other party and to keep that information from becoming part of the public record.¹⁹

Notably, when courts face secrecy claims of ordinary privilege, they apply a well-established set of procedures to evaluate the merit of those claims. In general, those procedures attempt to ensure the maximum possible level of adversarial process, recognizing some inherent limitations arising from information asymmetry.²⁰ This tendency is consistent with the U.S. legal system's preference for adversarialism as a means to truth seeking and litigant autonomy.²¹ When adversarialism fails to offer sufficient safeguards, however, courts employ substitute inquisitorial procedures, placing a greater onus on judges to ensure the integrity of their decisions.²²

Like other justifications for privilege claims, national security is a longstanding basis for withholding otherwise relevant information during litigation.²³ This Article argues, however, that courts exempt these national security secrecy claims from the typical procedural testing to determine their merit. Unlike litigation over the application of other privileges, in litigation of national security secrecy claims, courts jettison the otherwise-applicable adversarial rules for dispute resolution, and severely curtail or even abandon inquisitorial fallback procedures. The result of failing to fully litigate whether

¹⁷ See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001, at 15-16 (3d ed. 1998) (“Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.” (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))); Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 42 (2011) (“Together with opportunities to be heard, open access and judicial independence have become definitional of courts.”).

¹⁸ See FED. R. EVID. 501 (indicating that the scope of privileges will be determined by federal common law); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:4 (4th ed. 2013) (listing common law privileges recognized by federal courts).

¹⁹ See FED. R. CIV. P. 26(b) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .”).

²⁰ See *infra* Part I.

²¹ See *infra* Part I.

²² See *infra* Part I.

²³ The doctrinal root of the claim varies across contexts. National security is a basis for withholding records under the Freedom of Information Act, a basis for claiming litigation privilege under the State Secrets Doctrine, and a basis for withholding information in a criminal prosecution under the Classified Information Procedures Act, among others. See *infra* Part II.

national security truly does justify secrecy in a particular case is that courts default to the status quo of secrecy. Moreover, the government often raises national security secrecy as a threshold matter; when the government wins the dispute over secrecy, that decision prevents adjudication of the merits of the underlying claims.²⁴

While claims of national security exceptionalism have surfaced in the literature,²⁵ this Article focuses on the exceptional procedures applied to national security secrecy in particular, rather than the claimed exceptionalism of the substantive review of the underlying challenged executive branch actions undertaken in the name of security. In addition, this Article examines national security secrecy across various legal contexts, including civil constitutional claims, criminal prosecutions, administrative hearings, and federal lawsuits over secrecy itself.

Looking across contexts brings two problems into stark relief. First, even though the doctrinal underpinnings of the process used to evaluate each type of national security secrecy claim appear to have arisen *sui generis* in the precedent concerning that particular type of claim, the judiciary handles the procedures of deciding national security secrecy claims in largely the same manner across contexts. This functional convergence of doctrine in the area of national security secrecy despite disparate backgrounds suggests that the nature of the secrecy claim uniquely drives decision-making. Second, when courts deny access to national security information in a way that precludes reaching the underlying merits of the litigation, judges often cite alternative litigation contexts in which the merits can or would be reached in a hypothetical case. This research suggests those alternative doors are not, as a practical matter, as open as the judiciary claims them to be. Rather, in those alternative contexts, threshold secrecy determinations, subject to the same exceptional—and deficient—procedures frequently prevent courts from reaching the merits, too.²⁶

Remedying deficient procedures over national security secrecy is no easy task. Merely suggesting the judiciary hew more skeptically in its approach is unlikely to effectuate change. Rather, true adversarialism should be restored by changing the rules of litigation. Restoring adversarialism can be accomplished in a variety of ways, including legislating particular procedural rights for types of cases that present these challenges. When full adversarialism between parties cannot be achieved without endangering national security, the use of special advocates with security clearance to offer the adversarial position provides another promising avenue. Finally, procedural rules could shift some of the cost of secrecy to the government, rather than the individual, by

²⁴ See *infra* Part II.

²⁵ See generally Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225 (identifying this trend in the literature and providing counterfactual case studies).

²⁶ See *infra* Part III.

establishing certain contested facts against the government when the individual has met a threshold showing but the government claims secrecy prevents full litigation on the merits.

Part I describes the set of procedures courts typically use to adjudicate disputed matters in the U.S. legal system both in general and specifically with respect to ordinary privilege claims made in litigation. It documents how the U.S. justice system defaults to a baseline of adversarialism, but adapts procedure to accommodate unusual circumstances where adversarialism fails by employing inquisitorial methods.

Part II delves into the processes courts use to adjudicate claims of national security secrecy across a variety of contexts. This Part demonstrates that, in the context of national security secrets, the judiciary almost uniformly rejects the otherwise applicable procedural rules, including both adversarial testing and the alternative inquisitorial inquiry. Moreover, it demonstrates that claims of national security secrecy often play out as threshold matters, and their resolution in favor of the government prevents the litigation from proceeding to the merits.

Part III explores the negative implications of failing to meaningfully test national security secrecy claims. In particular, it shows how punting on these claims affects the accuracy of outcomes and the legitimacy of the law.

Part IV suggests alternative approaches to adjudicating national security secrecy. Based on arguments rooted in cognitive psychology, this Part argues that merely changing the standard under which judges review national security secrecy claims or calling on judges to review those claims more aggressively will likely fail to produce the desired results. Instead, it suggests three interventions designed either to change the information the judge sees when deciding the matter or to change the incentives of the parties to pursue the claims. These interventions, this Part suggests, are more likely to curb judicial rubber-stamping of excessive national security secrecy claims.

I. PROCEDURAL DEFAULTS

The U.S. legal system's procedural law is generally a transsubstantive body of rules.²⁷ That is, courts decide cases using the same sets of procedures regardless of the subject matter of the case. For example, the Federal Rules of Civil Procedure expressly govern the method of resolving "all civil actions and proceedings in the United States district courts," regardless of whether the case concerns a car accident or a civil rights violation.²⁸ The Federal Rules of Criminal Procedure reach even further, "govern[ing] the procedure in all criminal proceedings in the United States district courts, the United States

²⁷ See David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1209 (describing transsubstantivity's "ascendancy" in American procedural law).

²⁸ FED. R. CIV. P. 1.

courts of appeals, and the Supreme Court of the United States,” whether the case concerns a pickpocket or a murder.²⁹ Evidentiary rules span even greater breadth; the Federal Rules of Evidence govern all civil *and* criminal cases in any federal court.³⁰ In fact, the principle of transsubstantivity is deeply ingrained as a concept of political neutrality, and departures from transsubstantivity—while they do exist—are accordingly quite rare, especially for judge-made procedural rules.³¹

This Part will describe the character of transsubstantive process, documenting how the rules we have chosen reflect our commitment to maximum adversarialism with fallback inquisitorial methods when adversarialism fails. It will then describe in particular how those default rules operate in the context of “everyday” secrecy claims in litigation, which arise in the form of privilege claims. This Part thus provides the yardstick by which to measure procedures courts use to test national security secrecy claims.

A. *Adversarial and Inquisitorial Methods*

The judicial process in the United States is firmly rooted in an adversarial tradition.³² An adversarial justice system is one in which the judicial process relies on attorneys to investigate the facts and law, present the issues to the court, and engage in zealous advocacy on behalf of their clients.³³ Courts are generally responsible for deciding only the evidence and issues presented to them, rather than taking an active role in investigation.³⁴ By contrast, civil law systems, such as those the majority of continental European countries employ, typically rely not on adversarial processes to resolve disputes, but on

²⁹ FED. R. CRIM. P. 1(a)(1).

³⁰ FED. R. EVID. 101.

³¹ See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 401-15 (2010) (describing some meaningful inroads into substance-specific procedure by legislatures, but concluding that the judiciary remains steadfastly committed to transsubstantivity when it engages in rulemaking); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 728-33 (2006) (describing how having unified evidence law across the criminal and civil divide increases the legitimacy of the evidentiary rules because the value of evidence for inference purposes remains the same in divergent litigation contexts).

³² Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) (labeling the U.S. system “more adversarial than most”).

³³ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382 (1978); see also MODEL RULES OF PROF’L CONDUCT, pmbl. para. 2 (AM. BAR ASS’N 2016) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

³⁴ Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714-15 (1983).

inquisitorial procedures, which are characterized by an active court that takes the lead in investigating the case and shaping the litigation.³⁵

While truth seeking is a fundamental goal of any justice system,³⁶ it is not the only function of a judiciary. For instance, judicial systems may also function as lawmaking institutions,³⁷ loci of social change,³⁸ and protectors of individual dignitary interests.³⁹ Indeed, adversarialism as it exists in the United States in particular promotes a variety of goals beyond truth seeking, and those goals are deeply connected to constitutional values.⁴⁰ For example, adversarialism protects individual autonomy by allowing individuals to control their own litigation, make strategic choices about the presentation of their claims and defenses, and advocate for themselves.⁴¹ It also protects the litigants' right to fully participate in the litigation process as well as their right to be heard.⁴² These fundamental liberty interests are evidenced in other parts of the Constitution, and are tied to the design of an adversarial judicial process.⁴³

Further, specific constitutional provisions promote adversarialism, both as to civil litigation and criminal prosecutions. For example, adversarialism is enshrined in the jurisdictional limits of federal courts, which can only hear

³⁵ See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2005-09 (1999) (describing examples of the court's active role in some civil law systems).

³⁶ Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 479 (1962) (describing the goal of truth seeking through litigation as one of the "decencies of civilization that no one would dispute" (quoting *Mich. Tr. Co. v. Ferry*, 228 U.S. 346, 353 (1913))).

³⁷ GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT* 35 (2005) (describing how precedential decisions are, in fact, law in common law countries).

³⁸ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) ("In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.").

³⁹ See Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 389-91 (2001) (locating dignitary interests in procedural due process protections).

⁴⁰ It has even been suggested that adversarialism is so connected to core constitutional values that to relinquish it would threaten the constitutional democracy of the United States. *See id.* at 364.

⁴¹ This constitutional value is expressed, for example, in the First Amendment's protection of free speech. *See* U.S. CONST. amend. I.

⁴² Within the Constitution, this value is most expressly addressed by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* U.S. CONST. amends. V, XIV. Lon Fuller describes the lawyer as the "[g]uardian of [d]ue [p]rocess" in an adversarial system. Fuller, *supra* note 33, at 384 (arguing that a lawyer's highest loyalty is not to persons, but to procedures and legal institutions).

⁴³ *See* Redish, *supra* note 39, at 382-83 (discussing the relationship between adversary theory and the rationales behind freedom of expression).

“cases” and “controversies,”⁴⁴ terms from which the doctrines of standing, mootness, and ripeness police the requirement that the litigants have an actual stake in the dispute.⁴⁵ It also appears, with respect to criminal disputes, in the protection of the rights of a defendant to confront the witnesses against him, have counsel provided, and take advantage of compulsory process.⁴⁶ In fact, adversarialism is such a central part of the American justice system, it is nearly taken for granted that disputes must be resolved according to adversarial testing.⁴⁷

Nonetheless, no system of justice is singularly adversarial or inquisitorial; rather these models represent two ends of a spectrum on which a justice system may lie.⁴⁸ While adversarialism dominates the U.S. justice system, it does not do so exclusively; some inquisitorial elements have taken hold. Judith Resnik has identified the increasingly “managerial” role of judges based on their active involvement in promoting settlement discussions and enforcing broad remedies.⁴⁹ Likewise, Amalia Kessler has contended that the historic role of masters was largely inquisitorial in nature.⁵⁰ Thus, there remains some role for adapting procedures to address novel problems.

Moreover, the scholarly literature has identified numerous instances in which adversarialism is particularly ill-suited to resolve a given issue. Justin Pidot argues that courts, in raising questions of their own jurisdiction *sua sponte*, should have a quasi-inquisitorial duty to investigate those issues on their own, forging a new area of so called “jurisdictional procedure.”⁵¹

⁴⁴ U.S. CONST. art. III, § 2, cl. 1.

⁴⁵ See, e.g., *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (discussing “the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness” to have standing to allege the unconstitutionality of a federal expenditure).

⁴⁶ U.S. CONST. amend. VI.

⁴⁷ See Landsman, *supra* note 34, at 713-14 (arguing that the belief in the uncontroversial nature of the adversarial system has led to a failure to fully explore its roots).

⁴⁸ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 (2005) (describing our system as a “botched marriage” of inquisitorial and adversarial approaches).

⁴⁹ Resnik, *supra* note 32, at 376-77 (exploring the shift by judges toward more carefully directing the path of litigation through supervision of case preparation and pretrial conferences). Another example can be found in the consolidated cases in multidistrict litigation, where the assigned court takes a much more active role in directing pretrial litigation. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 84-118 (2015) (describing the tension in judges’ roles in multidistrict consolidated cases as being, on the one hand, acting as traditional judges with no more powers than those in another district court and, on the other hand, uniquely directing the course of the litigation, including settlement).

⁵⁰ Kessler, *supra* note 48, at 1253-60.

⁵¹ Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 65-67 (2012)

Amanda Frost argues that judges have a duty to raise issues, far beyond the confines of assessing their own jurisdiction, in furtherance of their duty to articulate the meaning of contested questions of law.⁵² And Brianne Gorod contends that when disputes turn on legislative facts (i.e., disputes about the state of the world rather than an issue concerning the particular parties), adversarialism in its current form fails to produce the best available information.⁵³

These contributions to the literature have helped shape the landscape in understanding when courts chafe against the confines of formal adversarialism. They have, moreover, demonstrated that when adversarialism is impractical or insufficient, inquisitorial procedures are routinely and appropriately deployed to supplement the decision-making process and ensure the best possible result. Claims of secrecy in litigation are typically subjected to precisely these kinds of default procedures.

B. “Ordinary” Secrecy Claims

One prominent feature of adversarial litigation in the United States is liberal discovery. This innovation, which came with the advent of the Federal Rules of Civil Procedure, means that “civil trials in the federal courts no longer need be carried on in the dark,” but rather, discovery allows “parties to obtain the fullest possible knowledge of the issues and facts before trial.”⁵⁴ Likewise, in criminal cases, discovery rights are both prescribed by rule⁵⁵ and constitutionalized under *Brady v. Maryland*⁵⁶ as a due process right.⁵⁷ Nonetheless, the system admits that privileges are permitted to limit full discovery, and that allowing those privileges is a hindrance to truth seeking in the underlying matter.⁵⁸ The content of the privileges (i.e., what

(arguing that this will result in “more accurate, and thus more just, judicial decisions”).

⁵² Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 499 (2009) (“[P]ermitt[ing] a judge to introduce legal issues might answer, at least in small part, the most persistent criticism of adversarial procedure—that it fails when the parties’ skills and resources are not evenly matched.”).

⁵³ Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 69 (2011) (suggesting that an alternative model with different practices and procedures should be adopted for such cases).

⁵⁴ *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

⁵⁵ See FED. R. CRIM. P. 15-17.

⁵⁶ 373 U.S. 83 (1963).

⁵⁷ See *id.* at 87 (holding that a prosecutor violates due process by suppressing evidence favorable to the defendant when the evidence is material to guilt or punishment and the defendant has requested the evidence).

⁵⁸ See Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 60 (2006).

communications they cover) is created by federal common law as designated by the Federal Rule of Evidence.⁵⁹

Of course, whether a particular privilege applies can be, and often is, the subject of dispute. For example, the opposing party may challenge the claim that a communication between an attorney and her client was for the purpose of seeking legal advice.⁶⁰ Or, the opposing party may contest the claim that the communication was confidential and not disclosed to third parties.⁶¹

In civil litigation, the rules for resolving these types of disputes are clear. Once a discovery request is made, if the responding party withholds information based on a privilege claim, she must “expressly make the claim” and “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”⁶² That is, despite withholding the underlying information, the party asserting the privilege must disclose enough about the communication to allow the claim of privilege to be challenged by the other party in an adversarial manner.⁶³ Maximum adversarialism is the goal for adjudicating whether the privilege applies.

Moreover, there is little hesitancy to employ inquisitorial methods when the circumstances indicate it would be of benefit. The Supreme Court, considering a claim of privilege made by a government defendant, opined that “*in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between [the government defendant’s] claims of irrelevance and privilege and plaintiffs’ asserted need for the documents is correctly struck.”⁶⁴ In fact, *in camera* inspection is viewed as an essential tool to aid the court’s independent fact-finding obligation:

[I]t is to be remembered that existence of the privilege is not a basis for keeping the documents from having to be brought before the court. The privilege is not self-operative against a judicially required production, since the court is entitled to an opportunity to make [*in camera*]

⁵⁹ FED. R. EVID. 501.

⁶⁰ See *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011) (“The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.”).

⁶¹ See *id.* at 134.

⁶² FED. R. CIV. P. 26(b)(5).

⁶³ Some courts’ local rules give even more detailed requirements for a privilege log. See, e.g., N.D. OKLA. CIV. R. 26.4 (requiring for each withheld document “the type of document; the general subject matter of the document; the date of the document; the author of the document, whether or not the author is a lawyer; each recipient of the document; and the privilege asserted”).

⁶⁴ *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 405 (1976).

inspection of any such documents in order to satisfy itself that they are in fact privileged.⁶⁵

To be sure, courts have not gone so far as to require or even authorize automatic *in camera* inspection of allegedly privileged documents, particularly in the context of criminal cases or possible criminal charges. For example, the Supreme Court has held that when the government asserts the crime-fraud exception to attorney-client privilege (which waives the privilege for communications regarding future, but not past, criminal conduct), a court may only inspect the communications *in camera* upon a factual showing of some likelihood that the exception truly applies.⁶⁶ Nonetheless, the Court cautioned that this requirement “need not be a stringent one.”⁶⁷ Courts have even been willing to mandate *in camera* proceedings in some circumstances to test the strongest and most important of litigation privileges, the Fifth Amendment privilege against self-incrimination.⁶⁸ As the Court of Appeals for the Eleventh Circuit described in one case:

[W]e must remand this case to the district court, to enable that court to conduct an *in camera* proceeding, on a question-by-question basis, to determine the actual extent to which [the target of an IRS investigation]

⁶⁵ *Schwimmer v. United States*, 232 F.2d 855, 864 (8th Cir. 1956); *see also In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 70 (1st Cir. 2011) (“When, as in this case, the assertion of privilege is subject to legitimate dispute, the desirability of [in camera] review is heightened. Even if the parties do not explicitly request such a step, a district court may be well advised to conduct an [in camera] review. The court below acted wisely and within the scope of its discretion in doing so.” (citation omitted)); *Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990) (“Only when the district court has been exposed to the contested documents and the specific facts which support a finding of privilege under the attorney-client relationship for each document can it make a principled determination as to whether the attorney-client privilege in fact applies.” (citing *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980)); *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) (“The proper procedure for [judicial] consideration [of an attorney-client privilege claim] is . . . *in camera* inspection by the court.”); *In re Grand Jury Proceeding*, 721 F.2d 1221, 1223 (9th Cir. 1983) (“If [the privilege claim is] disputed, the materials sought should be submitted to the court for an *in camera* inspection, with the party asserting privilege providing an explanation of how the information fits within that privilege.”).

