

# Secret Law

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*The law cannot be a secret hidden from the public. This proposition strikes most of us as uncontroversial—a basic premise of any legal order committed to democratic accountability and the rule of law. Yet in this country secret law not only exists, but has become an entrenched feature of contemporary national security governance. From NSA surveillance to terrorist watch lists to targeted killings, the most controversial national security programs of our time have all been governed by secret rules, secret directives, and secret legal interpretations.*

*This Article sheds new light on this deeply unsettling state of affairs. It pushes beyond a reflexive aversion to secret law to unpack the underlying normative principles that both militate against secret law and motivate its widespread use. Secret law poses grave threats to basic values of democratic accountability, individual liberty, and separation of powers, but it also serves pragmatic national security purposes. By clarifying these competing values, it is possible to identify a number of distinct characteristics that make a given example of secret law especially odious—or essentially benign. This Article thus offers a systematic rubric for evaluating particular instances of secret law.*

*This Article also provides the first systematic review of the legal ecosystem that governs secret law in the Executive Branch—what I call the “law of secret law.” The picture that emerges is startling: existing law gives the Executive Branch enormous discretion to keep law secret. Indeed, the courts have effectively endorsed the practice of secret law, and Congress has been almost entirely quiescent in its face.*

*This Article proposes a novel reform agenda to transform this permissive legal ecosystem into one that more adequately protects transparency values. It offers core principles for a new framework statute limiting the practice of secret law. In addition, it argues that courts can and should prompt democratic deliberation over secret law (and legislative reconsideration of the status quo) by adopting a constitutional clear statement rule against secret law that is grounded in the text and structure of the Constitution.*

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#### INTRODUCTION

The law cannot be a secret hidden from the public. This proposition strikes most of us as uncontroversial—a basic premise of any legal order committed to democratic accountability and the rule of law. The idea that the very rules that empower and constrain the government could be kept secret from the public—immune from its scrutiny and democratic deliberation—is deeply troubling. Yet in this country secret law not only exists, but has become an entrenched feature of contemporary national security governance. Indeed, over the past fifteen years the government has consistently, vigorously, and openly defended its authority to adopt and maintain secret legal rules; the courts have often endorsed this practice; and Congress has been almost entirely quiescent in its face.

Over and over in the post-9/11 era, the story of national security policymaking has been the story of secret law. The most controversial programs initiated in response to the contemporary threat of terrorism have been founded upon secret legal rules, secret legal interpretations, secret legal directives, or some combination of the three. Although the notion of secret law is startling, there is no doubt that it has become a regular part of national security governance. A brief recitation of recent programs establishes this alarming claim.

Immediately after the 9/11 attacks, the administration of President George W. Bush enacted a policy of warrantless domestic surveillance, apparently flouting criminal prohibitions on domestic spying by intelligence agencies.<sup>1</sup> It did so by

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1. See generally OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., REP. NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009), <https://oig.justice.gov/special/s0907.pdf> [<https://perma.cc/YN3M-HYYQ>] [hereinafter PSP REPORT] (discussing the creation and underlying policies of the President's Surveillance Program); see also Morton H. Halperin & Jerry Berman, *A Legal Analysis of the NSA Warrantless Surveillance Program*, CTR. FOR DEMOCRACY & TECH. 3–4 (Jan. 17, 2006), <https://www.cdt.org/files/security/nsa/20060117halperinberman.pdf> [<https://perma.cc/TK7M-2359>].

adopting novel and aggressive legal interpretations in secret.<sup>2</sup> Soon thereafter, the government adopted the use of torture—euphemistically dubbed “enhanced interrogation”—up to and including waterboarding.<sup>3</sup> It authorized and governed this program by again adopting novel and aggressive legal interpretations in secret.<sup>4</sup> In 2003, the government created a sizable new agency within the FBI to administer a massive terrorist watch list.<sup>5</sup> That watch list in turn spawned more specific watch lists like the No-Fly List, which strips individuals of their ability to fly in U.S. airspace.<sup>6</sup> The basic rules governing the No-Fly List and other lists—such as what it takes to be added or removed—were kept secret from the public.<sup>7</sup> After the original secret warrantless wiretapping program was exposed by *The New York Times*,<sup>8</sup> the government continued many of its dragnet surveillance programs on the basis of secret law.<sup>9</sup> For instance, the National Security Agency’s (NSA) mass telephone call tracking program—the first program revealed as a result of the Snowden disclosures<sup>10</sup>—was based upon novel, aggressive, and secret statutory interpretations issued by the Foreign Intelligence Surveillance Court (FISC) starting in 2006.<sup>11</sup> A bulk email-tracking program was likewise based upon secret FISC rulings.<sup>12</sup>

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2. See PSP REPORT, *supra* note 1, at 5–14 (discussing the adoption of “new, highly classified intelligence activities” authorized by President Bush, including authorized interceptions of international communications).

3. See generally S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014), <https://www.congress.gov/113/crpt/srpt288/CRPT-113srpt288.pdf> [<https://perma.cc/K7JY-FQA2>] (evaluating the CIA’s use of “enhanced interrogation”); LARRY SIEMS, THE TORTURE REPORT: WHAT THE DOCUMENTS SAY ABOUT AMERICA’S POST-9/11 TORTURE PROGRAM (2011) (providing a meticulous account of the Bush-era torture program based on thousands of government documents).

4. See *A Guide to the Memos on Torture*, N.Y. TIMES (2005), <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> [<https://perma.cc/Q3AU-BCY8>]; Andrew Cohen, *The Torture Memos, 10 Years Later*, ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439> [<https://perma.cc/X9BW-H25G>].

5. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE TERRORIST SCREENING CENTER (2005), <https://oig.justice.gov/reports/FBI/a0527/final.pdf> [<https://perma.cc/U4Q6-NJHC>] [hereinafter DOJ-OIG 2005] (discussing the creation of the Terrorist Screening Center to synthesize numerous terrorist watch lists).

6. See *id.* at 99–100.

7. See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141 & n.3 (D. Or. 2014).

8. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [<https://nyti.ms/2k90zpQ>].

9. See PSP REPORT, *supra* note 1, at 30–31.

10. See Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL’Y 757, 759–60 (2014); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/9SAX-W3LK>].

11. See *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from [REDACTED]*, Order No. BR 0605 1, 2 (FISA Ct. May 24, 2006). See generally Donohue, *supra* note 10 (analyzing, in depth, the telephone call tracking program).

12. See Press Release, James R. Clapper, Dir. of Nat’l Intelligence, DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (Nov. 18, 2013), <https://icontherecord.tumblr.com/post/67419963949/dni->

The practice of secret law continued into the administration of President Barack Obama. By the end of 2009, it was apparent that the government's counterterrorism efforts had begun to rely more heavily on targeted killings. Drone strikes were frequently targeting individuals well beyond the borders of the hot battlefields in Iraq and Afghanistan.<sup>13</sup> The legal framework governing these uses of lethal force was secret. Perhaps most startling of all, the government claimed and deployed the legal authority to kill even U.S. citizens<sup>14</sup>—in 2011, the government targeted and killed a U.S. citizen away from any traditional battlefield as a counterterrorism measure.<sup>15</sup> But even this awesome assertion of power by the government was exercised according to legal rules and standards that the public was not permitted to know.<sup>16</sup>

Secret law is real, and it has become an important and unsettling tool of national security governance. Of course, nobody disputes that the government must be permitted to implement aspects of its national security policy in secret; counterterrorism, military, and intelligence activities often require secrecy to be effective. But the notion that the *rules* governing such programs may also be secret is deeply troubling. An analogy from the context of ordinary criminal law enforcement is instructive: We do not flinch at the idea of a particular search warrant or surveillance order being issued under seal, that is, in secret. But the notion that the *law* of government searches and surveillance—the Fourth Amendment doctrines, statutes, and interpretations that govern this activity—could also be secret is intolerable.<sup>17</sup> Yet in the national security context, the rules that govern are often secret.