⁶⁶ *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (“Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, ‘the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,’ that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” (quoting *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982))).

⁶⁷ *Id.*

⁶⁸ *Fisher v. United States*, 425 U.S. 391, 409 (1976) (“[T]he Fifth Amendment . . . protects a person only against being incriminated by his own compelled testimonial communications.”).

may rely on his fifth amendment privilege to avoid compliance with the IRS summons.⁶⁹

Thus, when ordinary secrecy claims arise in litigation as claims of discovery privilege, whether in a civil or criminal case, courts take seriously the responsibility to first promote maximum adversarialism and second, when adversarialism is insufficient, to exercise their independent obligation to ensure a privilege is properly invoked. Justification in open court of the claimed privilege, which allows the opponent to formulate adversary arguments, is preferred. Disclosure to the court in camera always remains an option where accurate resolution cannot be achieved on the basis of the public record. These procedures protect the privilege holder's rights while enacting safeguards against excessive secrecy and needless roadblocks to arriving at the truth of the underlying dispute.

II. EXCEPTIONAL PROCEDURE

National security secrecy is, like other bases for privilege, a legitimate and important reason for withholding otherwise relevant information in litigation. However, national security secrecy differs from these other privilege claims insofar as courts exempt these claims from ordinary procedural testing: when the claim of secrecy is challenged, courts first conclude that adversarial testing simply cannot be brought to bear; and, in the face of that failure, courts often either formally or practically abandon the decision-making task altogether rather than apply second-best inquisitorial options. Moreover, the result of this apparent decision-making vacuum is the parties' inability to proceed, sometimes completely, with the litigation, and a resulting enforcement of the status quo by default. That status quo, as we will see, is secrecy.

This Part considers national security secrecy claims that arise in a variety of legal contexts, including civil litigation, criminal prosecutions, and

⁶⁹ *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991). While *Argomaniz* provides an example of the willingness of courts to engage in in camera review when necessary to evaluate a Fifth Amendment claim of privilege, the reality is that because of the much more categorical nature of the privilege, most disputes about its application are legal and not factual, and thus in camera review is of no assistance in resolving the matter. For example, a criminal defendant has a Fifth Amendment right not to take the stand at all without negative inference, making the content of his proposed testimony irrelevant. See *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt). Thus, disputes tend to arise regarding nondefendant witnesses and defendant witnesses in civil proceedings. Still, contested areas are usually legal, such as whether a particular compelled act is "testimonial" or whether a potential question could possibly produce an incriminating response. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 28 (2000) (deciding close questions about the testimonial nature of records production); *Rogers v. United States*, 340 U.S. 367, 371-72 (1951) (requiring question-by-question analysis of whether the response might incriminate the witness).

administrative hearings. This transsubstantive examination demonstrates that the nature of the national security secrecy claim has more impact on judges' decision-making than the type of case or its doctrinal root. Moreover, as to some types of claims, a transsubstantive comparison debunks the myth that although secrecy may prevent particular claims from reaching the merits in one litigation context, there are other litigation contexts in which those claims can be litigated. Rather, it shows that, in fact, all litigation doors are often shut, potentially immunizing wrongdoing from judicial accountability. Other scholars have noted the value of comparing civil and criminal procedures, particularly in overlapping areas such as evidentiary and discovery matters.⁷⁰ These are precisely the areas in which national security secrecy falls. Accordingly, this Part proceeds by documenting courts' treatment of national security claims as procedurally exceptional across these contexts.

A. *State Secrets Privilege*

National security secrecy claims regularly arise during the process of discovery in civil litigation. Under the federal rules, parties “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.”⁷¹ The applicability of a privilege, in turn, is determined by the rules of evidence, which have left it to the federal courts to apply common law privileges “in the light of reason and experience.”⁷² One such common law privilege is the state secrets privilege. In *United States v. Reynolds*,⁷³ the Supreme Court first clearly announced this evidentiary privilege, allowing the government to withhold certain records in discovery because of a “reasonable danger that compulsion of the evidence [would] expose military matters which, in the interest of national security, should not be divulged.”⁷⁴

Unlike other privilege claims, however, courts subject state secrets privilege claims to their own unique set of procedures without regard to the typical discovery rules. These procedures arose, in part, from *Reynolds* itself. On the one hand, the Court cautioned that the privilege “is not to be lightly invoked,” and that only the head of the department may assert the privilege after his or

⁷⁰ See, e.g., Sklansky & Yeazell, *supra* note 31, at 728-33 (describing how having unified evidence law across the criminal and civil divide increases the legitimacy of the evidentiary rules because the value of evidence for inference purposes remains the same in divergent litigation contexts).

⁷¹ FED. R. CIV. P. 26(b)(1).

⁷² FED. R. EVID. 501.

⁷³ 345 U.S. 1 (1953).

⁷⁴ *Id.* at 10. Related to the *Reynolds* privilege is what is known as the *Totten* bar, under which “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.” *Totten v. United States*, 92 U.S. 105, 107 (1875) (barring a breach of contract suit brought by a Civil War spy on the grounds that the very contract alleged to exist was agreed to be a secret one).

her personal consideration of the issues.⁷⁵ However, the Court in *Reynolds* also emphasized deference to the executive branch's determination.⁷⁶ While "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," the Court refused to require disclosure even to the court in camera of the contested information.⁷⁷ The depth of the court's inquiry depends on the opposing party's showing of necessity for the disputed information, but no amount of necessity may overcome an otherwise applicable state secrets privilege.⁷⁸ In fact, the Court also emphasized caution regarding strict judicial oversight: "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect . . ."⁷⁹ This concern about disclosure even in camera to the court is unlike any other privilege context, including our most sacred of privileges, the Fifth Amendment right against self-incrimination.⁸⁰

There has been a steep increase in the invocation of the state secrets privilege since September 11, 2001 (or "9/11"), though not all claims, by any means, are successful.⁸¹ Invocation of the state secrets privilege has played a particularly prominent role in litigation over two post-9/11 phenomena: (1) the CIA's extraordinary rendition program and (2) the National Security Agency's ("NSA") warrantless wiretapping practices.⁸² In each of these contexts, as litigation has played out, courts have failed to subject assertions of state secrets privilege to meaningful adversarial testing or, as a fallback, inquisitorial review. This procedural exceptionalism, which ratifies government secrecy decisions without stringent oversight has, in turn, prevented the litigation from moving forward at all, and resulted in a complete bar to judicial review of questionable government practices.

⁷⁵ *Reynolds*, 345 U.S. at 7-8.

⁷⁶ See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1937 (2007) (noting the agreement of commentators that *Reynolds* requires courts to defer to executive assertions of state secrets privilege).

⁷⁷ *Reynolds*, 345 U.S. at 7-8, 10.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 8; cf. Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 *WM. MITCHELL L. REV.* 1629, 1632-33 (2012) (describing the state secrets cases as embracing "formalistic reasoning to extend unwarranted deference to the executive branch in security-related contexts," rather than a more "flexible, rule-of-law-oriented approach").

⁸⁰ See *supra* notes 66-69 and accompanying text.

⁸¹ Prior to 9/11, the privilege was asserted on average in 2.4 cases per year, but since 9/11 it has been asserted on average in 11.4 cases per year. Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 *STAN. L. REV.* 1173, 1188 (2015). Daniel Cassman reports: "In general, when courts decide state secrets claims, they uphold the privilege 67% of the time, deny it 18% of the time, and uphold it in part 15% of the time. In 21% of cases in which the privilege is raised, courts never rule on the issue." *Id.*

⁸² Frost, *supra* note 76, at 1942.

1. Dismissal for Inability to Proceed

In *Mohamed v. Jeppesen Dataplan, Inc.*,⁸³ the Court of Appeals for the Ninth Circuit ruled en banc that the government's assertion of the state secrets privilege not only allowed the government to withhold certain information in discovery, but in fact barred litigation from proceeding in its entirety.⁸⁴ There, five plaintiffs sued a subsidiary of Boeing Co. allegedly responsible for providing logistical support for the extraordinary rendition program, under which each plaintiff contended he was apprehended and transferred to a foreign detention facility and subjected to various unlawful detention conditions and interrogation methods.⁸⁵ Immediately after they filed their complaint, the United States moved to intervene as a defendant and to dismiss the complaint on the basis of the State Secrets Doctrine.⁸⁶

The Ninth Circuit permitted several departures from ordinary procedure, which exemplify a pattern across the federal courts in state secrets cases. First, the court allowed the state secrets privilege claim to be raised at the pleadings stage, absent any discovery request.⁸⁷ That is, no particular records or information were yet at issue. Because of this oddity, no privilege log could be created, and instead the government listed four categories of information it asserted were entitled to state secrets privilege, including a general catchall category of "any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods."⁸⁸ Given the general nature of this disclosure, there was virtually no way for the plaintiffs to engage in a meaningful argument about whether particular information fell within this category and thus should be privileged.⁸⁹

⁸³ 614 F.3d 1070 (9th Cir. 2010) (en banc).

⁸⁴ *Id.* at 1083 (affirming dismissal after the government successfully claimed state secrets because proceeding would present an unacceptable risk of disclosing state secrets).

⁸⁵ *Id.* at 1073-75.

⁸⁶ *Id.* at 1076.

⁸⁷ *Id.* at 1080. As the dissent rightly pointed out, this approach "ignor[es] well-established principles of civil procedure which, at this stage of the litigation, do not permit the prospective evaluation of hypothetical claims of privilege that the government has yet to raise and the district court has yet to consider." *Id.* at 1099 (Hawkins, J., dissenting).

⁸⁸ *Id.* at 1086.

⁸⁹ *Jeppesen Dataplan* is hardly the only case in which the state secrets assertion has been made and adjudicated at the pleadings stage. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 4-11 (2005) (dismissing most claims prior to discovery on state secrets grounds in a case where two foreign nationals alleged that the CIA had failed to provide promised support); *El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007) (affirming dismissal of a complaint concerning extraordinary rendition at the pleadings stage); *Kasza v. Browner*, 133 F.3d 1159, 1163 (9th Cir. 1998) (affirming dismissal prior to discovery on state secrets grounds of a case brought by former workers at a classified facility operated by the Air Force seeking to compel compliance with hazardous waste inventory, inspection, and disclosure responsibilities).

In addition, the court provided very little explanation: “We can [only] say . . . that the secrets fall within one or more of the four categories identified by the government and that we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.”⁹⁰

Second, because the court did not require that the privilege be invoked in response to a discovery request or that the government produce a meaningful privilege log, the court deprived the plaintiffs of any opportunity to argue for possible redactions or segregation. And while the court acknowledged that segregability analysis applies to state secrets claims, like any other claim of privilege, it went on to say that there are times when even nonsecret evidence cannot be turned over because of the “high risk of inadvertent or indirect disclosures.”⁹¹ Thus, it sanctioned a sort of halo of secrecy beyond the strictly privileged information.

Third, the Ninth Circuit employed only the most limited inquisitorial procedure as a substitute. While the court considered in camera a classified declaration submitted by the government, it did not look at the disputed evidence itself, to the extent that evidence was even identified.⁹² As the court said, it undertook its review “without forcing a disclosure of the very thing the privilege is designed to protect,” even to the court.⁹³

Fourth and finally, rather than simply excluding privileged evidence and permitting the litigation to proceed so long as the plaintiffs could rely on nonprivileged evidence to make out their case,⁹⁴ the court required dismissal of the action, reasoning that “there is no feasible way to litigate Jeppesen’s

⁹⁰ *Jeppesen Dataplan*, 614 F.3d at 1086.

⁹¹ *Id.* at 1082 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir. 1992)). The court also relied on *Kasza v. Browner* for the idea that “seemingly innocuous information is be part of a . . . mosaic.” *Id.* at 1086 (quoting *Kasza*, 133 F.3d at 1166 (alteration in original)).

⁹² *Id.* at 1086 (“We have thoroughly and critically reviewed the government’s public and classified declarations . . .”).

⁹³ *Id.* at 1082.

⁹⁴ Other courts have similarly refused to allow the introduction of evidence from nonprivileged sources when the information proffered is claimed to be a state secret, including prohibiting plaintiffs from using information they already possess and placing plaintiffs under stringent protective measures in order to litigate the applicability of the privilege in the first place. *See, e.g., Doe v. CIA*, 576 F.3d 95, 106-07 (2d Cir. 2009); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204-05 (9th Cir. 2007). As one scholar noted, this approach “confuses evidence and information,” by disallowing the same information to be used in judicial proceedings if it can be found in nonprivileged sources. Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 828-29 (2010) (explaining that in *Jeppesen Dataplan*, “the Government’s position would have even prevented the plaintiff from telling his own story in pleadings, discovery, or court” despite the fact that “by the time the case reached the Ninth Circuit, the very subject matter of the case . . . was well known by the public”).

alleged liability without creating an unjustifiable risk of divulging state secrets.”⁹⁵ In disallowing the plaintiffs from using even evidence within their own control, the Ninth Circuit concluded that permitting the litigation to go forward would unacceptably risk inadvertent disclosure, no matter what protective measures were put in place.⁹⁶ Accordingly, courts’ treatment of state secrets as procedurally exceptional may prevent any adjudication on the merits of the underlying claims in whole classes of cases the legality of the government’s extraordinary rendition program.⁹⁷

2. Dismissal for Lack of Standing

State secrets claims do not need to rise to the level of requiring dismissal to potentially shut down a civil suit. Another line of cases demonstrates how the state secrets privilege can effectively end litigation when its invocation would prevent plaintiffs from amassing evidence needed to demonstrate that they have standing. Standing requirements, rooted in Article III’s case-or-controversy language,⁹⁸ require a plaintiff to show an injury-in-fact that is fairly traceable to the defendant’s challenged action and redressable by a favorable ruling.⁹⁹ The requisite injury-in-fact must be “concrete and particularized” as well as “actual or imminent.”¹⁰⁰

For example, journalists, lawyers, and scholars sued the NSA alleging it was engaging in warrantless wiretapping in violation of the Constitution and the

⁹⁵ *Jeppesen Dataplan*, 614 F.3d at 1087. While the court treated the case as a *Reynolds* privilege case, it noted that the result of a successful invocation of the *Reynolds* privilege can be, in some cases, dismissal of the action, in which case “the *Reynolds* privilege converges with the *Totten* bar.” *Id.* at 1083.

⁹⁶ *Id.* at 1089; *see also Doe*, 576 F.3d at 106 (“Even if they already know some of it, permitting the plaintiffs, through counsel, to use the information to oppose the assertion of privilege may present a danger of ‘[i]nadvertent disclosure’—through a leak, for example, or through a failure or mis-use of the secure media that plaintiffs’ counsel seeks to use, or even through over-disclosure to the district court *in camera*—which is precisely ‘the sort of risk that *Reynolds* attempts to avoid.’” (alteration in original) (quoting *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005))).

⁹⁷ Even the majority in *Jeppesen Dataplan* admitted that, “[a]t a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors.” *Jeppesen Dataplan*, 614 F.3d at 1091; *see also Frost*, *supra* note 76, at 1950-51 (suggesting that the State Secrets Doctrine is stripping courts of jurisdiction over classes of cases and potentially serving as a form of governmental immunity); Galit Raguean, *Masquerading Justiciability: The Misapplication of State Secrets Privilege in Mohamed v. Jeppesen—Reflections from a Comparative Perspective*, 40 GA. J. INT’L & COMP. L. 423, 436 (2012) (arguing that *Jeppesen Dataplan* effectuates a “transformation of the state secrets privilege from an evidentiary privilege to a doctrine of nonjusticiability with far-reaching results”).

⁹⁸ U.S. CONST. art. III, § 2.

⁹⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁰⁰ *Id.*

Foreign Intelligence Surveillance Act (“FISA”).¹⁰¹ The lawsuit was prompted by a *New York Times* article reporting, based on leaked information, the existence of the program known as the Terrorist Surveillance Program (“TSP”).¹⁰² The government filed a motion to dismiss, arguing that the state secrets privilege prevented plaintiffs from obtaining evidence needed to establish Article III standing.¹⁰³ The district court sided with the plaintiffs, but the Court of Appeals for the Sixth Circuit reversed, reasoning that “the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants.”¹⁰⁴ That is, they were unable to show an injury-in-fact, actual or imminent, because they lacked evidence that their communications had been targeted.¹⁰⁵

Soon thereafter, the Supreme Court weighed in on these issues in a case concerning similar circumstances. In *Clapper v. Amnesty International USA*,¹⁰⁶ a group of plaintiffs similarly composed of journalists, lawyers, and human rights organizations challenged a 2008 amendment to FISA that expanded surveillance authority.¹⁰⁷ Specifically, the amendment allowed the Foreign Intelligence Surveillance Court (“FISA court” or “FISC”) to authorize surveillance of non-U.S. persons located abroad without the need to demonstrate probable cause that the target is a foreign power or agent thereof.¹⁰⁸ Despite the facial nature of the challenge, which would not require divulgence of state secrets to reach the merits, the Supreme Court required dismissal of the case based on the plaintiffs’ failure to establish standing.¹⁰⁹

In particular, the Court rejected the plaintiffs’ assertion of a future injury based on the likelihood that their communications would be intercepted, ruling that it was “highly speculative” and thus did not satisfy standing requirements.¹¹⁰ As Stephen Vladeck has noted, “[o]f course, the only reason

¹⁰¹ *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

¹⁰² James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting that months after 9/11, President Bush secretly authorized the NSA to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying).