How can this be? This Article appraises and illuminates this unsettling state of affairs, focusing on the use of secret law in the Executive Branch.<sup>18</sup> First, this

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clapper-declassifies-additional-intelligence [https://perma.cc/RAK8-8MA2]; Press Release, Office of Dir. of Nat'l Intelligence, Newly Declassified Documents Regarding the Now-Discontinued NSA Bulk Electronic Communications Metadata Pursuant to Section 402 of the Foreign Intelligence Surveillance Act (Aug. 11, 2014), <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1099-newly-declassified-documents-regarding-the-now-discontinued-nsa-bulk-electronic-communications-metadata-pursuant-to-section-402-of-the-foreign-intelligence-surveillance-act> [https://perma.cc/QN93-T282].

13. See THE DRONE MEMOS: TARGETED KILLING, SECRECY, AND THE LAW (Jameel Jaffer ed., 2016) (describing the Obama era targeted killing program and the context in which the secret legal framework governing targeted killings was developed).

14. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8, 11 (D.D.C. 2010).

15. See *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 104 (2d Cir. 2014); see Dominic Rushe et al., *Anwar al-Awlaki Death: US Keeps Role Under Wraps to Manage Yemen Fallout*, *GUARDIAN* (Sept. 30, 2011, 2:31 PM), <https://www.theguardian.com/world/2011/sep/30/anwar-al-awlaki-yemen> [https://perma.cc/ZVL6-SVF2].

16. *N.Y. Times Co.*, 756 F.3d at 103.

17. Cf. Kevin S. Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 *U.S.F. L. REV.* 589, 605–06, 619–20, 624–25 (2007) (discussing *ex parte* applications for certain pen register surveillance orders, cell phone tracking orders, and “internet pen registers”).

18. Other authors have recently undertaken to examine secret law and have focused on the growth of secret law in Congress and the courts, as well as the Executive Branch. Dakota Rudesill authored an excellent and nuanced examination of the practice and problems of secret law that includes, among other novel contributions, the most authoritative treatment of Congress's practice of enacting legislation that is kept secret from the public. See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 *HARV.*

Article unearths the basic principles and values that secret law offends, as well as the purposes that secret law serves. Second, based on this discussion, this Article describes a novel and systematic rubric for evaluating whether and to what extent any given secret law is problematic. Third, this Article provides a synoptic view of the legal ecosystem that governs secret law, or what I call the “law of secret law.” Finally, it proposes a reform agenda to transform this legal ecosystem, which currently allows secret law to flourish, into one that strictly limits secret law to circumstances where it is justified according to stringent and public standards.

This Article seeks to push beyond a reflexive aversion to secret law to unpack the underlying normative principles that both militate against secret law and motivate its widespread use in the national security context. By clarifying these competing principles, it is possible to identify distinct characteristics of specific secret laws that make them particularly odious—or particularly benign. Specifically, this Article argues that certain secret laws can be assessed along five axes, each of which describes a key characteristic of a given secret law. These axes are (1) the extent of external effects, (2) the novelty and unforeseeability, (3) the level of granularity at which the law is disclosed, (4) the expected duration of secrecy, and (5) the depth or extent of secrecy. This Article contends that secret laws are more problematic to the extent that they lie toward the extremes of one or more of these axes. This multifactor test for assessing secret laws illuminates what is really at stake in disagreements about the legitimacy of secret law, moving beyond both a blanket rejection of secret law and a complete deference to national security secrecy. Instead, debates about the legitimacy of a given instance of secret law can more usefully be understood as disagreements about where a secret law should lie along one or more of these axes—for example,

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NAT'L SEC. J. 241 (2015). In addition, the Brennan Center for Justice published a remarkable report on the problem of secret law that, among many other contributions, includes the most comprehensive compilation of secret Department of Justice (DOJ) legal opinions that constitute governing law for the Executive Branch. See ELIZABETH GOITEIN, BRENNAN CTR. FOR JUSTICE, *THE NEW ERA OF SECRET LAW* (2016). Jonathan Hafetz authored an incisive and thoughtful examination of secret law that focuses, in particular, on how such laws often take the form of fluid and indeterminate standards that tend to expand discretion. See Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141 (2016). Sudha Setty critiqued the practice of secret law from a historical and comparative perspective. See Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579 (2009). The problem of secret law in the courts—which can arise when courts seal their judicial opinions in full or part—has also received some scholarly attention. See, e.g., Bankston, *supra* note 17 (discussing sealed judicial opinions that elaborate legal standards governing various forms of electronic surveillance); Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1525 (2014) (observing that secret decisions of the Foreign Intelligence Surveillance Court have produced “a body of secret law that seems removed from what a majority of the public would approve”); Michael A. Sall, Note, *Classified Opinions: Habeas at Guantánamo and the Creation of Secret Law*, 101 GEO. L.J. 1147, 1159–61 (2013) (arguing that judicial opinions in Guantánamo Bay habeas proceedings can establish secret legal rules because such opinions are often heavily redacted to excise classified information, thereby obscuring the precise contours of the legal rules that have been developed and elaborated in those cases).

whether a secret law's external effects on the public are direct and significant enough that secrecy is intolerable, or whether the rules developed in secret should be disclosed in more granular detail.<sup>19</sup>

This Article is the first to attempt a systematic description of the law of secret law—that is, the ecosystem of legal rules that govern the practice of secret law in the Executive Branch, including the Due Process Clause, the Federal Register Act, and the Freedom of Information Act.<sup>20</sup> The upshot of this survey is that there are, in practice, few legal constraints on the creation of secret law. The law of secret law essentially gives the Executive Branch discretion to determine whether and when the rules governing national security programs can be shielded from the public and, thus, ordinary democratic oversight.

This legal ecosystem produces an equilibrium in which secret law proliferates. Current legal arrangements vastly undervalue the principles that militate against secret law. Moreover, they produce an equilibrium that is not only suboptimal, but also unstable. National security leaks like the Snowden disclosures bring secret law into the light in fitful, unpredictable, and episodic ways. Indeed, the Snowden disclosures were so momentous and disruptive precisely because they revealed a body of law that had, for years, secretly empowered the intelligence community in unforeseeable ways.

The law of secret law must be reformed to reset this equilibrium. This Article proposes that Congress impose stringent limits that would be binding on the Executive Branch and enforceable by the courts. This Article offers a novel roadmap to obtain such reforms, arguing that *courts* should initiate legislative reconsideration of secret law by recognizing that secret laws raise grave constitutional concerns and should not be permitted unless Congress has clearly authorized them. Indeed, as this Article will show, constitutional text, doctrine, and structure support the notion that the Constitution is hostile to secret law in the Executive Branch.<sup>21</sup>

If courts were to recognize this kind of constitutional “clear statement rule” against secret law, they would effectively put the question of secret law to Congress—if not outright prohibit it themselves. In other words, the courts would be prompting a public and democratic deliberation about the second-

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19. Cf. Hafetz, *supra* note 18. Hafetz argues that the problem of secret law is often better regarded as a problem of inadequately specified legal standards that leave too much room for discretion. *Id.* at 2150–52. On this account, the problem is not that the rules are not disclosed at a sufficiently granular level, but that there are not sufficiently granular rules to disclose in the first place. *Id.*

20. Jameel Jaffer and Brett Max Kaufman recently offered a trenchant examination of the “working law doctrine” under FOIA, which is one important aspect of the law of secret law. See Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 *YALE L.J. F.* 242 (2016).

21. This argument builds upon existing literature exploring the constitutional limits on secrecy in the Executive Branch. See, e.g., MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* (Univ. Press of Kan., 3d ed., 2010) (1994); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 *IOWA L. REV.* 489, 514–15, 542–43 (2007); David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257 (2010); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 *UCLA L. REV.* 909 (2006).

order question of when law can be kept secret and thus immune from public and democratic oversight.

The Supreme Court has repeatedly issued this kind of “democracy-forcing” decision in its post-9/11 national security cases<sup>22</sup>—similar intervention is necessary here. As it stands, we have stumbled into a system that permits secret law essentially at will in the national security context. The courts should, at a minimum, require our democratic institutions to make an explicit, public decision about whether and when secret law is justified. In the absence of meaningful reform, we invite further creeping expansion of secret law, and we risk a Kafkaesque state of affairs in which the public cannot know the rules by which the government is playing.

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This Article proceeds in five parts. Part I defines key terms, explaining what I mean by “secret law” and why we should regard these kinds of internal Executive Branch rules as “law.” Part II explores the normative terrain of secret law, identifying three fundamental objections to secret law, as well as the four principal rationales offered in its defense. Part III offers a systematic rubric for assessing whether a given secret law is justifiable. Part IV is a synoptic tour of the legal landscape in which secret law has taken root—what I call the “law of secret law.” Finally, Part V offers a reform agenda to address the problem of secret law and begins to sketch constitutional arguments that can be mounted against the practice of secret law in the Executive Branch.

## I. SECRET LAW DEFINED

To examine the normative and legal ecosystem that governs secret law, it is necessary to provide a firmer account of what exactly constitutes “secret law” as I use the phrase. Why does it make sense to regard internal Executive Branch texts as “laws,” rather than something else—perhaps secret “guidance” or secret “advice”? What does it mean for a law to be “secret”?

Thus far, this Article has illustrated the concept of secret law through examples, such as Department of Justice (DOJ) memos assessing the legality of targeted killings or torture, legal directives elaborating surveillance rules, and manuals setting forth the rules for placing individuals on terrorism watch lists. What makes each of these an instance of “law”?

In my view, these and other internal administrative texts constitute “law” if they articulate rules or principles of general applicability that are regarded by

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22. See Josh Benson, *The Guantánamo Game: A Public Choice Perspective on Judicial Review in Wartime*, 97 CAL. L. REV. 1219, 1264–73 (2009); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 53–54 (“Courts should require clear congressional authorization before the [E]xecutive intrudes on interests that have a strong claim to constitutional protection.”); Jack M. Balkin, *Hamdan as a Democracy-Forcing Decision*, BALKINIZATION (June 29, 2006), <https://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> [<https://perma.cc/LACZ-GH2F>].



the relevant officials as binding on their conduct.<sup>23</sup> This is an explicitly functional and sociological approach to what counts as law. Whether a legal text constitutes law will depend on whether, as a matter of social fact, it plays a certain role—specifying general rules or principles of conduct—for the relevant government officials.

This definition is purposely indifferent to the particular form in which the rule or principle is embodied or whether the legal text in question is denominated as a “rule,” “directive,” “opinion,” “manual,” or otherwise. What matters is the social function of the text. Thus, a “memorandum” issued by a senior official to govern the conduct of subordinates is an example of law, as I use the term, so long as it sets out rules or principles of general applicability, as opposed to, say, delivering a specific order to carry out a particular action.

On this definition, Executive Branch legal opinions that are regarded as authoritative and binding by government officials count as law. More specifically, formal opinions of the DOJ’s Office of Legal Counsel (OLC) are law because such opinions are—as a matter of practice and sociological fact—regarded as “binding within the [E]xecutive [B]ranch unless ‘overruled’ by the Attorney General or the President.”<sup>24</sup> Likewise, a manual setting forth the rules by which government officials are to administer a program is law if the manual is regarded as binding by the officials administering the program.

This understanding of what constitutes a law makes sense for the purposes of this Article, which aims to investigate the secrecy of the rules according to which the government actually operates in dealings that affect the public. In this context, what matters is whether the legal texts in question actually function as authoritative rules that empower or constrain the government.

But this definition of law is not simply convenient for this Article’s purposes; it is also broadly consistent with modern philosophical conceptions of law. This definition is particularly likely to resonate with legal positivists, who emphasize that whether a particular norm constitutes law depends on facts about the world, particularly sociological facts about what rules the relevant community will recognize as valid and binding.<sup>25</sup> That said, accepting my working definition of

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23. For an example of a more formal definition of law, see 5 U.S.C. § 551(4) (2012), which defines a “rule” for purposes of the Administrative Procedure Act.

24. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1711 & nn.90–91 (2011) (book review) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (“OLC generally will not provide legal advice if there is doubt about whether it will be followed.”); see also Jaffer & Kaufman, *supra* note 20.

25. See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed., 2012) (discussing law as a social construction); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1161–65 (2006) (describing H.L.A. Hart’s account of social rules in term of rules that groups regard as binding from the internal point of view). Many positivist accounts of law also rely on a version of the “rule of recognition”—in other words, the acceptance of second-order rules that identify which primary rules are binding. In contrast with formalized rules that identify valid laws passed by Congress or elaborated by courts, second-order rules that identify internal laws within the Executive Branch are less stylized and uniform. There is nevertheless little doubt that general agreement exists about which internal rules are binding. “Both inside and outside of administration, agency rules, practices, and precedents are

law does not necessarily require a commitment to legal positivism because it is not inconsistent with (at least some) contemporary natural law theorists' jurisprudential views.<sup>26</sup>

The use of the term law in this way may strike a dissonant note to some ears because such internal rules usually do not directly govern the conduct of the public. Instead, they are primarily directed to the conduct of government officials and will typically only have second-order effects on the public.<sup>27</sup> In addition, the laws at issue here are developed within the Executive Branch, in contrast with legal rules enacted by Congress or prescribed in judicial opinions. Moreover, unlike more familiar species of administrative law—for example, rules adopted through notice-and-comment, agency circulars, and “publication rules”<sup>28</sup>—these internal laws often escape judicial review or any other requirements of the Administrative Procedure Act (APA) because they concern national security matters.<sup>29</sup>

Using the term “law” in this context may be uncommon, but it is by no means an innovation. The notion that internal agency rules, practices, and precedents constitute an “internal law of administration” dates back to the first treatise on American administrative law, penned by Bruce Wyman in 1903.<sup>30</sup> Although contemporary study of administrative law tends to focus on the “external law” of statutes and court decisions that constrain agencies and subject agency law to judicial oversight, internal rules and practices—even those not adopted through formal or informal rulemaking—continue to play an essential role in administra-

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taken both to have normative force and to be subject to normative critique concerning whether they instantiate an appropriate vision of lawful administration.” Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1471 (2010); see Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 *GEO. WASH. L. REV.* 859, 861 (2009).