¹⁰³ *ACLU*, 438 F. Supp. 2d at 766.

¹⁰⁴ *ACLU*, 493 F.3d at 653.

¹⁰⁵ *See id.*

¹⁰⁶ 133 S. Ct. 1138 (2013).

¹⁰⁷ *Id.* at 1142.

¹⁰⁸ *Id.* at 1144.

¹⁰⁹ *See id.* at 1143.

¹¹⁰ *Id.* at 1148. The Court further explained that “even if [plaintiffs] could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to [the FISA amendment].” *Id.* at 1143.

why the plaintiffs' allegations in this regard were so 'highly speculative' was because the government's surveillance operations under [the FISA amendment] were (and largely remain) secret."¹¹¹

In a footnote, the Court explained the lack of evidence as the plaintiffs' responsibility:

It was suggested at oral argument that the Government could help resolve the standing inquiry by disclosing to a court, perhaps through an *in camera* proceeding, (1) whether it is intercepting respondents' communications and (2) what targeting or minimization procedures it is using. This suggestion is puzzling. As an initial matter, it is *respondents'* burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing by revealing details of its surveillance priorities.¹¹²

However, it is entirely routine for courts, when faced with disputes about the factual predicate for standing (in an instance where the legal theory of standing is otherwise adequate), to allow parties discovery on the question of justiciability.¹¹³ In a particularly salient example, the Court of Appeals for the Second Circuit even issued a mandamus order—an extraordinary remedy—to require the district court to allow discovery on jurisdictional facts, noting that the lower court's order vacating the plaintiff-petitioners' notices of deposition "makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated."¹¹⁴

While the *Clapper* Court's explanation for the lack of evidence departs drastically from ordinary procedural principles, the outcome is nonetheless consistent with courts' treatment of the state secrets privilege.¹¹⁵ If typical jurisdictional discovery did take place to uncover the underlying facts necessary to support standing (i.e., whether the plaintiffs' communications were in fact subject to surveillance under the FISA amendments), the state secrets privilege would be immediately invoked and would prevent discovery

¹¹¹ Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 551, 565 (2014).

¹¹² *Clapper*, 133 S. Ct. at 1149 n.4 (citations omitted).

¹¹³ See *Pidot*, *supra* note 51, at 73 n.353 (discussing jurisdictional fact-finding and appellate review).

¹¹⁴ *Inv. Props. Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 707 (2d Cir. 1972); see also *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 F. App'x 348, 349 (4th Cir. 2008) (remanding to the district court for fact-finding on the issue of standing); *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) ("Finally, we think a remand here is also consistent with our precedent allowing jurisdictional discovery and factfinding if allegations indicate its likely utility.").

¹¹⁵ See *supra* Section II.A (discussing how invocation of state secret privilege often results in dismissal due to plaintiff's inability to proceed).

of the same.¹¹⁶ That is, the problem is not that the government is in possession of the relevant information, but that the plaintiff is unable to access it. In that way, invocation (or threatened invocation) of the state secrets privilege can, again, end litigation in its entirety.

Since *Clapper* was decided, public revelations about the extent of NSA surveillance, in particular those made by former NSA contractor-turned-leaker Edward Snowden, have given potential plaintiffs more information with which to work.¹¹⁷ But post-*Clapper* cases confirm the continuing circular nature of the intersection of state secrets claims and standing doctrine; the failure to meaningfully police state secrets claims still prevents plaintiffs from reaching the merits of challenges to government surveillance in many cases.¹¹⁸

For example, in *Jewel v. NSA*,¹¹⁹ customers of AT&T alleged that by virtue of their patronage, their communications would have been collected and stored

¹¹⁶ See *supra* Section II.A (discussing how state secrecy claims regularly arise during discovery and how “no amount of necessity may overcome an otherwise applicable state secrets privilege”).

¹¹⁷ For a detailed account of Edward Snowden’s leaks, and the relationship between national security leaks and transparency procedures writ large, see Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1397-1419, 1445-54 (2015).

¹¹⁸ See *Rousset v. AT&T Inc.*, No. A-14-CV-0843-LY-ML, 2015 WL 9473821, at *5 (W.D. Tex. Dec. 28, 2015) (“Though the gradual development of the public record regarding the NSA’s domestic surveillance program may indeed provide, as Plaintiff terms it, ‘secondary proof’ of the existence of a public-private surveillance partnership, Plaintiff’s generalized reliance on public information concerning the government’s domestic surveillance efforts is not enough to establish that he himself has been injured in any redressable way.”). Some specific public revelations, however, have provided sufficient evidence for individual plaintiffs to proceed. *E.g.*, *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (finding standing because “the government’s own orders demonstrate that appellants’ call records are indeed among those collected as part of the telephone metadata program”); see also *Schuchardt v. Obama*, No. 14-705, 2015 WL 5732117, at *6 (W.D. Pa. Sept. 30, 2015) (“In reviewing the foregoing decisions, a meaningful distinction emerges. In situations where plaintiffs are able to allege with some degree of particularity that their own communications were specifically targeted—for example, by citing a leaked FISC order or relying on a detailed insider account—courts have concluded that the particularity requirement has been satisfied. On the other hand, courts have refused to find standing based on naked averments that an individual’s communications must have been seized because the government operates a data collection program and the individual utilized the service of a large telecommunications company or companies.” (citations omitted)), *vacated sub nom.*, *Schuchardt v. President of the United States*, 839 F.3d 336, 353-54 (3d Cir. 2016) (stating that while the plaintiff had sufficiently pleaded standing “[t]his does not mean that he has standing,” and explaining “nothing in our opinion should be construed to preclude the Government from raising any applicable privileges barring discovery—including the state secrets doctrine—or to suggest how the District Court should rule on any privilege the Government may choose to assert”).

¹¹⁹ No. C 08-04373 JSW, 2015 WL 545925 (N.D. Cal. Feb. 10, 2015).

for the NSA in a program already publicly acknowledged.¹²⁰ The court first concluded that the publicly available information submitted by the plaintiffs was insufficient to establish what data was actually being collected.¹²¹ And it further concluded that the state secrets privilege applied to the data collection and, as a result, “that even if the public evidence proffered by Plaintiffs were sufficiently probative on the question of standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security.”¹²² Other courts have followed suit.¹²³

Judges’ failure to allow the typical jurisdictional fact discovery in this set of standing cases can only be attributed to their implicit view that such discovery is pointless in light of the state secrets claim that would be made. However, that courts dismiss these cases for lack of standing without even the opportunity to litigate the discovery or evidentiary issues is itself a striking example of procedural exceptionalism. Moreover, the effect of courts’ failure to employ typical procedures to test state secrets is once again to prevent the litigation from reaching the merits of the underlying claims, such as those alleging unlawful government surveillance.

B. *Criminal Prosecutions*

National security secrets that arise in criminal prosecutions pose some of the starkest adversarialism problems. Unlike in civil suits where, no matter how important the individual interest, a court may conclude that society’s interests outweigh providing a remedy for every wrong, criminal defendants’ liberty is at stake and they are accordingly granted the strongest of constitutional protections.¹²⁴ Among those protections are, of course, Fourth Amendment rights against unreasonable searches and seizures, with a presumption of a warrant requirement.¹²⁵

¹²⁰ *Id.* at *14-16.

¹²¹ *Id.* at *16-18.

¹²² *Id.* at *19.

¹²³ *See, e.g.,* *Obama v. Klayman*, 800 F.3d 559, 564 (D.C. Cir. 2015) (reversing a preliminary injunction as to government surveillance on the grounds that plaintiffs had not demonstrated a likelihood of success on the question of standing and noting that “it is for the district court to determine whether limited discovery to explore jurisdictional facts is appropriate,” but that “[i]t is entirely possible that, even if plaintiffs are granted discovery, the government may refuse [on State Secrets privilege grounds] to provide information (if any exists) that would further plaintiffs’ case”); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 901 (N.D. Ill. 2006) (concluding that due to privilege, the plaintiffs could not obtain the information they would need to prove their standing to sue for prospective relief and thus could not maintain that type of claim).

¹²⁴ *Cf. Gideon v. Wainwright*, 372 U.S. 335, 342-45 (discussing fundamental rights given to criminal defendants).

¹²⁵ The Fourth Amendment reads, in full: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

Key to ensuring that criminal defendants can enforce their rights is the Supreme Court's pronouncement in *Brady v. Maryland*¹²⁶ that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."¹²⁷ Criminal procedure rules enforce the defendant's right to access this so-called *Brady* material. In federal courts, for example, "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy [any records that are] within the government's possession, custody, or control and . . . material to preparing the defense."¹²⁸ This information access right is therefore both constitutional and based in procedural rules.¹²⁹ These procedures are designed to facilitate maximum adversarial process; however, as in civil litigation, when national security secrets are at stake, these typical procedures are often circumvented.¹³⁰

1. FISA Warrants

In 1978, Congress passed FISA, which established the FISA court as a special court on which a rotating cast of federal judges would review warrant applications related to national security.¹³¹ As to individualized warrants, the government must: identify the target of surveillance; show probable cause that the target is a foreign power or an agent of a foreign power; justify the locus of the surveillance; detail procedures that will be used to minimize any invasion of privacy concerning U.S. persons; and certify that a significant purpose of

violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

¹²⁶ 373 U.S. 83 (1963).

¹²⁷ *Id.* at 87.

¹²⁸ FED. R. CRIM. P. 16(a)(1)(E).

¹²⁹ While not decided definitely, many courts have held that *Brady* requirements apply to materials favorable in a suppression hearing. Compare *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (holding that *Brady* principles must be applied to suppression hearings involving a challenge to the truthfulness of an affidavit for a search warrant), and *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) ("The appropriate assessment for *Brady* purposes, of course, is whether nondisclosure affected the outcome of the suppression hearing."), *judgment vacated on other grounds*, 503 U.S. 930 (1992), with *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999) ("[I]t is hardly clear that the *Brady* line of . . . cases applies to suppression hearings."), and *United States v. Williams*, 10 F.3d 1070, 1077 (4th Cir. 1993) (assuming without deciding that *Brady* applies to suppression hearings).

¹³⁰ See *infra* Sections I.B.1-3 (discussing how procedures surrounding secret FISA warrants, use of FISA-obtained evidence, use of evidence obtained under E.O. 12,333, and CIPA requests during trial all serve to effectively circumvent typical adversarial safeguards).

¹³¹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1812 (2012)).

the surveillance is to obtain foreign intelligence information.¹³² As mentioned above, the 2008 FISA Amendments Act created a new authority for intelligence collection allowing the FISA court to authorize foreign intelligence surveillance targeting communications of non-U.S. persons located abroad, without having to find probable cause that the target is a foreign power or agent of a foreign power, and without having to justify the locus of the surveillance.¹³³ While FISA surveillance is not intended to aid in criminal investigations, but rather in national security and defense, evidence obtained can nonetheless be used in criminal prosecutions.¹³⁴

In a typical criminal case where evidence is gathered under a warrant, a defendant is free to examine the search warrant and underlying affidavit, and may move to suppress evidence collected thereunder if he believes the warrant is invalid on any number of grounds.¹³⁵ A defendant is further entitled to an evidentiary hearing to determine whether a warrant was lawfully issued—referred to as a *Franks* hearing after *Franks v. Delaware*¹³⁶—upon a preliminary showing of reckless or deliberate misrepresentations in a warrant affidavit.¹³⁷ But, again, with respect to national security information, exceptional procedures apply that undermine the general presumption of maximum adversarial testing of these threshold issues.

On its face, FISA seems to provide for the possibility of adversarial testing of the underlying legality of the search. When the government seeks to use evidence “obtained or derived” from FISA or its amendments, the statute states that the government must notify the defendant, who may then move for disclosure of the applications, orders, or other materials regarding the surveillance, or for suppression of the evidence.¹³⁸ However, if the Attorney

¹³² 50 U.S.C. § 1804(a).

¹³³ 2008 FISA Amendments Act, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438-48 (codified at 50 U.S.C. § 1881(a)); *see also* Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1144 (2013) (describing the FISA Amendments Act).

¹³⁴ In fact, the Patriot Act amended the standard from requiring that foreign intelligence gathering be “the purpose” of the surveillance to requiring only that it be “a significant purpose.” Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (codified as amended at 50 U.S.C. § 1804(a)(6)(B)).

¹³⁵ *See, e.g.*, 22A CORPUS JURIS SECUNDUM § 1074 (2006) (“Where a search or seizure warrant is defective in that it contains an inadequate description of the place to be searched or things to be seized, evidence obtained under the warrant may be excluded.”).

¹³⁶ 438 U.S. 154 (1978).

¹³⁷ *Id.* at 171. (“To mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.”).

¹³⁸ 50 U.S.C. § 1806(c) (requiring the Government to notify both the defendant and the court that the Government intends to use or disclose information obtained from electronic surveillance), *id.* § 1825(d) (requiring the same notification for information obtained

General then certifies that “disclosure or an adversary hearing would harm the national security of the United States,” a court must then undertake *ex parte*, *in camera* review.¹³⁹ Despite any extant security risk, after reviewing the underlying materials, a court must order disclosure of the underlying FISA materials to the defendant, using appropriate protective orders, “where such disclosure is necessary to make an accurate determination of the legality of the surveillance.”¹⁴⁰

However, on the questions of both the government’s need for secrecy and the defendant’s need for the underlying materials, typical adversarial process is completely abandoned. As to the former, there is in fact no procedure whatsoever available to challenge the Attorney General’s initial assertion for the need for secrecy on the basis of national security.¹⁴¹ According to the plain terms of the statute, even *in camera* review is not designed to pass judgment on that issue, but rather to determine the necessity of the information to the defense.¹⁴² And, as to the defendant’s need for the materials, every decision is made on the basis of *ex parte* submissions without the benefit of even limited adversarial argument.¹⁴³

Moreover, there is strong evidence that even these second-best inquisitorial proceedings are functionally hollow. Despite the existence of the disclosure procedure since FISA’s inception, “no court has ever allowed disclosure of FISA materials to the defense” on the basis that disclosure is needed to determine the legality of the search.¹⁴⁴ As one treatise explains, “[m]ost decisions simply state that the court has reviewed the application and order and determined that the surveillance or search was lawfully conducted.”¹⁴⁵ Given

through physical search), *id.* § 1881(e) (requiring the same notification for electronic surveillance of non-U.S. citizens outside the United States).

¹³⁹ 50 U.S.C. § 1806(f).

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *Id.* (requiring courts that find hearings unnecessary to “review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted”).

¹⁴⁴ *United States v. Daoud*, 755 F.3d 479, 481 (7th Cir. 2014) (quoting *United States v. Daoud*, No. 12 cr 723, 2014 WL 321384, at *3 (N.D. Ill. Jan. 29, 2014)).

¹⁴⁵ 2 DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROCEDURE § 31:3, at 264 (2d ed. 2012); *see also, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 569-70 (5th Cir. 2011) (“Similarly, we reject the defendants’ argument that the FISA warrant applications did not establish the requisite probable cause in this case. Upon careful *in camera* review of the challenged FISA orders and applications, and the classified materials in support of the applications, we conclude that the Government demonstrated the requirements for probable cause”); *United States v. Abu-Jihaad*, 630 F.3d 102, 131 (2d Cir. 2010) (“[B]ecause nothing in the record . . . provides any basis to think that the FISA application contained any false statement, . . . we identify no error in the district court’s

that fact, ultimate adversarial testing of the legality of the surveillance, as contemplated in appropriate situations by the statute, is never actually achieved.

The inability of the defendant to access the underlying FISA warrant materials (even with appropriate safeguards) in practice either impairs or completely impedes reaching the merits of constitutional challenges to FISA authorized searches in criminal cases.¹⁴⁶ First, and most clearly, a defendant is obviously hard-pressed to identify arguments about possible factual misrepresentations without seeing the underlying FISA warrant or supporting affidavit.¹⁴⁷ Second, the failure to allow FISA disclosure can undermine even facial challenges to the constitutionality of the underlying authority for the surveillance at issue, including provisions of FISA.¹⁴⁸ In some cases, without access to the underlying FISA materials, a defendant may be unable to ascertain on which of several possible legal authorities the government relied in conducting the relevant search.

A recent case out of the Seventh Circuit illustrates both types of problems that arise from a complete bar to adversarial testing of FISA warrants. In *United States v. Daoud*,¹⁴⁹ a defendant charged with attempting to detonate an explosive in connection with an FBI sting operation was notified that FISA evidence would be used in his case.¹⁵⁰ The defendant moved for disclosure of the FISA application and materials, arguing that it was necessary both for the purpose of conducting a *Franks* hearing and for challenging the constitutionality of the surveillance mechanisms actually used in his case.¹⁵¹

decision not to hold a *Franks* hearing.”); *United States v. Huang*, 15 F. Supp. 3d 1131, 1141 (D.N.M. 2014) (“The Court has carefully reviewed the materials provided by the government for in camera review and finds that the certification submitted by the Executive Branch in support of a FISA application was properly made and fulfills all FISA requirements for certification.”); *United States v. Kashmiri*, No. 09 CR 830-4, 2010 WL 4705159, at *6 (N.D. Ill. Nov. 10, 2010) (“In addition, the Court has already undertaken a process akin to a *Franks* hearing through its *ex parte*, *in camera* review of the FISA materials. Through this review, the Court finds that Defendant is not entitled to a *Franks* hearing.” (citation omitted)).

¹⁴⁶ See *infra* notes 149-57 and accompanying text (using the *Daoud* case to illustrate how procedures surrounding FISA warrants preclude defendants from raising constitutional challenges).

¹⁴⁷ See *infra* notes 157-58 and accompanying text (describing how the defendant in *Daoud* could not possibly identify falsehoods contained in statements he is not allowed to see).

¹⁴⁸ See *infra* notes 157-58 and accompanying text (discussing how the defendant in *Daoud* argued that disclosure of the FISA application against him was necessary in order to make any constitutional challenges to the surveillance mechanisms used against him).