26. Modern natural law theorists, such as Lon Fuller, are not primarily concerned with identifying the social facts or practices that distinguish law from other norms; instead they argue that to qualify as law, a system of rules must meet certain moral criteria. See generally LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. rev. ed. 1969). Fuller argued that one of the eight principles essential to the “internal morality of law” was that laws, properly so-called, must be made known to the public. See *id.* at 45, 49–51, 93. On this view, a system of laws in which the law is kept secret is essentially illegitimate—it doesn’t satisfy the moral requirements of law. *Id.* at 49–51.

For purposes of this project, however, it would beg the question against the legitimacy of secret law simply to posit that law must be public to be legitimate. The point of this Article is to examine the special case where law is known only to government officials and not to the public. Indeed, Fuller himself acknowledged that there may be circumstances in which “we must bow to grim necessity” and keep law secret. *Id.* at 92. I thus employ a definition of law that does not include disclosure to the public as a *sine qua non*.

27. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984) (distinguishing between “decision rules” directed to officials and “conduct rules” directed to the public).

28. See 5 U.S.C. §§ 551, 553 (2012); Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 *DUKE L.J.* 1463, 1466–68 (2002).

29. See Robert Knowles, *National Security Rulemaking*, 41 *FLA. ST. L. REV.* 883, 883 (2014) (explaining that a “national security exception from notice-and-comment” in the APA “insulate[s] most national security rulemaking from public scrutiny and meaningful judicial review”).

30. See generally BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903).

tive governance. Jerry Mashaw has long stressed the crucial and underappreciated role of such “internal law.”<sup>31</sup> Gillian Metzger and Kevin Stack have likewise revived and defended the idea of “internal administrative law” as a distinctive form of law.<sup>32</sup> Following these authors, I take the view that such internal norms, which pervasively structure and govern bureaucracies, have a philosophical and pragmatic claim to the status of law similar to the varieties of “external” law that are more commonly studied in the literature.<sup>33</sup>

In addition to clarifying how I use the term “law,” it is worth explaining what constitutes a “secret” law. I use the term “secret” to refer to laws that are not officially made available to the general public. For instance, an Executive Branch legal opinion that is shared with both Congress and the courts constitutes a secret law unless it has been disclosed to the broader public.

Of course, there are degrees of secrecy: secrecy varies to the extent that the law in question is disseminated within the Executive Branch, across branches of government, or even with subsets of the public.<sup>34</sup> Thus, for instance, one might ask whether a classified FISC opinion still counts as a secret law if it has been shared with security-cleared lawyers outside of the government who work for the telecommunications companies directed to carry out the surveillance but who are subject to a strict nondisclosure obligation. On my account, even this species of law constitutes a secret law because the rules in question cannot be shared with the general public.

Variations in the degree of secrecy certainly matter, as I discuss below, but because the purpose of this Article is to explore whether and when the general public can be kept in the dark about what the law is, I reserve the phrase “secret law” to describe those cases where the public at large is shut out.

## II. SECRET LAW IN THE BALANCE

This Part explores the normative terrain upon which disputes about secret law are contested. It first sets out the principal arguments against secret law, which fall into three clusters: threats to individual liberty, democratic deficits, and separation of powers concerns.

It then discusses the principal rationales that have been advanced in favor of secret law: maintaining the secrecy of sensitive government programs, preventing circumvention or otherwise increasing a program’s effectiveness, insulating

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31. See, e.g., Mashaw, *supra* note 25, at 1412–15; Jerry L. Mashaw, Foreword, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975 (2010); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007).

32. See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

33. See Mashaw, *supra* note 25; Metzger & Stack, *supra* note 32, at 1256–63; see also Magill, *supra* note 25, at 861.

34. See Pozen, *supra* note 21, at 262–75 (offering a subtle exploration of the degrees of secrecy in government).

laws from public opposition, and protecting the deliberative capacity of government.

#### A. THE TROUBLE WITH SECRET LAW

##### 1. Secret Law as a Threat to Individual Liberty and to Limits on Government Powers

Where the law is secret, individuals may not understand the legal consequences of their actions or what restraints the government must respect in its dealings with them. When the government operates according to secret rules, it may appear to ordinary members of the public that officials are acting arbitrarily, lawlessly, or unpredictably. Members of the public will be left to guess at the limits on the government's authority, the rules it must follow, what official consequences might flow from particular actions, and what kinds of activity might arouse government scrutiny.

The result may be a significant chilling effect on individual liberties. As the courts have recognized with respect to free speech rights, where a law that relates to speech is unclear, "it operates to inhibit the exercise of [First Amendment] freedoms" because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."<sup>35</sup> The same is true with respect to other liberties: Where the government operates according to secret rules, individuals may be deterred from engaging in all manner of lawful activities they fear might subject them to government scrutiny, interference, or other negative consequences.<sup>36</sup>

Even where individuals are not actually deterred by the specter of secret law, there is nevertheless significant harm to individual liberty. Governance according to secret law will often be experienced by individuals as inscrutable, arbitrary, and oppressive. This is because secret law, in essence, shifts the ordinary balance of power between citizens and the government decisively in favor of the latter. When the law is public, an individual can determine whether a government action is unlawful and contest it. When a police officer makes a traffic stop, for instance, the driver can know the rules of the game, what rights she retains, and what legal options are available to her in responding to the officer's questions or directions. In other words, she can (in principle, at least) ascertain the likely consequences of her actions. But when a government official acts according to secret laws, the citizen is placed at a grave disadvantage: Individuals are unable to dispute what the governing rules require, how they should be applied, how they can be avoided, and what consequences can follow

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35. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations, footnotes, and alterations omitted).

36. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 689-92 (1978) (discussing the chilling effect with respect to rights beyond free speech); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969) (same).

from them. When the law is secret, citizens are at the mercy of the government, unable to know what the law requires or whether the government is violating it.

Contemporary government watchlisting programs provide a prime example of these problems. The government maintains a database of more than one million individuals in its Terrorist Identities Datamart Environment.<sup>37</sup> Approximately 680,000 of these people have reportedly been watchlisted as “known or suspected terrorists.”<sup>38</sup> Thousands of these people are U.S. citizens or permanent residents.<sup>39</sup> Subsets of those watchlisted are subject to overt restrictions, such as being placed on the No-Fly List, which forbids air travel. Other effects of watchlisting are more opaque. The watch lists are routinely shared with federal agencies, local police, foreign governments, and certain private entities, which use them in ways that are unclear to the public.<sup>40</sup> When a watchlisted individual encounters any such entity, he or she is liable to face, at a minimum, increased scrutiny and lengthier questioning,<sup>41</sup> but often much more serious consequences.<sup>42</sup>

The government sought for years to keep the rules governing this enormously complex and consequential apparatus secret.<sup>43</sup> The rules only became public in July 2014, when they were leaked to journalists.<sup>44</sup> Up until that point the only

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37. Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama's Secret Terrorist-Tracking System, By the Numbers*, INTERCEPT (Aug. 5, 2014, 12:45 PM), <https://theintercept.com/2014/08/05/watch-commander> [<https://perma.cc/G6WL-LM32>].

38. *Id.* (internal quotations omitted).

39. *Id.* (reproducing government document indicating that approximately 20,800 U.S. citizens or permanent residents are included in the government's database, of which 5,000 have been watchlisted); see Walter Pincus, *1,600 Are Suggested Daily for the FBI's List*, WASH. POST (Nov. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/31/AR2009103102141.html> [<https://perma.cc/XZ6P-L8MT>] (“Fewer than 5 percent of the people on the list are U.S. citizens or legal permanent residents.”).

40. Scahill & Devereaux, *supra* note 37.

41. The government's leaked Watchlisting Guidance directs agencies that “encounter” an individual on the watch list to use their existing authorities to collect all manner of information about the individual for subsequent addition to the database. See NAT'L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE 59–71 (2013), <https://www.documentcloud.org/documents/1227228-2013-watchlist-guidance.html> [<https://perma.cc/RR74-FHF9>] [hereinafter WATCHLISTING GUIDANCE]; NAT'L CRIME INFO. CTR., NCIC 2000 OPERATING MANUAL: KNOWN OR APPROPRIATELY SUSPECTED TERRORIST (KST) FILE § 5.2 (2000) (indicating law enforcement officers who encounter a watchlisted person should contact the FBI's Terrorist Screening Center and gather a variety of information, among other steps).

42. See, e.g., First Amended Complaint ¶ 8, *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (Document No. 15) (alleging the FBI used the threat of continued placement on the No-Fly List to coerce Muslim Americans to become informants); Adam Goldman, *Lawsuit Alleges FBI Is Using No-Fly List to Force Muslims to Become Informants*, WASH. POST (Apr. 22, 2014), <https://www.washingtonpost.com/world/national-security/lawsuit-alleges-fbi-is-using-no-fly-list-to-force-muslims-to-become-informants/2014/04/22/1a62f566-ca27-11e3-a75e-463587891b57> [<https://perma.cc/FN3A-JB2B>].

43. See WATCHLISTING GUIDANCE, *supra* note 41, at 1 (indicating that no part of the guidance manual may be released because it constitutes “Sensitive Security Information” pursuant to transportation security regulations).

44. See Jeremy Scahill & Ryan Devereaux, *Blacklisted: The Secret Government Rulebook for Labeling You a Terrorist*, INTERCEPT (July 23, 2014, 1:45 PM), <https://theintercept.com/2014/07/23/blacklisted> [<https://perma.cc/JM6N-VBR9>]; see also *March 2013 Watchlisting Guidance*, INTERCEPT

legal rule the government had disclosed was that a “reasonable suspicion” standard of proof is applied when deciding whether to add individuals to watch lists.<sup>45</sup> Furthermore, the government had refused to say what a person must be reasonably suspected of doing to be added, let alone revealed the detailed criteria elaborating upon these requirements or the processes by which such decisions are made.<sup>46</sup> Nor had the government explained what standard must be met for one’s name to be removed from the lists.<sup>47</sup> As a result of many years of litigation, the government did eventually describe the general criteria governing placement on one particular watch list, the No-Fly List, but it still refuses to disclose details about the No-Fly List rules and it has not disclosed anything about the rules applicable to other watch lists.<sup>48</sup>

As a result of this secrecy, individuals have been kept in the dark as to why they might be included on a watch list, what they must show to get themselves removed, or even the likely consequences of being placed on a watch list. Individuals who are improperly watchlisted are unable to point to violations of the rules because the rules are secret. The government, in turn, enjoys enormous unchecked discretion in how it interprets and applies its secret rules. Perhaps unsurprisingly, the government has at times applied its watchlisting rules extremely broadly and sloppily.<sup>49</sup> In one case, the government put a Stanford University graduate student on the No-Fly List because an FBI agent misunderstood a routine form and mistakenly designated her for inclusion.<sup>50</sup> Despite the error, the government fought for years in court to keep her on the list—and to prevent her from obtaining judicial review—taking two appeals to the Ninth

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(July 23, 2014, 2:46 PM), <https://theintercept.com/document/2014/07/23/march-2013-watchlisting-guidance> [<https://perma.cc/C387-LN52>] (publishing the rules).

45. *See id.*

46. *See* *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014) (“The government also has its own ‘Watchlisting Guidance’ for internal law-enforcement and intelligence use, and the No-Fly List has its own minimum substantive derogatory criteria. The government does not release these documents.”).

47. *See id.*

48. *See* *Latif v. Lynch*, No. 10-cv-750, 2016 WL 1239925, at \*3 (D. Or. Mar. 28, 2016) (listing the “substantive derogatory criteria” for inclusion in the No-Fly List but noting that other “sublists” in the government’s watchlisting system have their own “substantive criteria”); Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs’s ¶¶ 5–6, *Latif*, No. 10-cv-750, ECF No. 173 (noting that “[t]he Government has defined or further elucidated some of the terms used in the criteria for placement on the No Fly List in the Watchlisting Guidance, which it has disseminated solely within the U.S. Government watchlisting and screening communities”).

49. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER xvii–xxii (2007), <https://oig.justice.gov/reports/FBI/a0741/final.pdf> [<https://perma.cc/XJH2-LZQQ>] (finding, among other things, that the FBI did not consistently update or remove names from the watch list); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION’S TERRORIST WATCHLIST NOMINATION PRACTICES (2009), <https://oig.justice.gov/reports/FBI/a0925/final.pdf> [<https://perma.cc/XM2G-55BJ>] (auditing the terrorist watch list and finding, among other things, that many names were not removed when required or failed to be added when appropriate); DOJ-OIG 2005, *supra* note 5, at xi–xv (finding numerous problems with the accuracy and completeness of the watch list database).

50. *See* *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 911, 916 (N.D. Cal. 2014).

Circuit.<sup>51</sup> Eight years after the case was filed, following a trial at which the error finally came to light, the district court could only describe her treatment by the government as “Kafkaesque.”<sup>52</sup>

It seems inevitable that the specter of being watchlisted has deterred perfectly lawful behavior, particularly in the American Muslim community, which is the most affected by such efforts.<sup>53</sup> Even if not deterred, individuals who are, or who believe they might be, on the watch list live their lives under the foreboding specter of the government’s power and its secret rulebook.

The same dynamic exists in other areas where secret law regulates government activities. Secret rules governing surveillance, for instance, have led individuals—particularly journalists and other professionals who owe duties of confidentiality—to avoid using various means of communication because they cannot be sure whether and how their communications will be protected.<sup>54</sup> There is evidence of more subtle and widespread chilling effects on individual behavior.<sup>55</sup> Even if there were no empirical chilling effects, where the law is secret, individuals live under the threat that they may at any time be caught up in programs governed by rules that they are not permitted to learn.<sup>56</sup>

## 2. Thwarting Democratic Accountability and Participation

Secret law also poses a challenge to democratic principles: If the law in a particular area is kept secret from the public, people cannot intelligently exercise their democratic prerogatives with respect to those areas of law. Ordinarily, people who support, oppose, or propose changes to a law have many democratic tools at their disposal. Not only can they vote for candidates who share their views, but they can also take more targeted actions to effect change, such as petitioning, organizing, lobbying, fundraising, donating, and advertising. Indeed, the Constitution specifically guarantees these rights through the petition, speech, assembly, and press clauses of the First Amendment.<sup>57</sup>

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51. *See id.* at 911–12.

52. *Id.* at 931.

53. *See* Scahill & Devereaux, *supra* note 37.

54. *See* Clapper v. Amnesty Int’l USA, 568 U.S. 398, 406–07 (2013); *id.* at 424–25 (Breyer, J., dissenting).

55. *See, e.g.*, Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117 (2016) (finding a significant chilling effect following the Snowden disclosures by measuring short- and long-term decline in traffic to Wikipedia articles on topics that raise privacy concerns); Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (Feb. 17, 2017) (unpublished manuscript) (finding a significant chilling effect, both domestically and internationally, resulting from government surveillance based on data comparing the frequency of searches for private or sensitive information on Google before and after the Snowden revelations), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412564) [<https://perma.cc/J2MH-GVYJ>].