¹⁴⁹ 755 F.3d 479 (7th Cir. 2014), *cert denied*, 135 S. Ct. 1456 (2015).

¹⁵⁰ *Id.* at 480.

¹⁵¹ *United States v. Daoud*, No. 12 cr 723, 2014 WL 321384, at *3 (N.D. Ill. Jan. 29, 2014).

The district court initially ruled for the defendant, ordering disclosure of the FISA materials to a security-cleared member of the defense team.¹⁵² The court reasoned:

Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. “The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”¹⁵³

The government appealed and the Court of Appeals for Seventh Circuit reversed,¹⁵⁴ reasoning that limiting disclosure to security-cleared defense counsel did not sufficiently protect national security because counsel might mistakenly reveal the information, and even nonsecret information might “provide clues to classified material.”¹⁵⁵ The Seventh Circuit concluded, based on its own review of the classified materials, that the government was being truthful, that disclosure would result in national security harm, and that the underlying surveillance that took place did not violate FISA.¹⁵⁶

As Daoud argued in his petition for certiorari, which was later denied by the Supreme Court, “defendants cannot identify knowing or reckless falsehoods in affidavits they have not seen,” nor can they “determine which surveillance authorities were used against them . . . [in order to] effectively contest the legality of those authorities or the admissibility of evidence obtained through the[ir] use.”¹⁵⁷ To be sure, some criminal defendants have been able to mount (unsuccessful) facial constitutional attacks on aspects of FISA itself without access to the underlying materials applicable in individual cases,¹⁵⁸ but challenges to individual FISA orders remain essentially impossible without disclosure.

Exceptional procedures accordingly pervade criminal cases in which FISA-obtained evidence is used. While these exceptional procedures purport to offer

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

¹⁵⁴ *Daoud*, 755 F.3d at 481.

¹⁵⁵ *Id.* at 484.

¹⁵⁶ *Id.* at 485.

¹⁵⁷ Petition for Writ of Certiorari at 15-16, *United States v. Daoud*, 135 S. Ct. 1456 (2015) (No. 14-794).

¹⁵⁸ *See, e.g., United States v. Abu-Jihaad*, 630 F.3d 102, 128-29 (2d Cir. 2010) (“Accordingly, we reject Abu-Jihaad’s argument that FISA is unconstitutional because it does not require certification of a primary purpose to obtain foreign intelligence information. Rather, we hold that certification of a significant purpose to obtain foreign intelligence information, together with satisfaction of all other FISA requirements, is reasonable and, therefore, sufficient to support the issuance of a warrant under the Fourth Amendment.”).

opportunities for full adversarial testing and meaningful second-best inquisitorial procedures, the empirical evidence and the reasoning of judicial decisions reveal an empty promise. Moreover, these exceptional procedures affect not only the initial secrecy determination about FISA materials, but also the subsequent merits challenge to the legality of government activity undertaken under the statute.

2. Notice of a Search

The failure of exceptional procedures to protect defendants' ability to challenge warrants issued by the FISA court pales in comparison to the exceptional procedures under which some criminal defendants do not even know that clandestinely collected evidence is being used against them. In fact, in the national security context, secret government searches may easily go undetected if the government fails to provide actual notice to the defendants about how evidence was gathered.¹⁵⁹ The failure to provide notice is, itself, an exceptional procedure that departs from regular criminal process.

Criminal defendants have a well-established right to notice of a search.¹⁶⁰ Notice rights are seen as essential to protecting constitutional rights, including both procedural due process¹⁶¹ and Fourth Amendment protections against unreasonable searches and seizures.¹⁶² Notice is also a right protected in the Federal Rules of Criminal Procedure, which require notice with the execution of a warrant, and allow delays of that notice only in certain circumstances.¹⁶³ However, there has been a significant erosion of these notice requirements in cases where alleged national security secrets are at stake,¹⁶⁴ a procedural exception that undermines the adversarial testing of the search itself. This

¹⁵⁹ See *infra* notes 167-74 and accompanying text (discussing the effects of defendants virtually never receiving notice of either FISA-obtained evidence not directly introduced in the criminal proceeding, or evidence obtained under Executive Order 12,333).

¹⁶⁰ See generally Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & the Right to Notice*, 54 SANTA CLARA L. REV. 843, 851 (2014) (discussing the origins of a defendant's right to notice and arguing that this right is "severely undermined" by secret government interception of communications).

¹⁶¹ See *Lambert v. California*, 355 U.S. 225, 228 (1957) (discussing how due process requires that a person be given some form of notice when a passive failure to act can result in criminal charges).

¹⁶² See *Berger v. New York*, 388 U.S. 41, 60 (1967) (holding a "blanket grant of permission to eavesdrop" impermissibly lacks protective procedures such as notice).

¹⁶³ See FED. R. CRIM. P. 41(f).

¹⁶⁴ See *infra* notes 167-74 and accompanying text (highlighting the apparent disregard for providing notice of FISA-obtained evidence except where evidence is being directly used in criminal proceedings, and the DOJ position that notice is not required for evidence obtained under Executive Order 12,333).

problem has arisen both in the context of FISA-authorized searches as well as other types of secret searches.¹⁶⁵

In the FISA context, from 2008 to 2013 the lawyers from the Department of Justice (“DOJ”) apparently took the position that the government need not provide notice to a defendant that it obtained evidence under the 2008 FISA Amendments unless such evidence was to be directly introduced in the criminal proceedings.¹⁶⁶ For example, if the evidence obtained under FISA were used, in turn, to obtain a traditional warrant, from which further evidence was found, only the evidence from and existence of the traditional warrant would need to be disclosed.¹⁶⁷ Indeed, reports of other secret surveillance programs suggest DOJ lawyers have sanctioned law enforcement affirmatively hiding the origins of evidence later used in criminal trials.¹⁶⁸

When reports surfaced that evidence collected under the 2008 FISA Amendments was being used in criminal proceedings without providing notice to defendants, the DOJ changed its position and undertook a systematic review of criminal cases to make additional disclosures to defendants, some of whom had already been convicted and were serving prison sentences.¹⁶⁹ Nonetheless, since that time, the DOJ has only issued five such notices, and none since April 2014.¹⁷⁰ The DOJ has also fought a lawsuit seeking disclosure of its legal

¹⁶⁵ See *infra* notes 167-71 and accompanying text (discussing FISA-authorized searches); notes 172-73 and accompanying text (discussing evidence obtained under Executive Order 12,333).

¹⁶⁶ Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. TIMES, Oct. 26, 2013, at A21 (“[T]hat the department’s National Security Division did not notify criminal defendants when eavesdropping without a warrant was an early link in an investigative chain that led to evidence used in court.”). This position was taken despite the fact that notice is required to be provided to any defendant against whom evidence is to be used that was “obtained or derived” from FISA-authorized surveillance. 50 U.S.C. § 1806(c) (2012).

¹⁶⁷ Sari Horwitz, *Holder Reviewing Cases That Involved Spying Data*, WASH. POST, Nov. 16, 2013, at A2 (“The National Security Division lawyers had argued that it was not necessary to make the notifications unless the evidence derived from the wiretap or intercepted e-mail was introduced directly into the case”); Savage, *supra* note 166 (discussing previous assertions by the DOJ that it was not required to say whether evidence presented was obtained in connection with FISA-authorized surveillance, thereby taking a narrow definition of the word “derived” in 50 U.S.C. § 1806(c)).

¹⁶⁸ See Brad Heath, *Calls Tracked Before 9/11*, USA TODAY, Apr. 8, 2015, at 1A (“Instead, [the Drug Enforcement Agency’s] Special Operations Division passed the data to field agents as tips to help them find new targets or focus existing investigations, a process approved by Justice Department lawyers.”).

¹⁶⁹ Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Oct. 17, 2013, at A3; see also *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at *2-5 (D. Or. June 24, 2014).

¹⁷⁰ Patrick Toomey reported this statistic as of December 11, 2015. Patrick C. Toomey, *Why Aren’t Criminal Defendants Getting Notice of Section 702 Surveillance — Again*, JUST

interpretations of FISA notice requirements, either prior to 2013 or currently.¹⁷¹ It thus remains unclear what the DOJ believes the FISA notice provision actually requires and whether all defendants against whom evidence has been obtained using FISA surveillance are actually receiving notice.

Moreover, the DOJ still maintains it need not provide notice of secret surveillance concerning criminal defendants when the surveillance is conducted under non-FISA authority. Under a Reagan-era Executive Order, E.O. 12,333, the NSA can conduct surveillance outside the United States, even when, in practice, it may incidentally catch domestic communications.¹⁷² But according to the *New York Times*, “officials contend that defendants have no right to know if [E.O.] 12,333 intercepts provided a tip from which investigators derived other evidence.”¹⁷³

To be sure, a criminal defendant cannot possibly bring the traditional adversarial process to bear on whether he should have access to the justifications for and circumstances of a search if the defendant has no idea that the search even took place. And in these circumstances, the judge cannot even undertake any *ex parte* proceedings or in camera review as an inquisitorial replacement procedure, because the court is also unaware of the origins of the evidence.¹⁷⁴

Accordingly, executive branch decisions—in this instance, even more than judicial decisions—functionally exempt from otherwise-applicable notice and

SECURITY (Dec. 11, 2015), <https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again/> [<https://perma.cc/89PK-FLZU>].

¹⁷¹ See *FISA Amendments Act FOIA Request*, ACLU, <https://www.aclu.org/fisa-amendments-act-foia-request> [<https://perma.cc/G2M7-6JKT>] (last visited Oct. 12, 2016). The ACLU has posted the government’s responses to the lawsuit, including two indices of withheld records. See Documents Withheld in Full by Executive Office for U.S. Attorneys, August 2015, *ACLU v. U.S. Dep’t of Justice*, No. 1:13-cv-07347-GHW (S.D.N.Y. Nov. 23, 2015), https://www.aclu.org/sites/default/files/field_document/eousa_index_11.23.15.pdf [<https://perma.cc/CK9L-A72A>]; Documents Withheld in Full by National Security Division, August 2015, *ACLU v. U.S. Dep’t of Justice*, No. 1:13-cv-07347-GHW (S.D.N.Y. Nov. 23, 2015), https://www.aclu.org/sites/default/files/field_document/nsd_index_11.23.15.pdf [<https://perma.cc/KB97-4WBF>].

¹⁷² Exec. Order No. 12,333, 46 FED. REG. 59,941 (Dec. 4, 1981). In fact, this executive order governs the bulk of the NSA’s activities. Toomey & Kaufman, *supra* note 160, at 876.

¹⁷³ Charlie Savage, *Reagan-Era Order on Surveillance Violates Rights, Says Departing Aide*, N.Y. TIMES, Aug. 13, 2014, at A12.

¹⁷⁴ That is not to say that even if a criminal defendant successfully challenged the legality of a search pursuant to FISA or E.O. 12,333, that it would necessarily lead to exclusion of the evidence, given the many exceptions to the so-called “fruit of the poisonous tree” doctrine. See, e.g., *Murray v. United States*, 487 U.S. 533, 537-39 (1988) (describing the independent source exception to the exclusionary rule); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (describing the good faith exception to the exclusionary rule); *Nix v. Williams*, 467 U.S. 431, 441-43 (1984) (describing the attenuation of the taint exception to the exclusionary rule).

discovery requirements a difficult to define class of criminal cases in which evidence derived from national security surveillance is used. Procedural exceptionalism that sanctions secrecy about the existence of a search causes an additional catch-22 for the judicial system: not only do courts then fail to police the defendants' right to access the underlying materials about the search, but they also will never reach the merits of the legality of the surveillance programs and methods used.

3. CIPA

In addition to secret surveillance and Fourth Amendment concerns, national security secrecy issues may arise in criminal trials in a variety of ways. In fact, sometimes the very subject matter of the criminal liability involves national security secrets.¹⁷⁵ Historically, one problematic category of cases concerned the prosecution of government insiders for espionage; after all, to prosecute such a case, the government would likely need to disclose publicly the very secrets alleged to have been stolen, secrets that clearly merited protection in the first instance.¹⁷⁶

In 1980, Congress enacted the Classified Information Procedures Act ("CIPA")¹⁷⁷ specifically to address the problem in which the individual could essentially "graymail" the government into dropping the prosecution by threatening disclosure of sensitive information.¹⁷⁸ While CIPA specified procedures for handling classified information in criminal trials in order to protect national security interests, Congress expressly disavowed altering criminal defendants' substantive discovery rights.¹⁷⁹ Nonetheless, as described below, CIPA represents a congressionally-created set of exceptional procedures that significantly depart from traditional adversarial testing of claims for the need for secrecy in a particular case and, in some instances, eliminate the possibility for inquisitorial oversight as well.

While some provisions concern the handling of defendant-disclosed classified information, such as might be at issue in espionage cases,¹⁸⁰ the central provision at issue in modern prosecutions involving national security

¹⁷⁵ See *infra* notes 178-85 and accompanying text (discussing how the classification of information becomes problematic under traditional prosecution procedures for espionage and terrorism cases).

¹⁷⁶ See *infra* notes 178-82 and accompanying text (discussing the issues surrounding prosecuting espionage).

¹⁷⁷ Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C. app. 3 (2012)).

¹⁷⁸ S. REP. NO. 96-823, at 2 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4295.

¹⁷⁹ See *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989); Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 449 (2010) (describing how "Congress did not tinker with the rules of evidence" and meant for "[t]he standard for admissibility . . . to remain the same").

¹⁸⁰ See 18 U.S.C. app. 3 §§ 5-6.

concern the government's obligations to disclose classified material to the defense. Primarily, it requires disclosure of classified information if it "is helpful or material to the defense,"¹⁸¹ but, upon sufficient showing, the court may authorize the government "to delete specified items of classified information . . . to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."¹⁸²

Importantly, the procedure for testing the defendant's need for the discovery, on the one hand, and the necessity of substitute procedures to protect national security interests, on the other, may be entirely inquisitorial under the terms of the statute. A court can authorize the government to make the request for substitute disclosures *ex parte* and *in camera* and, if the court grants the requested relief, the order remains under seal.¹⁸³ As one scholar has documented, although the statute is permissive as to *ex parte* filings, stating only that courts "may" allow them, courts treat them as a routine aspect of CIPA cases.¹⁸⁴ Thus, the default of maximum adversarial process is abandoned as to the initial decision concerning either the defendant's need for the information or the national security risk of disclosure.¹⁸⁵

To be sure, if the court concludes the defendant's need for information cannot be met with these types of substitutes, CIPA allows classified information to be disclosed subject to a protective order limiting disclosure to defense counsel with an appropriate security clearance.¹⁸⁶ While disclosure only to counsel, and not the client, can certainly in some instances severely

¹⁸¹ *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 124 (2d Cir. 2008).

¹⁸² 18 U.S.C. app. 3 § 4.

¹⁸³ *Id.*

¹⁸⁴ See generally Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1046-49 (2007) (arguing that the routine *ex parte* nature of decision-making regarding substitute disclosures undermines the judicial process).

¹⁸⁵ See, e.g., *United States v. Boulos*, No. 13-CR-612 (ENV), 2015 WL 502170, at *1 (E.D.N.Y. Feb. 3, 2015) (granting the government's motion to be relieved from ordinary discovery obligations under CIPA based on *ex parte*, *in camera* review of government submissions); *United States v. Shehadeh*, 857 F. Supp. 2d 290, 291-92 (E.D.N.Y. 2012) (granting motion to protect information under CIPA from ordinary discovery *ex parte* and *in camera*), *aff'd*, 586 F. App'x 47 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1185 (2015); *United States v. El-Hanafi*, No. S5 10 CR 162(KMW), 2012 WL 603649, at *1 (S.D.N.Y. Feb. 24, 2012) (deciding discovery obligations under CIPA "without an adversary proceeding," but recognizing "dangers" associated with "not hav[ing] available the fundamental instrument for judicial judgment an adversary proceeding in which both parties may participate").

¹⁸⁶ 18 U.S.C. app. 3 §§ 3, 9.

undermine adversarial process,¹⁸⁷ it improves the prospects for meaningful judicial oversight.

Nonetheless, even this sort of limited counsel-eyes-only disclosure is not mandatory. In the event that the court concludes a defendant needs classified information, but the government is still unwilling to provide it, the government can request that the court dismiss the indictment or complaint rather than order disclosure.¹⁸⁸ And there is complete judicial deference on the need for national security secrecy in these instances. As the Court of Appeals for the Fourth Circuit said, “we have no authority . . . to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security.”¹⁸⁹ As a result, CIPA does not truly allow for any testing of claims for national security secrecy needs, and, as happens in other contexts, the initial national security secrecy claim may prevent the litigation from going forward on the merits.¹⁹⁰

To be sure, the fact that the government ultimately internalizes the cost of a secrecy claim by having to drop the criminal charges acts as internal pressure not to press secrecy claims without merit. But, as one scholar has observed, “because dismissal is always an available option for the government, CIPA cannot invariably force disclosure, and it therefore does not offer any accountability at all when the executive is determined to avoid it.”¹⁹¹

Interestingly, despite CIPA’s shortcomings in failing to allow procedurally regular adversarial testing of secrecy claims, it remains better in some respects than the absolute bar to litigation that the state secrets privilege has come to entail. As a result, CIPA-like procedures were adopted in habeas corpus litigation brought by Guantánamo Bay detainees¹⁹² after the Supreme Court

¹⁸⁷ See Arjun Chandran, Note, *The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner*, 64 DUKE L.J. 1411, 1440-41 (2015) (describing a case in which an attorney argued that classified evidence must be discussed with defendant in order for counsel to provide a useful defense).

¹⁸⁸ 18 U.S.C. app. 3 § 6(e).

¹⁸⁹ *United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008) (quoting *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990)).

¹⁹⁰ Given CIPA’s myriad protections for the government’s national security interests, it is ironic that the government in fact cites having to reveal classified information in open court as a barrier to prosecuting leak suspects. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 551-54 (2013) (arguing that, despite government protests to the contrary, CIPA and alternative paths to punishing those who leak classified information provide the government with adequate avenues for prosecuting leak suspects without revealing classified information).

¹⁹¹ Stephen Schulhofer, *Oversight of National Security Secrecy in the United States*, in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 22, 31 (David Cole et al. eds., 2013).

¹⁹² Ian MacDougall, Note, *CIPA Creep: The Classified Information Procedures Act and Its Drift into Civil National Security Litigation*, 45 COLUM. HUM. RTS. L. REV. 668, 701-08

required a “meaningful opportunity” for detainees to demonstrate they are being unlawfully held.¹⁹³ In a case management order governing this class of litigation, the D.C. District Court imported concepts from CIPA, including permitting substitutions of classified information with summaries or admissions.¹⁹⁴ Moreover, numerous decisions of the district court expressly cited CIPA as authority for ad hoc rulings on discovery issues that arose during this exceptional habeas review.¹⁹⁵ While clearly giving more effect to the Supreme Court’s mandate for meaningful review than a straight state secrets analysis that might preclude the litigation from moving forward entirely,¹⁹⁶ importing CIPA’s ideals imports its flaws as well, including its failure to allow adversarial testing, which “tilt[s] the rules of evidence in favor of the government.”¹⁹⁷

C. *Administrative Proceedings*

Beyond judicial processes—whether civil or criminal—national security secrecy claims may also arise in the course of proceedings before administrative agencies. One such area is immigration proceedings, whether they are proceedings concerning an individual seeking admission to the United States or those to decide the government’s attempt to deport noncitizens from the country.¹⁹⁸ In fact, in popular discourse, immigration enforcement is intimately linked to national security and counterterrorism efforts.¹⁹⁹ This

(2014) (describing how courts handling the Guantánamo Bay habeas corpus litigation specifically referred to the CIPA procedures).

¹⁹³ *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

¹⁹⁴ Case Management Order at 4, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (D.D.C. Nov. 6, 2008).

¹⁹⁵ *See, e.g., MacDougall, supra* note 192, at 704-05, 705 n.213 (explaining how the D.C. District Court has repeatedly analogized to CIPA in determining how classified information would be managed in cases of habeas corpus).

¹⁹⁶ *Id.* at 705.

¹⁹⁷ *Id.* at 718. Moreover, post-*Boumediene* procedures used by the district courts did not result in the liberation of a significant number of detainees. *See Aziz Z. Huq, What Good Is Habeas?*, 26 CONST. COMMENT. 385, 421 (2010) (“It is striking that at the most, *less than four percent of releases* from the Cuban base have followed a judicial order of release—and even in these case[s] it is not wholly clear that release would not have happened sooner or later.”).

¹⁹⁸ *See* 8 U.S.C. § 1229(a) (2012) (describing proceedings to determine inadmissibility and deportability).

¹⁹⁹ For example, the mass shooting in San Bernardino, California focused public officials’ attention on the Visa Waiver Program, sparking a national discussion concerning the purported link between immigration and terrorism. *See, e.g., Monica Alba, Hillary Clinton Calls for ‘Hard Look’ at Visa Waiver Program After San Bernardino Shooting*, NBC NEWS (Dec. 5, 2015, 2:54 PM), <http://www.nbcnews.com/politics/2016-election/hillary-clinton-calls-hard-look-visa-waiver-program-after-san-n474856> [<https://perma.cc/D765-CEJ3>].

connection was made particularly salient when immigration enforcement agencies were moved under the umbrella of the newly created Department of Homeland Security after 9/11.²⁰⁰

Individuals have long been excluded from or removed from the United States on the grounds that they constitute threats to national security.²⁰¹ For example, in the present day version of the Immigration and Nationality Act (“INA”), grounds of inadmissibility include planning to enter the country to engage in espionage or sabotage, and engaging in, planning, endorsing, or affiliating with terrorist activity.²⁰² As to deportation of individuals already present in the United States, most of the same national security grounds justify deportation.²⁰³

Immigration procedures, however, have no default of transsubstantive procedures that otherwise apply in the same way that civil constitutional litigation or criminal proceedings do. The process of deciding a case before the agency is entirely crafted by the agencies’ own rules, constrained only by what the Due Process Clause might require in a given situation.²⁰⁴

Nonetheless, procedural exceptionalism with respect to the treatment of national security secrecy is written into the INA. In particular, the INA provides certain hearing rights to the noncitizen facing removal²⁰⁵ that include examining the evidence against him and cross-examining witnesses, but also specifies that “these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief.”²⁰⁶ And courts have nearly universally upheld the right of

²⁰⁰ *History*, DEPT. HOMELAND SEC., www.dhs.gov/history [https://perma.cc/TG3S-A2BH] (last accessed Jan. 27, 2016).

²⁰¹ See *infra* Section III.A for a detailed description of *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the most well-known of such cases.

²⁰² 8 U.S.C. § 1182(a)(3).

²⁰³ Compare *id.* § 1182(a)(3), with *id.* § 1227(a)(4).

²⁰⁴ Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227, 234, 245 (1988).

²⁰⁵ While noncitizens facing deportation have a right to a hearing, only some noncitizens seeking admission do. For example, a lawful permanent resident (i.e., a green card holder) who has left the country and is returning, while still seeking admission, is entitled to a hearing. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that an exclusion hearing may provide adequate due process to a lawful permanent resident returning to the United States). In addition, certain asylum claimants have a right to a hearing. Moreover, the government in certain circumstances, provides a hearing even when none is required, for example, when a noncitizen with a valid visa who seeks admission is being denied entry to the United States.

²⁰⁶ 8 U.S.C. § 1229a(b)(4)(B).

the government to use secret evidence in immigration proceedings based on a national security claim.²⁰⁷

To be sure, there is the possibility that some disclosure of national security information is required if it goes to the question of the removability of a noncitizen who has a constitutional right to a hearing under the Due Process Clause.²⁰⁸ However, the fact that the statute itself contemplates a per se, unquestionable exclusion of national security information in most circumstances itself renders the treatment of national security secrets in immigration cases exceptional. The exceptional treatment of those secrets also very likely prevents meaningful litigation on the merits of the underlying claim, such as claims to entitlement to relief from deportation or to entry into the United States.

D. FOIA

The Freedom of Information Act (“FOIA”) is, of course, a statute that gives rise to litigation over secrecy itself. It allows “any person” to request any records from the federal government for any reason, and requires the government to provide them,²⁰⁹ subject to nine statutorily enumerated exemptions.²¹⁰ While records that implicate national security risks are exempt from disclosure,²¹¹ claims of exemption under FOIA on that basis are expressly reviewable de novo in federal court.²¹²

²⁰⁷ See, e.g., *Jay v. Boyd*, 351 U.S. 345, 359-61 (1956) (upholding a regulation that denied access to secret evidence with respect to a claim for discretionary relief from deportation); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 546-47 (1950) (upholding a regulation that denied a hearing in exclusion cases based on confidential information); *United States ex rel. Barbour v. Dist. Dir. of INS*, 491 F.2d 573, 574 (5th Cir. 1974).

²⁰⁸ See, e.g., *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (holding that the use of undisclosed classified information violated the noncitizens’ due process rights), *rev’d on other grounds*, 525 U.S. 471 (1999).

²⁰⁹ 5 U.S.C. § 552(a)(3) (2012).

²¹⁰ *Id.* § 552(b)(1)-(9) (listing the exempt records as (1) properly classified records, (2) records relating only to internal personnel rules and practices, (3) records exempt from disclosure by another statute, (4) records containing trade secret and confidential commercial or financial information, (5) records that would be privileged in litigation, (6) records for which disclosure would constitute a clearly unwarranted invasion of personal privacy, (7) certain law enforcement records, (8) certain records relating to regulatory oversight of financial institutions, and (9) certain records concerning wells).

²¹¹ In the context of national security information, two exemptions in particular are typically in play. The first exemption covers records that are properly classified pursuant to an executive order for reasons related to national defense or foreign policy, *id.* § 552(b)(1), and the second exemption covers records exempt by another statute, *id.* § 552(b)(3), in this case Section 102(d)(3) of the National Security Act of 1947, which states that “the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.” National Security Act of 1947, Pub. L. No. 80-253,

However, preliminary threshold secrecy questions arise even in FOIA litigation, and courts treat these questions, like threshold national security secrecy determinations in other contexts, as procedurally exceptional. This phenomenon arises principally in the context of the so-called Glomar response, in which the agency responds that it cannot even confirm or deny the very existence of the requested records on the ground that disclosing the fact of their existence (or not) itself would cause national security harm.²¹³ Most commentators agree that there may be limited circumstances in which a Glomar response is appropriate.²¹⁴ The central problem with Glomar, however, is that courts treat those claims as procedurally exceptional, and thus fail to subject them to typical FOIA litigation procedures.²¹⁵

Default FOIA procedures are longstanding. As early as 1973, the Court of Appeals for the D.C. Circuit recognized in *Vaughn v. Rosen*²¹⁶ that the inherent

§ 102(d)(3), 61 Stat. 495, 498 (codified at 50 U.S.C. § 3507 (2012)); *see also* *CIA v. Sims*, 471 U.S. 159, 168 (1985) (holding that the National Security Act of 1947 qualifies as a withholding statute under FOIA).

²¹² 5 U.S.C. § 552(a)(4)(B) (“In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.”).

²¹³ *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (“In addition to withholding records that are exempt, an agency may issue a *Glomar* response, *i.e.*, refuse to confirm or deny the existence or nonexistence of responsive records if the particular FOIA exemption at issue would itself preclude the acknowledgement of such documents.”). The Glomar response is so named because the first case in which it was approved concerned records about a secret CIA-commissioned ship named the Hughes Glomar Explorer. *See Phillippi v. CIA*, 546 F.2d 1009, 1010 (D.C. Cir. 1976). While never codified as part of the statute itself, the use of the Glomar response is now expressly approved in the current version of the Executive Order concerning classification. Exec. Order No. 13,526, § 3.6(a), 75 FED. REG. 707,718-19 (Dec. 29, 2009) (“An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.”).

²¹⁴ *See, e.g.*, Danae J. Aitchison, Comment, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 247-54 (1993) (arguing for reforms to Glomar, but not abolishing the response); Michael D. Becker, Comment, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgement Doctrine to Keep Government Secrecy in Check*, 64 ADMIN. L. REV. 673, 693-700 (2012) (same); Nathan Freed Wessler, Note, “[We] Can Neither Confirm nor Deny The Existence or Nonexistence of Records Responsive to Your Request”: *Reforming the Glomar Response Under FOIA*, 85 N.Y.U. L. REV. 1381, 1409-14 (2010) (same).

²¹⁵ As I have documented elsewhere, the default FOIA procedures themselves have serious flaws. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 221-35 (2013) (arguing that the procedures used in FOIA litigation have the end effect of deferring to secrecy, rather than allowing true de novo review).

²¹⁶ 484 F.2d 820 (D.C. Cir. 1973).

information imbalance in FOIA cases precluded full adversarialism.²¹⁷ In that case, the D.C. Circuit created the requirement that the government produce what has become known as a *Vaughn* index, a specialized affidavit to support claims of exemption in FOIA litigation.²¹⁸ The court specified that the government was required to give a detailed explanation to justify each claim of exemption, and that for voluminous records each portion of a withheld document should be indexed and an itemized explanation given.²¹⁹ In essence, the *Vaughn* index requirements mirror the requirements in civil litigation for privilege logs of documents withheld in discovery.²²⁰ The *Vaughn* index is designed to promote maximum adversarialism and ensure an adequate basis for accurate judicial decision-making.²²¹

Moreover, when adversarial process is still insufficient for the court's needs, an inquisitorial approach is available as a fallback. In 1974, Congress expressly provided authority for courts to review requested records in camera to decide whether an exemption applies.²²² In fact, it adopted this provision as an

²¹⁷ *Id.* at 824-25 (“[The] lack of knowledge [about the contents of the requested records] by the party seeing disclosure seriously distorts the traditional adversary nature of our legal system’s form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible.”).

²¹⁸ *Id.* at 826-27.

²¹⁹ *Id.* at 827-28.

²²⁰ *See* FED. R. CIV. P. 26(b)(5)(A)(ii) (requiring a responding party withholding requested records under a claim of privilege to “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim”).

²²¹ *See* *Lykins v. U.S. Dep’t of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984).

²²² Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1562 (codified at 5 U.S.C. § 552(a)(4)(B) (2012)). For these reasons, one scholar recently argued that FOIA offers more promise in fighting national security secrecy than other routes. *See generally* Stephen J. Schulhofer, *Access to National Security Information Under the U.S. Freedom of Information Act* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 15-14, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610901 [<https://perma.cc/4XSV-RPZE>]. By contrast, however, other scholars have noted the strong deference afforded in practice to agency claims of secrecy under these exemptions, and have argued that this makes the review less meaningful. *See, e.g.,* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163 (2006) (“Even when purporting to conduct a de novo review as mandated by FOIA, courts have adopted a doctrine of deference to executive claims that secrecy is needed to protect national security interests.”); Kwoka, *supra* note 215, at 212-16 (describing the strong deference to national security based claims of exemption under FOIA); Christina E. Wells, “*National Security*” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1208 (2004) (“Most observers agree that courts are generally deferential to claims of harm to

amendment to FOIA precisely to strengthen courts' ability to review national security-based-exemption claims.²²³

However well or poorly these various procedures work to determine the merits of FOIA exemption claims, the Glomar response represents a nearly complete exception to their use. In fact, courts expressly acknowledge that regular procedures don't apply: "Glomar responses are an exception to the general rule [under *Vaughn*] that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information."²²⁴ In place of the *Vaughn* procedure, in Glomar response cases the government files a public affidavit explaining the justification for refusing to confirm or deny the existence of responsive records.²²⁵ But boilerplate affidavits are routinely accepted,²²⁶ and give essentially no information to the party seeking the records with which they might formulate responsive arguments.

Take, for example, *Freedom Watch, Inc. v. NSA*.²²⁷ Following revelations by NSA leaker Edward Snowden that were published in *The New York Times* describing the existence of a U.S. government program to launch covert cyberattacks on Iran's nuclear program, Freedom Watch submitted a FOIA request to the NSA and other federal agencies, including the Department of Defense ("DoD"), seeking the information that was leaked to the reporter, communications about the leaked information, and records related to investigations of who leaked the information.²²⁸ The D.C. Circuit upheld the DoD's invocation of the Glomar response on the basis of an affidavit that said, in relevant part, that "[a]cknowledging the existence or non-existence of records responsive to plaintiff's request could reveal whether the United States,

national security, rarely overriding the government's classification decisions."). For present purposes, the important point is that whatever the merits of the review process for the exemption claims, no review can be had at all if the agency wins on the right to give a Glomar response.

²²³ See Kwoka, *supra* note 215, at 198-200 (documenting the legislative history of the 1974 amendments). The Amendments included adding the in camera review provision, as rooted in Congress's desire to legislatively overrule *EPA v. Mink*, 410 U.S. 73, 81-84 (1973), which had made national security claims under FOIA subject to extremely limited review.

²²⁴ *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011).

²²⁵ To be sure, the way that the court in *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. 1976), described the procedure, it sounded robust. *Id.* at 1013. It "require[s] the [a]gency to provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records" and requiring that affidavit to be subject to adversarial testing by the plaintiff, including "appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established." *Id.*

²²⁶ Becker, *supra* note 214, at 688.

²²⁷ 783 F.3d 1340, 1342 (D.C. Cir. 2015).

²²⁸ *Id.*

and specifically DoD, conducts or has conducted cyber-attacks against Iran” and that release would “cause damage to national security by providing insight into DoD’s military and intelligence capabilities and interests.”²²⁹

These broad, generalized statements fail to explain how acknowledging the existence of records concerning an investigation into the leak could possibly damage security; it would hardly be surprising or revealing to know that defense and security agencies were investigating how this particular leak made its way to the press. The contents of those records may or may not be exempt, but their existence is essentially obvious.

The government has even used the Glomar response to attempt to defeat in camera review.²³⁰ The Second Circuit has concluded that so long as the government’s affidavit supporting the use of a Glomar response is sufficient on its face, “the court should not conduct a more detailed inquiry to test the agency’s judgment and expertise or to evaluate whether the court agrees with the agency’s opinions.”²³¹

The use of Glomar responses is on the rise,²³² and courts are highly deferential to agency assertions of the need for Glomar.²³³ The most common formulation of courts’ scope of review of a Glomar response, despite the formal de novo standard for reviewing FOIA request denials,²³⁴ is that a court should uphold the response so long as the agency’s justification seems “logical” or “plausible.”²³⁵ Courts’ refusal to allow full adversarial testing of Glomar claims, or even meaningful inquisitorial review, contributes to agencies’ success in invoking the response.²³⁶

Moreover, like in other contexts where exceptional procedure fails to test national security secrecy claims and in turn precludes courts’ consideration of the merits of an action, the Glomar litigation’s exceptionality prevents litigants from arguing the merits of FOIA disputes. The failure to acknowledge the existence of records means that no *Vaughn* index will describe the withheld records or give an individualized justification for the claimed exemption, and the court will thus never adjudicate the propriety of the underlying exemption, either.

²²⁹ *Id.* at 1345. The Glomar response given by the CIA and NSA was alternatively upheld on the grounds that plaintiff failed to exhaust administrative remedies before challenging those determinations in court. *See id.*

²³⁰ *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011).

²³¹ *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009) (quoting *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009)).

²³² *Wessler*, *supra* note 214, at 1395.

²³³ *Id.* at 1398.

²³⁴ 5 U.S.C. § 552(a)(4)(B) (2012).

²³⁵ *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

²³⁶ *See Wessler*, *supra* note 214, at 1393 (describing the government’s success in invoking Glomar).

III. INACCURACY AND ILLEGITIMACY

Our traditional rules of dispute resolution are founded on a presumption of adversarialism with inquisitorial procedures used as a second-best option as necessary.²³⁷ These same presumptions apply to claims made in the course of litigation that relevant material cannot be disclosed,²³⁸ except when the claim of secrecy is based on protecting national security interests. As the previous Part demonstrated, courts routinely apply exceptional procedures to such claims, which fail to meaningfully police the boundaries of appropriate national security secrecy.²³⁹

Procedural exceptionalism creates problems both for the accuracy of the outcomes and the legitimacy of the legal process. Perhaps most obviously, the failure of courts to meaningfully police the boundaries of national security secrecy creates significant risks of sanctioning secrecy where it is unjustified, resulting in incorrect judicial decision-making and bad outcomes. Moreover, the use of exceptional procedure is likely to have secondary consequences for the legitimacy of courts as actors in the national security arena. Litigants may perceive the process to be unfair because exceptional procedure denies traditional adversarialism and fails to effectuate meaningful oversight. And when threshold secrecy determinations pursuant to exceptional procedures prevent courts from reaching the merits of their claims, potentially illegal government conduct is insulated from judicial review. The combined effect is to undermine the confidence the public has in the legitimacy of the judiciary. At the very least, the procedural exceptionalism as to national security secrecy documented above departs from our normative understanding of the responsibilities of the judiciary. This Part will discuss each consequence in turn.