56. *See, e.g.*, *Gilmore v. Gonzales*, 435 F.3d 1125, 1129 (9th Cir. 2006) (recounting facts relating to individual denied boarding flight because of refusal to comply with requirements of secret security directives).

57. U.S. CONST. amend. I.

Where the law is secret, however, the democratic apparatus of public accountability is short-circuited. If the substance of the law is secret, the public cannot have any meaningful input or control over it.

The situation is particularly grave where not only the substance of the law is secret, but where the public is also kept in the dark that a secret law even exists. Nobody in 2002 would have rallied to oppose a law permitting waterboarding because nobody then knew that the OLC had, in effect, written such a law through its legal opinions authorizing the technique despite the criminal prohibition against torture.<sup>58</sup> When the existence of the law is kept secret, the most the public can hope for is that officials making the law pause to imagine what the public would think of the law if it were disclosed, and that this private thought experiment—perhaps combined with the possibility of future disclosure—has an effect on officials' decision making. In this sense, secret lawmakers are only accountable to a hypothetical public.

Even where the public knows that a secret law exists, democratic oversight is severely weakened. It is simply impossible to effectively manipulate the levers of democratic oversight when one is forced to speculate about what the law says.

Take, for instance, the example of surveillance pursuant to section 215 of the USA PATRIOT Act.<sup>59</sup> Under that law, the public knew that the FISC, on application from the FBI, could issue orders for disclosure of “tangible things” that were “relevant to an authorized investigation.”<sup>60</sup> But the specifics of how the FISC interpreted section 215 were kept secret. The provision was scheduled to sunset in 2010 and again in 2011, unless Congress voted to reauthorize it.<sup>61</sup> Civil society groups took the opportunity to lobby intensively for changes, but they were forced to speculate about how the law was being interpreted.<sup>62</sup> As it turns out, their speculations were way off the mark. Most groups lobbying for changes were concerned about the perceived risk that the FBI would use the law to target individuals based on their First Amendment protected activities.<sup>63</sup> This

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58. See S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM: FINDINGS AND CONCLUSIONS, S. REP. NO. 113-288, at xiii–xv (2014), <https://www.congress.gov/113/crpt/srpt288/CRPT-113srpt288.pdf> [<https://perma.cc/K7JY-FQA2>]; Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [<https://perma.cc/7PHX-K72F>].

59. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287–88 (2001) (codified at 50 U.S.C. § 1861 (2012)).

60. 50 U.S.C. § 1861(b)(2)(A) (2012).

61. See CONG. RESEARCH SERV., 215-SUNSET, SUNSET OF SECTION 215 OF THE USA PATRIOT ACT OF 2001, 1 n.4 (2015), <https://fas.org/sgp/crs/intel/215-sunset.pdf> [<https://perma.cc/R294-2XCG>].

62. See, e.g., *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 107th Cong. 107–610 (2001) (statement of Jerry Berman, Executive Director, Center for Democracy and Technology).

63. *Reform the Patriot Act—Section 215*, ACLU (Oct. 31, 2011), <https://web.archive.org/web/20111031065406/https://www.aclu.org/free-speech-national-security-technology-and-liberty/reform->



concern led groups to focus on the use of section 215 to obtain library records—a powerful example of records cloaked by First Amendment interests.<sup>64</sup> Indeed, section 215 came to be known as the “library records” provision.<sup>65</sup>

Asked about these lobbying efforts after the Snowden disclosures revealed the true scope of section 215 surveillance, Lee Tien, a civil liberties lawyer at the Electronic Frontier Foundation, explained “[p]eople could see that those kinds of records were very seriously connected to First Amendment activity and the librarians were going to war on it.”<sup>66</sup> Indeed, at that point the only public evidence of abuse of section 215 involved FBI circumvention of the section’s limited protection for First Amendment activity.<sup>67</sup>

It is hard to imagine a more misguided lobbying effort. As Tien reflected, “A person might uncharitably think of us as lacking in imagination . . . .”<sup>68</sup> But it is difficult to blame anyone for failing to imagine that section 215 had been interpreted to permit the indiscriminate mass collection of all domestic telephone records by the NSA (and that a parallel provision of law had been interpreted to permit mass collection of Internet records). Yet the law had been used in that way at least as far back as 2006, four years before it first came up for reauthorization.<sup>69</sup>

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patriot-act-section-215 [https://perma.cc/AX2P-Z6TT] (explaining the PATRIOT Act prohibited investigations conducted “solely” on the basis of First Amendment activity, which civil society groups interpreted to mean that “[t]he FBI [could] investigate United States persons based in part on their exercise of First Amendment rights”).

64. See, e.g., AM. CIVIL LIBERTIES UNION, RECLAIMING PATRIOTISM: A CALL TO RECONSIDER THE PATRIOT ACT 18–20 (2009), [https://www.aclu.org/sites/default/files/pdfs/safefree/patriot\\_report\\_20090310.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/patriot_report_20090310.pdf) [https://perma.cc/J6DQ-8XDE].

65. See Andrew C. McCarthy, *Why Sections 214 and 215 Should Be Retained*, PATRIOT DEBATES (2005), <https://apps.americanbar.org/natsecurity/patriotdebates/214-and-215-2#opening> [https://perma.cc/6LC6-FX5H]; see also Justin Elliott, *Remember When the Patriot Act Debate Was All About Library Records?*, PROPUBLICA (June 17, 2013, 2:08 PM), <http://www.propublica.org/article/remember-when-the-patriot-act-debate-was-about-library-records> [https://perma.cc/4FLM-4EC8].

66. Elliott, *supra* note 65 (internal quotation marks omitted).

67. A 2008 Inspector General report indicated that when the FISC twice denied section 215 applications citing First Amendment concerns, the FBI persisted in the investigation and issued National Security Letters instead, which do not require any court approval or oversight. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 5, 65–74 (2008), <http://www.usdoj.gov/oig/special/s0803a/final.pdf> [https://perma.cc/78FW-GHY6]; AM. CIVIL LIBERTIES UNION, *supra* note 64, at 18–19 (focusing on this and related concerns with section 215).

68. Elliot, *supra* note 65 (internal quotation marks omitted).

69. That the NSA was collecting domestic calling records was reported by *USA Today* as far back as 2006, but at that point the program was based on the voluntary cooperation of telephone companies turning over their call detail records, not any secret interpretation of law. See Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY (May 11, 2006, 10:38 AM), [http://usatoday30.usatoday.com/news/Washington/2006-05-10-nsa\\_x.htm](http://usatoday30.usatoday.com/news/Washington/2006-05-10-nsa_x.htm) [https://perma.cc/P4QA-9J4Y]. After these reports came to light, the phone companies stopped providing the records voluntarily and insisted that the government obtain a court order, prompting the government to obtain such a court order from the FISC under an aggressive (and secret) interpretation of section 215. See Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, WASH. POST (June 15, 2013), [https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a\\_story.html](https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html)

This interpretation was not a truly “deep secret”<sup>70</sup>—everyone understood that there was uncertainty about how section 215 would be applied by the FBI and interpreted by the FISC.<sup>71</sup> But even the shallow secrecy about the FISC’s interpretation meant that years of lobbying efforts were almost completely beside the point.