A. *Incorrect Outcomes*

At base, a process for resolving disputes should result in a reasonably high rate of accuracy with respect to outcomes. That is, judicially sanctioned decisions should be correct on the facts and the law's applicability to those facts.²⁴⁰ For claims of national security secrecy, that translates into judicial

²³⁷ See *supra* Section I.A (describing adversarialism as a central aspect of our judicial system while acknowledging that inquisitorial procedures are often used to supplement adversarial process).

²³⁸ See *supra* Section I.B (explaining how the ideal of adversarialism underlies liberal discovery and how courts proceed when a claim that something cannot be disclosed is made).

²³⁹ See *supra* Part II.

²⁴⁰ See Harvey Rochman, Note, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2710 (1992) ("The Court's rhetoric seems strongly in favor of an individual's opportunity to be heard. But once the argument structure is examined, we find that accuracy may be the Court's true focus.").

decisions that sanction secrecy when that secrecy is in fact necessary to protect legitimate security interests, and it should require release of information when the claim is ill founded and there is little evidence of a real risk of harm from release. As demonstrated above, however, courts' treatment of these types of secrecy claims as exempt from typical procedures renders judicial oversight virtually nonexistent.

The judiciary's normative commitment to adversarialism is tied to its view that adversarial process promotes accurate outcomes. The Supreme Court has declared that, "[a]dversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence" by ensuring the trial judge does not overlook important evidence or arguments.²⁴¹ With respect to secret evidence not subjected to adversary process in an immigration case, a district judge has said that "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations [of rights]."²⁴² That is, failing to test national security secrecy claims adversarially may result in bad outcomes both for the interest in transparency and in the underlying litigation.

The nature of the secrecy claims makes any empirical analysis of the accuracy of outcomes impossible. To begin such a project, one would have to sample cases in which the claim was made (both cases in which it was upheld and the comparatively rare cases in which it was denied) and for those cases in which secrecy was permitted, obtain access to the underlying secrets themselves. Moreover, one would then need to evaluate whether the secrets, if they had been produced, would have been likely to result in national security harm, and whether the claimed secrets that were eventually produced in fact did cause harm. Evaluating harm even when secrets have come to light has proven no straightforward task.²⁴³

It is worth observing, however, that some prominent cases across several of the legal contexts discussed above have been proven, after the fact, to have been wrongly decided. That is, secrecy was sanctioned, but when the secrets eventually came to light, it became clear that no real national security harm was at stake. Take, for example, *United States v. Reynolds*,²⁴⁴ the Supreme Court case that endorsed the state secrets privilege.²⁴⁵ The underlying action was a wrongful death case brought by the families of three civilians who were killed when a military plane crashed.²⁴⁶ When the families sought the U.S. Air

²⁴¹ *Alderman v. United States*, 394 U.S. 165, 184 (1969).

²⁴² *Am.-Arab Anti-Discrimination Comm. v. Reno*, 883 F. Supp. 1365, 1375 (C.D. Cal.), *rev'd on other grounds*, 525 U.S. 471 (1999).

²⁴³ See generally Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753, 753 (2012) (attempting to evaluate the harm that resulted from WikiLeaks disclosures and concluding that "disclosure's effects are [not] predictable, calculable, and capable of serving as the basis for adjudicating difficult cases").

²⁴⁴ 345 U.S. 1, 10-11 (1953).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 3.

Force's official report from the investigation and statements of surviving crewmembers, the government claimed the materials were matters of state secrets.²⁴⁷ The Court refused to require in camera review of the records,²⁴⁸ but nonetheless noted that "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident."²⁴⁹ Absent being able to discover the most relevant evidence, the plaintiffs subsequently settled.²⁵⁰ But as it turns out, the report was eventually released and "it contained no secrets at all but did show appalling negligence."²⁵¹

Likewise, in the immigration context, the leading case approving the government's practice of denying a noncitizen entry into the United States based on secret, undisclosed national security evidence similarly turned out to have been wrongly decided. In *United States ex rel. Knauff v. Shaughnessy*,²⁵² Ellen Knauff, who was born in Germany but had fled Hitler's regime and worked as a civilian for the U.S. Army during World War II, sought entry into the United States after marrying a United States citizen during the war.²⁵³ She was, however, detained at Ellis Island and, two months later, ordered excluded without a hearing based on the Attorney General's assertion that her admission was prejudicial to national interests.²⁵⁴ Famously declaring that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," the Supreme Court affirmed in a 4-3 decision the Attorney General's refusal to disclose the basis of the opinion on the grounds of national security.²⁵⁵

But after public campaigns mounted on Knauff's behalf, her case was reopened and a hearing was granted, at which the government asserted that Knauff engaged in espionage while working for the Army.²⁵⁶ But Knauff was

²⁴⁷ *Id.* at 3-5.

²⁴⁸ *Id.* at 10 (holding that the lower court judge should not have "jeopardize[d] the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers").

²⁴⁹ *Id.* at 11.

²⁵⁰ Settlement Agreement at 2a-3a, *Reynolds v. United States*, No. 10142 (E.D. Pa. June 22, 1953), <https://fas.org/sgp/othergov/reynoldspetapp.pdf> [<https://perma.cc/A2H2-7GHP>].

²⁵¹ Adam Liptak, *The Case That Led to an Uneasy Shift in the Balance of Government Powers*, N.Y. TIMES, July 2, 2008, at E9; see also *This American Life: Origin Story*, CHI. PUB. RADIO (June 19, 2009), <http://www.thisamericanlife.org/radio-archives/episode/383/origin-story> [<https://perma.cc/KQX2-UHSA>] (quoting the daughter of one of the victims describing the accident report: "nothing in there about the secret equipment or the secret mission of the plane").

²⁵² 338 U.S. 537, 539-40 (1950).

²⁵³ Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955 (1995).

²⁵⁴ *Id.*

²⁵⁵ *Knauff*, 338 U.S. at 544.

²⁵⁶ Weisselberg, *supra* note 253, at 961-63.

able to discredit the government's three witnesses, demonstrating that her visits to the Czech embassy, allegedly suspicious, were for passport purposes and that she had no access to secret information during the relevant time period; she later won her right to stay in the United States.²⁵⁷ That the government's evidence was flimsy at best and that Knauff was able to set the record straight demonstrates the value of subjecting the government's national security claims to ordinary procedural safeguards.

Even in the case that first endorsed the Glomar response to FOIA requests, the government eventually abandoned its position. The Hughes Glomar Explorer was a ship that had been secretly commissioned for the CIA under the cover story that recluse billionaire Howard Hughes was investing in harvesting manganese from the bottom of the ocean.²⁵⁸ The CIA's real purpose, however, was to—improbably—attempt to lift from the ocean floor a sunken Soviet nuclear submarine, in the hopes of learning valuable intelligence during the Cold War.²⁵⁹

The mission failed, but after a mysterious break-in to the Hughes headquarters and theft of related documents,²⁶⁰ leaks made their way to the press,²⁶¹ and the CIA sought to suppress publicity, convincing a number of major news outlets to hold the story.²⁶² Eventually, however, it broke.²⁶³ The Military Audit Project then filed a FOIA request for documents related to

²⁵⁷ *Id.* at 963.

²⁵⁸ Julia Barton, *What Lies Beneath*, RADIOLAB (Feb. 13, 2014), <http://www.radiolab.org/story/what-lies-beneath/> [https://perma.cc/48SG-WKZ8] (describing the lengths the CIA took to deceive the public into believing Hughes “invest[ed] millions of dollars to scoop up ‘manganese nodules’”).

²⁵⁹ *Neither Confirm nor Deny*, RADIOLAB (Feb. 12, 2014), <http://www.radiolab.org/story/confirm-nor-deny/> [https://perma.cc/VC8X-HMEQ] (discussing how the CIA stood to learn about cryptographic equipment and nuclear missiles).

²⁶⁰ Mark Strauss, *That Time the CIA and Howard Hughes Tried to Steal a Soviet Submarine*, IO9 (Apr. 10, 2014), <http://io9.com/that-time-the-cia-and-howard-hughes-tried-to-steal-a-so-1561583789> [https://perma.cc/8J8Z-JS7V] (describing the theft of “cash and four boxes of documents” including “a memo describing the secret CIA project”).

²⁶¹ Nate Jones, “*Neither Confirm nor Deny*”: *The History of the Glomar Response and the Glomar Explorer*, NAT'L SEC. ARCHIVE (Feb. 11, 2014), <https://nsarchive.wordpress.com/2014/02/11/neither-confirm-nor-deny-the-history-of-the-glomar-response-and-the-glomar-explorer/> [https://perma.cc/SL9E-YZK2] (stating that a *New York Times* reporter “sniffed a story”).

²⁶² *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981) (stating that the CIA “scrambled to suppress further publicity about the project” after *The Los Angeles Times* reported on it, and was successful in convincing an “impressive list of news organizations” to hold the story).

²⁶³ See William Farr & Jerry Cohen, *CIA Reportedly Contracted with Hughes in Effort to Raise Sunken Soviet A-Sub*, L.A. TIMES, Feb. 8, 1975, at 18.

planning, design, construction, and use of the Glomar ship,²⁶⁴ and journalist Ann Phillippi filed a FOIA request for records related to the CIA's attempts to persuade the news media not to publish the story.²⁶⁵

While both requesters received the same response refusing to confirm or deny the existence of responsive records, Phillippi's request was the first to reach the D.C. Circuit, which issued an opinion approving the Glomar response.²⁶⁶ Tellingly, though, in later stages of Phillippi's case, the government voluntarily abandoned its position that it could neither confirm nor deny the existence of records, thus essentially conceding it did not need to invoke the response.²⁶⁷

Of course, these examples are old, in part because in many instances only the passage of time (if anything) will lead to declassification and public release of the underlying secret information.²⁶⁸ But recent national security leaks have provided another context in which the public has had the opportunity to evaluate the validity of the government's claims of secrecy, and preliminary observations suggest that these disclosures, too, question the propriety of national security secrecy decisions by courts.

For example, the Second Circuit recently ruled in *ACLU v. Clapper*²⁶⁹ that an NSA collection of bulk telephone data violated the statutory authorization under the relevant FISA provision known as Section 215.²⁷⁰ As the court said in its opinion, "Americans first learned about the telephone metadata program that appellants now challenge on June 5, 2013, when the British newspaper *The Guardian* published a FISC order leaked by former government contractor Edward Snowden."²⁷¹ Only by this and subsequent revelations, both by Snowden and by the government in response to his disclosures, did the plaintiffs, "despite . . . substantial hurdles," imposed by *Clapper v. Amnesty International USA*, establish standing to sue because the court found that as a result of the disclosed government orders, the plaintiffs "need not speculate that the government has collected, or may in the future collect, their call records."²⁷² That is to say, only because of the likely unlawful steps taken by a former NSA contractor to unilaterally leak classified material to the press was the bulk data collection successfully challenged.

²⁶⁴ *Military Audit Project v. Casey*, 656 F.2d 724, 729 (D.C. Cir. 1981).

²⁶⁵ *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

²⁶⁶ *Id.* at 1012 (mandating procedures for evaluating Glomar responses).

²⁶⁷ *Phillippi*, 655 F.2d at 1328. The Government did, however, continue to litigate the underlying merits of the exemption. *See id.*

²⁶⁸ For example, it was not until 2010 that the CIA permitted the publication of a heavily redacted history of the Hughes Glomar Explorer, dubbed Project Azorian. *See Strauss, supra* note 260.

²⁶⁹ 785 F.3d 787 (2d Cir. 2015).

²⁷⁰ *Id.* at 792.

²⁷¹ *Id.* at 795.

²⁷² *Id.* at 801.

Tellingly, the concurrence in that case focuses on the lack of typical adversarial procedures in the FISA court as comprising a key component of the blame for the situation:

It may be worth considering that the participation of an adversary to the government at some point in the FISC's proceedings could similarly provide a significant benefit to that court. The FISC otherwise may be subject to the understandable suspicion that, hearing only from the government, it is likely to be strongly inclined to rule for the government. And at least in some cases it may be that its decision-making would be improved by the presence of counsel opposing the government's assertions before the court. Members of each branch of government have encouraged some such development.²⁷³

And, in fact, Snowden's disclosures have led to policy-level debates about the propriety of NSA surveillance activities and about whether to curb the NSA's statutory authority.²⁷⁴

To be sure, this evidence does not represent systematic empirical testing of the accuracy of national security secrecy determinations as compared to other judicial decisions. Nonetheless, given the judiciary's normative commitment to adversarial testing as a means to greater accuracy in judicial decision-making, these prominent cases provide some anecdotal evidence that suggests procedural exceptionalism may sanction the protection of unnecessary secrets that would not produce real harm if released. And when those secrets are incorrectly sanctioned, the merits of the litigation may never be reached.

B. *Undermining the Law*

Beyond getting the cases wrong, judicial abdication of responsibility to police national security secrecy threatens to undermine the judiciary and the rule of law in at least two important ways. First, evidence suggests that the judiciary may suffer from a perceived lack of legitimacy as a result of its failure to submit claims of national security secrecy to adversarial or other rigorous testing. Second, threshold national security secrecy creates proven risks of endorsing a body of so-called secret law, an anathema to our collective visions of constitutional democracy.

1. Procedural Justice

The judiciary's own legitimacy as a forum for dispute resolution and a coequal branch that performs a checking function is threatened in the public

²⁷³ *Id.* at 831 (Sack, J., concurring).

²⁷⁴ See Jennifer Steinhauer, *House Votes to Restrict Phone Sweeps by N.S.A.*, N.Y. TIMES, May 14, 2015, at A11 ("The House . . . overwhelmingly approved legislation to end the federal government's bulk collection of phone records . . ."); see also Charlie Savage, *Surveillance Court Rules That N.S.A. Can Resume Bulk Data Collection*, N.Y. TIMES, July 1, 2015, at A19 (describing congressional modifications to FISA authority).

view by the exceptional procedural treatment of national security secrecy claims. In fact, the social science literature on procedural justice demonstrates that a belief in the legitimacy of the legal system is a significant factor in individual decisions to comply with the law.²⁷⁵ Views on legitimacy, in turn, are heavily influenced by views on whether the processes used by legal actors are fair, as demonstrated by factors such as decision maker neutrality and the ability of the interested person to participate in the process.²⁷⁶

Courts' failure to apply ordinary procedural safeguards to national security secrecy claims, including maximum adversarialism combined with rigorous judicial oversight where needed, implicates both of these central concerns. Without disclosing enough information for a challenger to make arguments about the propriety of a national security secrecy claim, the challenger is effectively unable to participate in the process. And courts' frequent failure to subject those claims to any kind of meaningful alternative procedure, even an inquisitorial one such as in camera review, likely leaves litigants feeling as though the court is partial to the government's position.

While empirical evidence of the effects of procedural exceptionalism on the public's belief in the legitimacy of courts is unavailable, judicial opinions openly acknowledge the risk, or even the likelihood, of such negative effects. As to the cost of state secrets decisions to the judicial process, the Second Circuit has stated:

The parties' frustration with their exclusion from the *Reynolds* proceedings in the district court is understandable. The court, pursuant to *Reynolds*, dispensed with two fundamental protections for litigants, courts, and the public. First, the district court and the parties lost the benefit of an adversarial process, which may have informed and sharpened the judicial inquiry and which would have assured each litigant a fair chance to explain, complain, and otherwise be heard. Second, they lost the value of open proceedings and judgments based on public evidence.²⁷⁷

These concerns speak directly to the litigants' ability to participate in the process and their resulting view that the litigation was procedurally unjust.

Courts have made similar observations in criminal cases. Despite denying a *Franks* hearing regarding a FISA warrant, a judge in the Northern District of Illinois sympathized with the criminal defendant's plight, noting the "frustrating position" in which a *Franks* hearing secures important rights, but "[t]he requirements to obtain a hearing, however, are seemingly unattainable by Defendant. He does not have access to any of the materials concerning the FISA application or surveillance; all he has is notice that the government plans

²⁷⁵ TOM TYLER, WHY PEOPLE OBEY THE LAW 61 (2007).

²⁷⁶ See Kwoka, *supra* note 117, at 1422-23 (summarizing the agreement in the literature about the importance of these factors).

²⁷⁷ *Doe v. CIA*, 576 F.3d 95, 107 (2d Cir. 2009) (citations omitted).

to use this evidence against him.”²⁷⁸ The court went on to conclude that although the defendant’s “quest to satisfy the *Franks* requirements might feel like a wild-goose chase,” in camera review was still sufficient to protect the defendant’s interests.²⁷⁹ Similarly, as to administrative immigration decisions that allow the use of secret evidence, Justice Frankfurter, dissenting from a decision upholding such use, declared that while the Attorney General may be able to use confidential information, “he cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system.”²⁸⁰

Even beyond courts’ conjecture that procedural exceptionalism may negatively impact judicial legitimacy, there is empirical evidence that courts are in fact suffering from a perception of diminished legitimacy in the eyes of the public at large with respect to national security matters. One post-Snowden poll showed that fifty-three percent of Americans believed that “federal courts and congressionally mandated rules do not provide enough supervision over the government’s collection of telephone and Internet data,” whereas only eighteen percent thought that the oversight was adequate.²⁸¹ In another poll, when asked whether courts provide adequate limits on government data collection, only thirty percent of respondents said “yes,” and fifty-six percent said “no.”²⁸² Consumer demand has reflected Americans’ view that they have to take protecting their privacy into their own hands: tech companies are now offering stronger protections against government use of their data as assurances to their customer bases.²⁸³ And even Congress has acknowledged that “public confidence has suffered” as a result of state secrets cases.²⁸⁴

The implications may go far beyond public annoyance or even outrage. As I have argued elsewhere, a lack of legitimacy as characterized by procedural injustice in judicial decision-making over secrecy claims may increase the

²⁷⁸ *United States v. Kashmiri*, No. 09 CR 830-4, 2010 WL 4705159, at *6 (N.D. Ill. Nov. 10, 2010).

²⁷⁹ *Id.* (“Through [in camera] review, the Court finds that Defendant is not entitled to a *Franks* hearing.”).

²⁸⁰ *Jay v. Boyd*, 351 U.S. 345, 372 (1956) (Frankfurter, J., dissenting).

²⁸¹ Emily Swanson, *Poll: NSA Oversight Is Inadequate, Most Americans Say*, HUFFINGTON POST (Aug. 17, 2013, 9:31 AM), http://www.huffingtonpost.com/2013/08/17/nsa-oversight-poll_n_3769727.html [<https://perma.cc/9DMM-EDBL>].

²⁸² *Few See Adequate Limits on NSA Surveillance Program*, PEW RES. CTR. (July 26, 2013), <http://www.people-press.org/2013/07/26/few-see-adequate-limits-on-nsa-surveillance-program/> [<https://perma.cc/X42F-AKDZ>].

²⁸³ See, e.g., Matt Apuzzo et al., *Tech Companies Tangle with U.S. Over Data Access*, N.Y. TIMES, Sept. 8, 2015, at A1 (describing various measures, including encryption, that Apple, Google, Microsoft, and others are taking that prevents them from handing private data over to the government).

²⁸⁴ S. REP. NO. 110-442, at 6 (2008).

likelihood that individuals will resort to self-help as well as support others who do so.²⁸⁵ Indeed, recent national security leaks of unprecedented proportions—what I have labeled elsewhere as “deluge leaks,” are likely to be, at least in part, just that: rough justice for those who feel the formal system of challenging government secrecy has failed.²⁸⁶

2. Secret Law

Another consequence of the failure of adversarialism in this realm is the development of “secret law,” a phrase coined by Kenneth Culp Davis, which is “shorthand for agency use of precedents, policies, or controlling interpretative principles without prior publication or public availability of those uses.”²⁸⁷ Indeed, secret law is, as a formal matter, strongly disfavored by courts.²⁸⁸ Secret law has even made its way into the popular discourse; it was recently decried by *The Atlantic* as “un-American,” on the ground that “[w]hat good are frequent elections if the people are ignorant as to the actual policies their representatives have put into place?”²⁸⁹

Threshold determinations of national security secrecy that prevent the litigation from reaching the merits of the underlying claims in whole categories of cases, however, endorse such secret law. A *Mother Jones* article described the Supreme Court’s standing decision in *Clapper*: “Just because you’re paranoid doesn’t mean that they’re not after you. But you’ll never be able to prove it.”²⁹⁰ To be sure, when closing one litigation door, courts often cite the ability of other potential litigants to reach the merits of a challenge to a particular governmental action. In *Clapper* itself the Court assured the public that such oversight could still be had in other situations, including in the FISA court’s review of the warrants to ensure compliance with the Fourth

²⁸⁵ *See id.* (“Mistrust of the [state secrets] privilege breeds cynicism and suspicion about the national security activities of the U.S. Government, and it causes Americans to lose respect for the notion of legitimate state secrets. Perversely, overuse of the privilege may undermine national security by making those with access to sensitive information more likely to release it.”).

²⁸⁶ Kwoka, *supra* note 117, at 1396-1402. These leaks would include those of Edward Snowden and those facilitated by Julian Assange and his leak-publishing website, WikiLeaks. *Id.*

²⁸⁷ 1 JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE § 6:10, at 199 (2014).

²⁸⁸ *Id.*

²⁸⁹ Conor Friedersdorf, *Why Secret Law Is Un-American: The System Established by the U.S. Constitution Requires an Informed Electorate*, ATLANTIC (Jan. 3, 2014), <http://www.theatlantic.com/politics/archive/2014/01/why-secret-law-is-un-american/282786/> [<https://perma.cc/XS64-2FC4>].

²⁹⁰ Adam Serwer, *Supreme Court: You Can’t Challenge Secret Law Because It’s Secret*, MOTHER JONES (Feb. 27, 2013, 11:46 AM), <http://www.motherjones.com/mojo/2013/02/supreme-court-says-you-cant-challenge-secret-law-its-secret> [<https://perma.cc/S3DG-LTVF>].

Amendment, in a criminal case in which evidence obtained on the basis of such surveillance is used, or in instances in which the companies whose data is being collected themselves challenge the warrants before the FISA court.²⁹¹

But as described above, these other avenues may not be available for the same reasons that the *Clapper* plaintiffs were unable to prove standing: threshold secrecy claims that go untested will prevent reaching the merits.²⁹² As to criminal defendants, who may have the strongest argument, it is clear that many of them have not or may not still be receiving notice that evidence was gathered pursuant to the FISA amendments authority.²⁹³ An ACLU lawyer described the impact of the government's failure to provide notice of searches under Executive Order 12,333: "[N]otice to defendants is one of the few mechanisms by which dragnet surveillance programs—which affect millions—will ever be reviewed in court."²⁹⁴ And of course even those who do receive notice have never been allowed access to the underlying FISA warrant and supporting materials in order to challenge the legality of the search.²⁹⁵ In fact, it was later discovered that the Solicitor General representing the United States in *Clapper* made misrepresentations before the Supreme Court—albeit apparently unwittingly—about the government's position that a criminal defendant would have an absolute right to notice of a FISA-authorized search if evidence gathered were later used for the prosecution.²⁹⁶ Thus, the Supreme Court relied in part upon other avenues for challenging the same actions that are likely not available in practice.

²⁹¹ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 (2013); *see also* Wikimedia Found. v. NSA, 143 F. Supp. 3d 344, 363 (D. Md. 2015) (in part relying on the same rationale).

²⁹² Nancy Leong has documented the Supreme Court's use of this fallacious logic in other contexts, including its refusal to apply the exclusionary rule on the grounds that a § 1983 action would be available as a deterrent and remedy, but finding that, in reality, such a remedy is never used. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 419 (2012) (stating that "Justice Scalia relied on this logic in *Hudson v. Michigan* in holding the exclusionary remedy unavailable for knock-and-announce violations: because § 1983 damages actions had (he claimed) become much more widely available since *Mapp* [*v. Ohio*], the necessity for exclusion had concomitantly diminished," but finding that scholars disputed the "empirical claim that § 1983 provides a remedy for knock-and-announce violations" (citation omitted)).

²⁹³ *See supra* Section II.B.2.

²⁹⁴ Patrick C. Toomey, *Executive Order 12333, Notice, and the Due Process Rights of Criminal Defendants*, JUST SEC. (Aug. 14, 2014, 2:38 PM), <http://justsecurity.org/14040/executive-order-12333-notice-due-process-rights-criminal-defendants/> [<https://perma.cc/UX8Z-BZSK>].

²⁹⁵ *See supra* Section II.B.1.

²⁹⁶ Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES, July 16, 2013, at A11 (reporting that, although the Solicitor General asserted that the government must provide defendants such notice, federal prosecutors "have refused to make the promised disclosures").

Sometimes worst of all, in the national security context, FOIA is often used to try to uncover government actions with an eye toward potential challenges to their legality. But the requester's inability to meaningfully challenge the denial of information when a Glomar response is invoked often frustrates any testing of the legality of the government's actions. While bad faith on the part of the government in using Glomar to conceal illegal governmental activity is a reason to deny the use of the response, courts are nearly uniform in refusing to pass judgment on the legality of the questionable underlying activity.²⁹⁷ In *Wilner v. NSA*,²⁹⁸ for example, the Second Circuit refused to address the "legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action."²⁹⁹ Others have labeled this a form of "deep secrecy," or instances where the public doesn't know what it doesn't know.³⁰⁰

Long before the post-9/11 programs at issue in these cases, Judge Bazelon of the D.C. Circuit warned of the danger of sanctioning secrecy to the effect of insulating government conduct from judicial review:

The state secrets privilege, weakly rooted in our jurisprudence, cannot and should not be a device for the government to escape the strictures of the Fourth Amendment. "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." The panel employs an evidentiary privilege to carve out an exception to this basic principle of constitutional limitations on government.³⁰¹

Examining threshold secrecy decisions across the various legal contexts in this study demonstrates the very real threat of the development of a body of secret law (e.g., secret authorizations for surveillance that go untested, or secret justifications for interrogation methods that go undiscovered). Because the same procedural exceptionalism has crept into the jurisprudence in every type of case where national security secrecy is raised, there is a large swath of secrecy claims that courts do not review in any meaningful way. And this

²⁹⁷ See Wessler, *supra* note 214, at 1394 ("Even where the subject of a FOIA request is a program that is arguably operating in violation of the law, such as the NSA's warrantless wiretapping program, courts will not presume that the agency used the Glomar response *in order to* conceal such violations of the law and thus let the agency's response stand.").

²⁹⁸ 592 F.3d 60 (2d Cir. 2009).

²⁹⁹ *Id.* at 77.

³⁰⁰ David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 313 n.203 (2010); see also Martha Merrill Umphrey, Austin Sarat & Lawrence Douglas, *Transparency and Opacity in the Law*, in THE SECRETS OF LAW 1, 7-8 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2012) ("[I]nvoking the so-called *Glomar* doctrine . . . the courts turned a shallow secret into a deep secret and produced rulings that denied the very possibility of litigation concerning [the] TSP . . .").

³⁰¹ *Halkin v. Helms*, 598 F.2d 1, 14 (D.C. Cir. 1978) (Bazelon, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

threshold secrecy plays out as a common impediment to reaching the merits of cases. Without meaningful procedural safeguards, these claims may be hiding government overreach or wrongdoing, and we may never know. Such a result presents a real threat to the legitimacy of courts as the final arbiter on the meaning of the law, a normative commitment that dates at least to *Marbury v. Madison*.³⁰² The fact that criminal defendants and civil plaintiffs alike have for the first time been able to get to the merits of claims—sometimes successfully—based on unauthorized disclosures made by Snowden only underscores the depth of the problem.³⁰³

IV. RESTORING NATIONAL SECURITY TRANSPARENCY

For the sake of accuracy in our justice system, the legitimacy of legal process, accountability over our government, and the ability to protect genuine national security secrets against rogue disclosures, it is imperative that improvements be made to the judicial policing of national security secrecy claims.³⁰⁴ While there are no easy answers in this regard, we must consider options beyond a simple mandate that judges be more vigilant or more searching in their review. Such mandates have failed in the past, and various demonstrated heuristics make them unlikely to succeed in the future.³⁰⁵

Most tellingly, Congress has tried twice to mandate de novo review over classification decisions when those decisions are challenged in a FOIA lawsuit over access to the records.³⁰⁶ The first time, despite the de novo review standard, the Supreme Court interpreted its power as extending only to review whether the materials were in fact classified, not to determine the propriety of the classification decision.³⁰⁷ Congress moved quickly to overrule that

³⁰² *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

³⁰³ Nothing illustrates the point better than the recent successful challenge to a FISA order as exceeding the scope of FISA’s authorization, an order that only came to light because of an unauthorized leak. *See* *ACLU v. Clapper*, 785 F.3d 787, 819 (2d Cir. 2015); *supra* notes 269-74 and accompanying text. Toomey and Kaufman also detail the case of Basaaly Moalin, who discovered only from records leaked by Snowden that phone records key to the case against him were likely obtained using a questionable and untested bulk data collection program operating under Section 215 of FISA, which has no notice requirement. Toomey & Kaufman, *supra* note 160, at 882-85.

³⁰⁴ *See supra* Part III.

³⁰⁵ *See* Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 727 (2014) (finding that federal courts are generally deferential to agency classifications of documents as secret, and attributing such deference to the “overestimation of risk” of releasing secret documents, and a “secrecy heuristic”—the assumption that secret documents are more accurate than nonsecret documents).

³⁰⁶ *See infra* notes 307-09 and accompanying text.

³⁰⁷ *See* *EPA v. Mink*, 410 U.S. 73, 81-85 (1973) (“Rather than some vague standard, the

decision, changing the language of the relevant FOIA exemption to cover only records that are not only classified but also “are in fact properly classified” under an executive order,³⁰⁸ as well as explicitly granting courts the power to conduct in camera review of disputed records.³⁰⁹ Still, courts routinely cite a highly deferential standard in reviewing the government’s claims of exemption on the basis of classification, and almost never overrule the government’s decisions in that regard.³¹⁰

Recent work by Susan Nevelow Mart and Tom Ginsburg convincingly explains judges’ reluctance to take up Congress’s mandate for true de novo review over these claims. Judges are likely affected by various heuristics demonstrated by cognitive psychology to influence decision-making “counter to the model of the rational” decision maker.³¹¹ First, the “availability” heuristic leads decision makers to rely overly on information that is more readily available, and to discount that information that is difficult to discern.³¹² In the context of national security decision-making, this likely means judges overweigh the severity of harm that could result from mistaken release (e.g., a terrorist learns information enabling an attack), and underweigh the (usually tiny) probability of that harm arising.³¹³ Second, the “secrecy” heuristic may lead judges to attribute greater weight and veracity to secret information, undermining critical review.³¹⁴ And third, judges may overly rely on executive expertise even when evidence demonstrates that classification decisions are

[exemption’s] test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret.”), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. 93-502, 88 Stat. 1561, *as recognized in* *CIA v. Sims*, 471 U.S. 159, 168 (1985). For a full account of the legislative history of the original provisions and of the post-*EPA v. Mink* amendment, see Kwoka, *supra* note 215, at 196-200.

³⁰⁸ 5 U.S.C. § 552(b)(1) (2012).

³⁰⁹ *Id.* § 552(a)(4)(B).

³¹⁰ Most courts now articulate a standard of review that requires the agency to show only that the withheld information “logically falls into the category of the exemption indicated” and there is no evidence of bad faith on the part of the agency.” Kwoka, *supra* note 215, at 214-16 (quoting *Maynard v. CIA*, 986 F.2d 547, 555-56 (1st Cir. 1993)); *see also* Mart & Ginsburg, *supra* note 305, at 742 (noting that “very few FOIA requestors have been able to overcome the judicial reliance on the mention of ‘substantial weight’ in the legislative history” of the relevant FOIA amendments).

³¹¹ Mart & Ginsburg, *supra* note 305, at 746.

³¹² *Id.* at 746.

³¹³ *See id.* at 746-47 (arguing that the fact that “[i]n the realm of decisionmaking about national security, the stakes of the worst-case scenario—that terrorists will, for example, get sufficient information about the release of any given document to harm national security—trumps the probability or likelihood of that actually happening, given the vast number of over-classified documents . . . [this] may help explain the relatively low incidence of disclosure orders or true de novo review” (footnote omitted)).

³¹⁴ *Id.* at 760-61 (“If judges are, like the rest of us, subject to the secrecy heuristic, they are just as likely to treat claims of secrecy as a signal of the quality of the information.”).

often made on bases other than executive-branch expertise in national security matters.³¹⁵

The fact that courts have similarly treated national security secrecy claims as procedurally exceptional across various legal contexts, despite the various default rules that apply in each context, suggests that it is the nature of the national security issues that make these heuristics so salient. Combined with courts' continued deference to the executive branch despite Congress's repeated attempts to impose *de novo* review in one such context, the common pattern of procedural exceptionalism suggests that a simple mandate for more stringent review is not enough. Even suggestions that courts better employ special masters with expertise to evaluate the claims³¹⁶—a procedure already available to them—may not sufficiently alter the court's predispositions. This is particularly true when such procedures are merely available and not required, as they are often not availed.³¹⁷

Rather, procedural changes will need to alter the litigation dynamic in some meaningful way. The following proposals attempt to sketch how that dynamic could be changed. The first two focus on adversarialism as a way to expand the range of available information to which the judge has access to include evidence and arguments counter to the government's position. The third seeks to alter the government's incentives to claim secrecy needs in the first place, before relying on a judge to police the boundaries of appropriate secrecy.

A. *Maximizing Adversarialism*

One common thread of procedural exceptionalism in national security secrecy is the virtual elimination of adversarial testing of secrecy claims. To be sure, full adversarial testing is necessarily constrained by the circumstances of the information imbalance between the parties. Nonetheless, the failure of adversarialism in this context means that, at best, judges are making decisions with only one side of the story before them. Procedural reforms in this area could, therefore, focus on achieving the maximum possible adversarial testing of the claims in any given situation.

Before providing examples of the two possible routes to maximizing adversarialism, a note of caution about adversarialism. The U.S. brand of

³¹⁵ See *id.* at 748.

³¹⁶ See, e.g., David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 677-78 (2005) (suggesting special masters as a potential solution to excessive judicial deference to the government's claims of national security harm under a "mosaic theory" in FOIA cases).

³¹⁷ S. REP. NO. 110-442, at 19-20 (2008) ("[State Secrets Protection Act] Subsection 4052(f) authorizes the court to appoint a special master or other independent advisor who holds the necessary security clearances, to the extent they are needed, to assist the court in handling any matter under the [Act]. Federal judges already have legal authority to appoint independent experts to assess Government secrecy claims, . . . though they rarely avail themselves of this authority . . ." (footnote omitted)).

adversarialism has, of course, come under serious criticism. One central critique is that adversarialism fails to effectuate the most important end of the justice system. As one federal district court judge has declared, “our adversary system rates truth too low among the values that institutions of justice are meant to serve,”³¹⁸ and argued that “the process often achieves truth only as a convenience, a byproduct, or an accidental approximation.”³¹⁹ Nonetheless, I focus on adversarialism as a solution because experimental evidence suggests that adversarial systems may better combat judicial bias than inquisitorial ones, perhaps having a positive effect on the accuracy of outcomes.³²⁰ Such concerns are paramount in national security secrecy cases, given that the judicial decision-making biases described above are likely key components of the departure from default procedures and resulting rubber-stamping of secrecy.