This kind of democratic oversight is important—not just to ensure that the public can have its say, but also to improve the law itself. Where deliberation is cloistered within certain parts of the Executive Branch and Congress or a small number of judges, there is far less opportunity for expert criticism and moral deliberation. By contrast, when the public is in the loop, it is possible for subject matter experts, opinion leaders, and deep thinkers of various stripes to shape the law to improve it, or at least to shed light on its likely benefits and drawbacks.<sup>72</sup>

Again, the section 215 example illustrates the point. Immediately after the Snowden disclosures, technologists and computer scientists began to explain the implications and pitfalls of the bulk phone collection program. They showed, for example, that the rules governing the program meant that intelligence analysts could probably review the calling histories of millions of Americans, even though only a few thousand phone numbers had been tagged with reasonable suspicion.<sup>73</sup> Others explained and demonstrated how metadata analysis of calling records could reveal a great variety of personal, highly confidential information using simple analytic tools, even without combining it with other sources of information likely available to the government.<sup>74</sup>

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[<https://perma.cc/3D93-GB2R>]. It was not until the Snowden disclosures that the public learned section 215 had been interpreted to authorize bulk collection in this way. *See id.*

70. I follow the terminology used by David Pozen. *See Pozen, supra* note 21, at 267. As Pozen explains, the “depth” of a secret depends on how many people know of the secret, whether those people are spread across multiple institutions or branches of government, how much they know, and how quickly they find out. *See id.*

71. *See, e.g.,* AM. CIVIL LIBERTIES UNION, *supra* note 64, at 32.

72. Peter Shane makes a similar point, arguing that the lack of scrutiny that results from secrecy can lead to poor decision making, particularly with respect to advice from Executive Branch lawyers. Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SEC. L. & POL’Y 507, 508 (2012).

73. *See, e.g.,* Sean Gallagher, *You May Already Be a Winner in NSA’s “Three-Degrees” Surveillance Sweepstakes!*, ARS TECHNICA (July 18, 2013, 4:00 PM), <http://arstechnica.com/information-technology/2013/07/you-may-already-be-a-winner-in-nas-three-degrees-surveillance-sweepstakes> [<https://perma.cc/8QX5-EFRM>].

74. *See, e.g.,* Declaration of Professor Edward W. Felten ¶ 24, *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (ECF No. 27); Matt Blaze, Opinion, *Phew, NSA Is Just Collecting Metadata. (You Should Still Worry)*, WIRED (June 19, 2013, 9:30 AM), <http://www.wired.com/2013/06/phew-it-was-just-metadata-not-think-again> [<https://perma.cc/WC2E-F7QC>]; Matthew Harwood, *My Life in Circles: Why Metadata Is Incredibly Intimate*, ACLU (July 29, 2013, 3:19 PM), <https://www.aclu.org/blog/technology-and-liberty-national-security/my-life-circles-why-metadata-incredibly-intimate> [<https://perma.cc/K7Z5-HA5V>]; Mike Masnick, *Anyone Brushing Off NSA Surveillance Because It’s ‘Just Metadata’ Doesn’t Know What Metadata Is*, TECHDIRT (July 8, 2013, 11:24 AM), <https://www.techdirt.com/articles/20130708/01453123733/anyone-brushing-off-nsa-surveillance-because-its-just-metadata-doesnt-know-what-metadata-is.shtm> [<https://perma.cc/MS6L-DUXU>]; Kurt Opsahl, *Why Metadata*

Lawyers, for their part, quickly began raising Fourth Amendment concerns that the FISC had apparently never considered. For instance, they pointed out that in the Supreme Court's 2012 decision in *United States v. Jones*,<sup>75</sup> five concurring Justices joined opinions suggesting that Fourth Amendment protections might be triggered by certain kinds of pervasive data collection about individuals even if smaller scale collection of the same type of information would raise no constitutional concerns.<sup>76</sup>

In response to this input from outside experts, the Obama Administration announced significant reforms to the section 215 program,<sup>77</sup> Congress passed legislation to narrow the law and improve it,<sup>78</sup> and one circuit court held that the program—as it had been run pre-Snowden—was illegal.<sup>79</sup> None of this progress would have been possible had the secret interpretation of section 215 remained hidden from the public.

In short, secret law short-circuits ordinary democratic checks on lawmaking. In practice, this means that public pressure that would otherwise lead to changes and improvements in the law will be absent or misdirected. In extreme cases—particularly where the public does not even know about the existence of the law or where Congress is kept in the dark—secret lawmaking can amount to a kind of oligarchy: lawmaking entrusted to an elite few who need not be concerned about the public's views regarding the governing rules they enact.<sup>80</sup>

### 3. Undermining the Separation of Powers

Secret law also interferes with the ability of the branches of government to play their respective roles in a system of checked powers. Most notably, where the law is secret, Congress's ability to exercise its oversight responsibilities with respect to the Executive Branch are greatly diminished, and the courts will often be cut out of the equation completely because no litigant will be able to bring a

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*Matters*, EFF DEEPLINKS BLOG (June 7, 2013), <https://www.eff.org/deeplinks/2013/06/why-metadata-matters> [<https://perma.cc/6VTY-ZTKF>].

75. 565 U.S. 400 (2012).

76. See, e.g., Randy E. Barnett & Jim Harper, *Why NSA's Bulk Data Seizures Are Illegal and Unconstitutional*, FEDERALIST SOC'Y (Oct. 21, 2013), <http://www.fed-soc.org/publications/detail/why-nsas-bulk-data-seizures-are-illegal-and-unconstitutional> [<https://perma.cc/XRU7-AQZN>] (explaining *United States v. Jones* undermined the constitutional basis for the section 215 program in a number of ways); Jonathan Hafetz, *Bulk Data Collection and the Mosaic Theory: A More Balanced Approach to Information*, JUST SECURITY (Jan. 17, 2014, 9:00 AM), <http://justsecurity.org/5758/guest-post-bulk-data-collection-mosaic-theory> [<https://perma.cc/857J-JK8N>].

77. See Press Release, Office of the Press Sec'y., Statement by the President on the Section 215 Bulk Metadata Program (Mar. 27, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/03/27/statement-president-section-215-bulk-metadata-program> [<https://perma.cc/9FY7-TXPP>].

78. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

79. See *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015).

80. Legal philosopher Christopher Kutz makes a similar point regarding the illegitimacy of secret law: "[S]ecret law deprives the governor of his legitimacy, undermining his right to rule. This is because the claim to rule is a claim founded in law—not as a matter of constitutional pedigree, but as a distinctive form of governance, with aspirations beyond mere thuggish control." Christopher Kutz, *Secret Law and the Value of Publicity*, 22 *RATIO JURIS* 197, 212 (2009).

justiciable case. Secrecy thus undermines external checks on the conduct of the Executive Branch in the national security sphere, which, in turn, limits opportunities for external reinforcement of internal constraints within the Executive Branch.<sup>81</sup> I explain and illustrate each problem in turn.

Both of the principal functions of Congress—to make laws and oversee their implementation by the Executive—are impeded when the law is kept secret from the public. The most obvious problems occur when the law is not only kept from the public, but is only shared with a few select members of Congress. Members of Congress are hamstrung when they are not permitted to freely share information with all of their colleagues or the public: they cannot hold public hearings, they cannot issue public subpoenas, and they cannot make speeches because all of these activities would involve disseminating classified information.<sup>82</sup> Instead, members of Congress are relegated to working an inside game, attempting to expand the circle of legislators privy to the secret law in hopes of rallying efforts to engage in effective oversight or legislative efforts.<sup>83</sup>

But even when every member of Congress has access to a secret law, Congress's ability to discharge its oversight and legislative functions will be greatly diminished for a number of reasons. Where the law is secret, it is extraordinarily difficult to mount a legislative campaign to amend the law.<sup>84</sup> It is particularly difficult to muster legislative support, often in the face of executive opposition, to fix a problem that the public does not even know about. There are few rewards for a member of Congress to support such an initiative. Members with strong principled objections to the secret law may propose amendments, but in the absence of any public pressure to act others will prefer to abide the status quo.