1. Between Parties

Some of the failures of adversarialism documented as exceptional procedure above have easy and obvious solutions. For example, for those criminal defendants who were subjected to secret surveillance and were never notified, adversarial testing of the legality of those searches is never possible.³²¹ Congress could easily legislate rules of notice that require the government to disclose to a defendant any time it uses evidence that was obtained or derived from a secret search, be it under FISA, executive order, or other claimed authority.³²² Once notice is provided, the defendant can at least request the underlying authorization and supporting documents necessary to mount a challenge to the search. While notice may not in and of itself be sufficient to permit meaningful adversarial testing of the government’s invocation of secret warrants or secret affidavits supporting those warrants,³²³ it is certainly a necessary precursor.

Other easy ways to promote adversarialism without sacrificing security concerns arise in the FISA context. First, Congress could mandate that the government provide defendants in criminal cases with at least a statement

³¹⁸ Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1031 (1975); see also Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y. L. SCH. L. REV. 911, 914 (2011).

³¹⁹ Frankel, *supra* note 318, at 1037.

³²⁰ John Thibaut, Laurens Walker & E. Allan Lind, Comment, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 397 (1972) (finding empirical support for the proposition that “an adversary presentation significantly counteracts decisionmaker bias”).

³²¹ See *supra* Section II.B.2 (describing the government’s historical failure to provide notice to criminal defendants in many circumstances that a secret search was conducted).

³²² Arguably, of course, Congress did so as to FISA, even though the executive branch has interpreted the requirement in a limited way. See 50 U.S.C. § 1806(f) (2012).

³²³ See *supra* Section II.B.1 (describing the difficulty in obtaining the underlying warrants and affidavits even when FISA notice is provided).

concerning what legal authority was invoked to conduct any warrantless surveillance. Given that the legal authority is a matter of public law and this statement would not reveal anything about the underlying basis for the FISA warrant, this requirement would pose no security risk. It would, however, give defendants an opportunity to challenge the constitutionality of the law, one of the problems the defendant faced in *Daoud*.³²⁴ Second, Congress could change the disclosure standard under FISA to first require the government to demonstrate national security harm, rather than simply certify it. As it currently stands, the government's decision that harm would result is unreviewable by courts.³²⁵ Requiring a threshold showing by the government would at least bring the possibility of adversarial process to bear on the need for secrecy.

Many more instances of procedural exceptionalism are more complex to remedy with adversarial methods, but mandated procedural changes still offer some promise. Take, for example, state secrets cases. Congress has the power to legislate issues of privilege,³²⁶ and could require certain procedural protections to maximize adversarialism and a return to procedural regularity. In fact, Congress has attempted to do precisely that. In 2008, the State Secrets Protection Act³²⁷ ("SSPA") was introduced and reported out of the Senate Judiciary Committee, which would have required a court faced with a state secrets privilege claim to review the actual evidence in camera, to compel a detailed privilege log from the government, and to permit security-cleared counsel to attend the in camera proceedings unless national security required an ex parte hearing.³²⁸ It also would have clarified that a case could not be dismissed on state secrets grounds at the pleading stage, but rather that the court should rule on the privilege claim during discovery and attempt to use substitutions or deletions to allow the litigation to go forward where possible.³²⁹ These sorts of reforms would return state secrets litigation to the fold of procedural normality, advancing, in the committee's words, "the adversarial process—and the truth-seeking function of that process—to the fullest extent possible consistent with the protection of national security," and "solv[ing] the crisis of legitimacy currently surrounding the privilege."³³⁰

³²⁴ See *supra* notes 136-47 and accompanying text.

³²⁵ See 50 U.S.C. § 1806(f).

³²⁶ See FED. R. EVID. 501.

³²⁷ S. 2533, 110 CONG. (2008).

³²⁸ S. REP. NO. 110-442, at 22-23 (2008); see FED. R. CIV. P. 26(b)(5) (requiring the non-disclosing party asserting privilege to "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim").

³²⁹ S. REP. NO. 110-442, at 30 (reporting that the SSPA requires courts to substitute, for privileged material, nonprivileged material that creates the same opportunity for the parties to litigate or defend the action).

³³⁰ *Id.* at 12. For a discussion of the political opposition to the SSPA, see Sudha Setty,

A return to maximum adversarialism in the area of national security secrecy litigation would likely have a legitimizing effect on judicial proceedings in this area in part because it would push courts to, concurrently, engage in as much open and public process as possible. As Resnik has persuasively argued, “public facets of adjudication engender participatory obligations and enact democratic precepts.”³³¹ These benefits of so-called “publicity,” or public process, will accrue in tandem with the application of default adversarial procedures in national security cases.

2. With Special Advocates

Another avenue for improving national security secrecy litigation would be the use of special advocates in appropriate cases. Special advocates would be judicially appointed, government-cleared lawyers whose assigned task is to take the adversarial position in an *ex parte* proceeding involving the government’s claim of a need for secrecy based on national security.³³² Cases involving special advocates, rather than the private party’s own counsel, should be limited to those in which there is a serious risk to national security even by using security-cleared counsel for the private party, or when the private party cannot obtain security cleared counsel. In those instances, special advocates may offer some promise.

Special advocates have a long history in other countries. In a seminal case, the European Court of Human Rights (“ECHR”) suggested the use of special advocates to cure problems in adjudicating the deportation of an immigrant on the basis of evidence of terrorism involvement when that evidence could not be disclosed for national security reasons.³³³ As the ECHR explained, when the party or her counsel cannot take part in an *in camera* proceeding, “their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the

Litigating Secrets: Comparative Perspectives on the State Secrets Privilege, 75 BROOK. L. REV. 201, 219-26 (2009) (detailing the George W. Bush Administration’s opposition to the SSPA). The SSPA was never brought to a vote, and although similar bills have subsequently been introduced, none have gained traction. See MacDougall, *supra* note 192, at 707.

³³¹ Resnik, *supra* note 17, at 53.

³³² In the SSPA, Congress proposed use of the guardian ad litem procedure to fill this role where the risks to national security were too high even to allow security-cleared counsel *in camera* access to the subject matter of the dispute. See S. Rep. No. 110-442, at 19 (“In a situation in which a litigant’s attorney is barred from participating in a state secrets pre-trial hearing for national security reasons, [SSPA] authorizes the court to appoint a guardian ad litem with the necessary security clearances to represent that litigant.”).

³³³ See *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. Rep. 1831, 1866 (1996). For a basic description of special advocate systems, see Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3, 27-30 (2009).

State's case."³³⁴ The United Kingdom, a party to that case, took the suggestion with full force, modeling in part on Canada's use of such a system,³³⁵ and then quickly expanded the use of special advocates beyond immigration cases.³³⁶

While the use of special advocates cannot constitutionally extend to issues of guilt in criminal proceedings,³³⁷ special advocates could be effectively employed to test the threshold issues of secrecy in criminal cases that are currently subjected only to inquisitorial review. For example, a special advocate could be employed to argue for granting a criminal defendant access to underlying FISA materials to challenge the legality of a search, an area where courts have never sided with a defendant.³³⁸

Special advocates might be particularly appropriate in immigration cases that rely on secret evidence of national security risk to exclude noncitizens from admission or to remove them from the country.³³⁹ There, because there is no right to appointed counsel,³⁴⁰ approximately half of all noncitizens facing removal are unrepresented.³⁴¹ Accordingly, security-cleared counsel may often not be an option. The use of special advocates to examine the secret evidence and present adversarial argument would be particularly beneficial in such a context.

Glomar cases may also benefit from special advocates. While the court in *Phillippi v. CIA*³⁴² suggested that without confirmation of the existence of records³⁴³ there is nothing to review in camera, this reasoning assumes that the only information that can be disclosed to the court is the same as the information that can be disclosed to the public. In fact, the court could easily declare that it will review the records, if any exist, in camera to help in its

³³⁴ *Chahal*, 1996-V Eur. Ct. H.R. Rep. at 1869. The ECHR cited the Canadian system, which used special advocates as an alternative to security-cleared counsel, not in place of it. See David Jenkins, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, 42 COLUM. HUM. RTS. L. REV. 279, 280-81 (2011).

³³⁵ *Id.* at 304.

³³⁶ *Id.* at 318.

³³⁷ See Barak-Erez & Waxman, *supra* note 333, at 8 n.12.

³³⁸ See *supra* Section II.B.1 (detailing a case in which a federal court remarked on the seeming impossibility criminal defendants face in getting hearings to challenge the legality of a search).

³³⁹ See *supra* Section II.C (detailing how the immigration context has typically been viewed as an area rife with national security risk).

³⁴⁰ César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 54 (2011).

³⁴¹ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK, at F1 (2015), <http://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf> [<https://perma.cc/JC7M-L5XB>].

³⁴² 546 F.2d 1009 (D.C. Cir. 1979).

³⁴³ *Id.* at 1013.

determination about the propriety of the Glomar response, and use a special advocate to argue the other side of the Glomar issue. At the very least, a court could review a classified *Vaughn* index,³⁴⁴ which would be premised on the ground that it would either contain a list of records, if they exist, or declare that none exist, if they do not.³⁴⁵ That the *Vaughn* index would be reviewed in camera in a proceeding occurring only with the government and the special advocate would protect any legitimate national security interests. One commentator has suggested that courts have the power to compel live testimony in Glomar cases, so as to allow the court—and, under this proposal, the special advocate—to fully question the government’s assertions regarding the need for secrecy.³⁴⁶

Because not all government claims are well-founded, inquisitorial judicial review may in fact demonstrate that some portion of the index can be released publicly if it does not contain sensitive information, and thus may be used to facilitate a more typical adversarial process.³⁴⁷ This practice promotes the goal of compiling “as complete a public record as is possible,”³⁴⁸ and that public records “enhance the adversary process.”³⁴⁹ Finding a second-best alternative, as courts do in other contexts where adversarialism is an imperfect mechanism for dispute resolution, is a far cry better than punting on the secrecy issue altogether.

To be sure, a special advocate system must be carefully constructed, recognizing it cannot serve as a complete substitute for true adversarialism. Some of the additional protections that Canada’s original model included, for example, were the provision of a summary of some sort to the party, unfettered communication between the party and the special advocate to ensure the party’s interests were heard (even though secret evidence could not be revealed), and the special advocate’s unrestricted access to the underlying secret evidence.³⁵⁰ Thus, client involvement remained, as did the maximum possible disclosure to the party, not just the advocate. And, when implemented

³⁴⁴ See *supra* notes 217-19 and accompanying text.

³⁴⁵ It is not at all unprecedented for the government to create a *Vaughn* index, classify it, and submit it for in camera review to the court. See, e.g., *N.Y. Times Co. v. U.S. Dep’t of Justice*, 758 F.3d 436, 441-42 (2d Cir. 2014).

³⁴⁶ Aitchison, *supra* note 214, at 249 (“Congress should . . . include a new section in the FOIA explicitly granting courts in Glomar response cases the power to order live testimony about a request.”).

³⁴⁷ *N.Y. Times*, 758 F.3d at 439-40 (“Where, as here, the Government has elected to classify a *Vaughn* index, it becomes especially important to disclose the titles and descriptions of listed documents to facilitate the adjudication of claimed exemptions, unless those materials themselves reveal sensitive information.” (footnote omitted)).

³⁴⁸ *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979) (quoting *Phillippi*, 546 F.2d at 1013).

³⁴⁹ *Id.*

³⁵⁰ See *Jenkins*, *supra* note 334, at 320-21.

in the United Kingdom without such safeguards and applied to administrative detention, such procedures were later held unlawful by the ECHR.³⁵¹

Even those commentators highly critical of the United Kingdom's special advocate system, however, have recognized its virtues over a purely inquisitorial model.³⁵² While the use of special advocates in this way cannot achieve the full benefits of adversarialism, including the publicity benefits described above, it would introduce arguments and critiques to the judge that might otherwise go unarticulated and unconsidered. A carefully designed special advocate system used to supplement, and not replace, maximum adversarialism between the parties could improve judicial decision-making and legitimacy in national security secrecy cases.

B. *Redistributing Secrecy Costs*

While improving judicial policing of national security secrets is necessary, incentivizing the government to examine more closely its own claims of the need for secrecy would prevent judges from having to intervene as often. One way to incentivize the government to claim secrecy only when it is truly necessary is to impose a cost on the government associated with the claim.

The benefits of secrecy are frequently cited.³⁵³ Keeping certain secrets inures to the benefit of the government's interest in protecting our national security, which in turn benefits the public at large. Yet, secrecy—even necessary secrecy—also comes at a cost. For example, secrecy may prevent a court from reaching a meritorious claim, and thereby prevent compensation for an injured victim who is otherwise entitled to redress.³⁵⁴ It may prevent a criminal defendant from successfully challenging the legality of a search, and even result in his imprisonment where he would otherwise go free.³⁵⁵ These are, of course, costs that are born privately, by a single individual or small group of aggrieved litigants.

There is also a potential public cost to secrecy when secrets prevent the public from exercising vigorous oversight of government activities because those activities are obscured or even unknown. Unlike the benefits of secrecy which benefit the government and, by necessary corollary, the public, the public cost of secrecy has the potential to divide the interests of the public and the government. The government's interests are not aligned with the public's desire for accountability particularly when the government operates controversial programs. Secrecy in these instances allows the government to

³⁵¹ *A. v. United Kingdom*, 2009-II Eur. Ct. H.R. 137, 234 (2009).

³⁵² *See Jenkins*, *supra* note 334, at 335-36.

³⁵³ *See, e.g.*, S. REP. NO. 110-442, at 11 (2008) (acknowledging that the SSPA was designed to balance the national defense benefit of state secret privilege with the costs of such privilege).

³⁵⁴ *See supra* Section II.A.

³⁵⁵ *See supra* Section II.B.

avoid scrutiny and potential criticism. Overall, while benefits of secrecy accrue to the government, the costs of secrecy are largely—if not entirely—born outside the government.

In one context, however, the procedural mechanism shifts some costs of secrecy back to the government. In criminal prosecutions subject to the CIPA procedures, if information is deemed necessary to the defense and the government decides it still cannot produce it, the government may simply choose to keep the secret and dismiss the prosecution.³⁵⁶ That is, the government is disadvantaged in the litigation when it decides it must invoke national security to protect information, thereby incentivizing it to press forward with a secrecy claim only where truly necessary. Moreover, that the government bears the cost of secrecy in a sense spreads that cost over society, rather than forcing a single individual to bear it, in the same way that the benefits of secrecy are collective. Mechanisms that similarly shift the cost of national security secrecy to the government, rather than place it entirely on the individual, could be employed in other situations.

For example, this sort of mechanism could be useful in constitutional litigation over potential government misconduct when the government wants to invoke the State Secrets Doctrine to dismiss the lawsuit. Rather than dismissal, a rule could require the plaintiff to first prove a *prima facie* case of a constitutional violation relying on evidence within her own control. If she can do so, the court could give the government the choice between producing the evidence it claims is privileged in order to defend or rebut the plaintiff's case or having certain contested facts established against it.³⁵⁷ When the court establishes a fact as true for the purposes of litigation, that resolution does not purport to find that fact for any other purpose, thereby protecting the national security interest at stake.³⁵⁸ The litigation would then be permitted to reach the merits, and harmed plaintiffs may be compensated.

³⁵⁶ 18 U.S.C. app. 3 § 6(e) (2012); *see also supra* Section II.B.3 (describing CIPA procedures).

³⁵⁷ This proposal is a stronger version of the proposal in the SSPA, in which it was proposed that if, following an order to produce a nonprivileged substitute in lieu of privileged material, the government does not want to produce the substitute, it can refuse with the consequence that the court will resolve the disputed issue against the government. *See* S. REP. NO. 110-442, at 30 (2008).

³⁵⁸ This is akin to the routine practice in civil litigation of sanctioning discovery abuse with “adverse inference instructions,” or instructions to the jury that they may draw an adverse inference from one party’s failure to preserve evidence. *See Adkins v. Wolever*, 554 F.3d 650, 652-53 (6th Cir. 2009) (delineating various remedies for spoliation violations, including adverse inference instructions). The Federal Rules of Civil Procedure also allow a court, as a discovery sanction, to “direct[] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims.” FED. R. CIV. P. 37(b)(2)(A)(i).

In a limited way, it may be possible to expand a narrower cost-shifting structure in criminal cases as well. Take, for example, a defendant who is on notice that evidence was collected under FISA but is unable to access the underlying documents even to ascertain under which part of FISA the government claimed authority to conduct the surveillance. As it stands, that defendant would not be able to mount a facial challenge of the legal authority itself.³⁵⁹ A court considering such a case could require the government to choose between admitting to the authority relied upon and having that fact admitted against it for the purposes of the prosecution.

A cost-shifting framework would have several salutary results. First and foremost it would force the government to carefully consider whether the threat of national-security harm from the release of particular information is sufficiently grave as to justify the cost of secrecy. Second, it would have society bear the cost of secrecy collectively, through the government, rather than individually.³⁶⁰ Finally, it would allow courts to reach the merits of disputes and decide important constitutional questions, rather than insulating whole categories of government conduct from judicial review. This approach may restore some of the judicial legitimacy that has been lost.

CONCLUSION

We all have a collective interest in the government's ability to protect important national security secrets. Nonetheless, secrecy comes at a cost. As this Article documents, national security secrecy assertions arise routinely in litigation across various contexts, and the cost of sanctioning that secrecy is often forfeiture of the case in its entirety. Despite the fact that criminal and civil cases, not to mention administrative hearings, have different procedural defaults, common to all decision makers faced with the task of adjudicating the propriety of national security secrecy is the view that these types of secrecy claims are subject to exceptional procedure. This exceptional procedure, as this Article documents, fails to meaningfully police the boundaries of appropriate secrecy, and threatens to insulate government misconduct from any judicial oversight. The resulting problems for government accountability and judicial legitimacy that result warrant aggressive procedural reforms designed to alter the litigation dynamic in cases involving national security secrecy claims.

³⁵⁹ See *supra* notes 137-45 and accompanying text.

³⁶⁰ Another way of thinking about this shift is that it would promote society's collective interest in allowing harmed plaintiffs to seek redress. See MacDougall, *supra* note 192, at 722 (discussing that the cost of the government getting away with wrongdoing under the veil of secrecy "in no way serves the public interest").