These difficulties are compounded by the strict restrictions members of Congress face in reviewing, discussing, and sharing classified information. It appears that congressional access to secret law is typically accomplished by an opt-in system: members must go out of their way to review the secret materials

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81. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–47 (2009) (arguing that external checks and balances reinforce internal constraints on executive power).

82. See generally Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008).

83. As Professor Heidi Kitrosser has detailed, the rules governing the handling of classified information in Congress do not give individual members of Congress the power to decide to disclose information to colleagues. Instead, decisions about disseminating such information are entrusted to the Executive, or else put to a vote of the relevant committees. See *id.* at 1080. Each house reserves the right to make classified information public upon a majority vote of an entire house, but it does not appear that this mechanism has been invoked even once. See *id.* at 1081–83; see also DENIS McDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 27 (2006), <https://cdn.americanprogress.org/wp-content/uploads/kf/nomereoversight.pdf> [<https://perma.cc/C6GX-SNR2>].

84. See *supra* notes 59–71 and accompanying text (discussing the failed legislative campaign to reform section 215 of the USA PATRIOT Act prior to the Snowden disclosures about how broadly that provision had been interpreted).

in a specified secure facility after undertaking the necessary oaths and other formalities.<sup>85</sup> Thus, many of one's colleagues in Congress may not even be "read in" to the secret law. Still worse, expert staff members and legal counsel may not be cleared to see the information, severely hampering all but the most diligent and expert members of Congress.<sup>86</sup>

The result of all these restrictions is that any congressional deliberation will be stilted and cumbersome. And even if, despite these restrictions, there is a movement within Congress to conduct oversight, it can happen only in closed sessions, which are much less effective than open sessions precisely because they lack the power to focus public attention on an issue and trigger outside groups to engage with it.

The example of section 215 illustrates all of these difficulties. By the time the PATRIOT Act was scheduled to sunset in 2011, the DOJ appeared to have made available to members of Congress its secret interpretation of the law, which had by then been endorsed by the FISC. But few members of Congress learned that the law was in fact being interpreted to permit bulk collection of essentially *all* domestic telephone records because this information was strictly controlled and restricted.<sup>87</sup> Indeed, one of the original sponsors of the PATRIOT Act, Representative Jim Sensenbrenner, has since related that he would not have voted to reauthorize the law in 2011 had he known how it was being applied.<sup>88</sup>

Secrecy also stymied the small handful of legislators who began sounding the alarm about section 215 early. One senator went so far as to propose amendments that would have required disclosure of significant secret interpretations of section 215.<sup>89</sup> But those senators were unable to make a proper public case for their amendment. Instead, to avoid divulging classified law, they were forced to resort only to ambiguous hypotheticals about how the current law might permit abuses.<sup>90</sup> Unsurprisingly, relatively few members of Congress were moved to vote in favor of the proposed amendments.<sup>91</sup>

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85. See FREDERICK M. KAISER, CONG. RESEARCH SERV., RS20748, PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 1–3 (2011) (describing restrictions on access to classified information by members of Congress).

86. See Andrea Peterson, *Obama Says NSA Has Plenty of Congressional Oversight. But One Congressman Says It's a Farce*, WASH. POST (Oct. 9, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/09/obama-says-nsa-has-plenty-of-congressional-oversight-but-one-congressman-says-its-a-farce> [https://perma.cc/64BE-8X2K] ("[Rep.] Amash also noted that the release he had to sign to view classified documents prohibited him from discussing them with anyone—including other members of Congress who all have clearance to discuss them.").

87. See *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 820 (2d Cir. 2015).

88. See *id.*; Jim Sensenbrenner, Opinion, *How Obama Has Abused the Patriot Act*, L.A. TIMES (Aug. 19, 2013), <http://articles.latimes.com/2013/aug/19/opinion/la-oe-sensenbrenner-data-patriot-act-obama-20130819> [https://perma.cc/M4XQ-VRYB].

89. See 158 CONG. REC. S8,397–98 (daily ed. Dec. 27, 2012) (statement of Sen. Merkley).

90. See 158 CONG. REC. S8,398–407 (daily ed. Dec. 27, 2012); Declan McCullagh, *Patriot Act Renewed Despite Warnings of 'Secret' Law*, CNET (May 28, 2011, 6:08 AM PDT), <http://www.cnet.com/news/patriot-act-renewed-despite-warnings-of-secret-law> [https://perma.cc/KE33-N75K].

91. 158 CONG. REC. S8,427–28 (daily ed. Dec. 27, 2012) (recording votes on Senate Amendment 3435 regarding public disclosure of significant FISC opinions, which failed 37–54).

By contrast, once the secret interpretations of section 215 were made public by Snowden—and members of Congress were made to feel the weight of public opinion—similar amendments were passed into law with a bipartisan majority.<sup>92</sup> Until the secret law of section 215 became public, Congress was unable to act as an effective check on the Executive Branch; once the law was public, Congress was able to discharge its role.

Secret law also impedes the ability of the *courts* to function as an independent check on the lawfulness of executive action. It does so for a simple reason: if the law governing a program is secret, it will often be impossible to develop cases to challenge the program. Even when lawyers do manage to bring cases to court, secret law creates numerous obstacles to obtaining a decision on the merits.

This was illustrated most starkly by *Clapper v. Amnesty International USA*, in which a group of lawyers, journalists, and human rights researchers brought suit to challenge foreign electronic surveillance under the FISA Amendments Act because the law forced them to take costly measures to avoid the likelihood that their confidential communications would be intercepted.<sup>93</sup> The Supreme Court dismissed the case for lack of standing because the plaintiffs did not know to a certainty that their communications had been surveilled, and so, in the Court's view, could not prove an injury sufficient to establish their standing.<sup>94</sup>

Even in cases where plaintiffs can establish standing, the state secrets privilege will often stand as an obstacle to adjudication.<sup>95</sup> For instance, in response to a lawsuit challenging the legality of the planned targeted killing of a citizen, the government argued that the case could not be litigated because essential facts about the program—including the detailed legal rationale<sup>96</sup>—were state secrets. Although that case was ultimately dismissed on other grounds (the political question doctrine and standing), the state secrets privilege stood as an additional obstacle to adjudication had those two grounds been overcome.<sup>97</sup>

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92. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

93. 568 U.S. 398, 401–02 (2013).

94. *Id.*

95. See generally Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PENN. L. REV. 77 (2010) (documenting how the state secrets privilege has evolved from an evidentiary privilege into a tool to prevent cases from proceeding to the merits).

96. See Public Declaration and Assertion of Military and State Secrets Privilege by Robert M. Gates, Secretary of Defense ¶ 5(B), *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), ECF No. 15-5 (asserting state secrets privilege over “criteria or procedures DoD may utilize in connection with such military operations”); Declaration and Formal Claim of State Secrets Privilege and Statutory Privileges by Leon E. Panetta, Director, Central Intelligence Agency ¶ 3, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), ECF No. 15-6.

97. See *Al-Aulaqi*, 727 F. Supp. at 53. Steve Vladeck and Andy Wright question whether greater transparency would lead to better oversight given the myriad obstacles that have been placed in the way of plaintiffs seeking to challenge national security programs. See Steve Vladeck & Andy Wright, *Why (Some) Secrecy is Good for Civil Liberties*, JUST SECURITY (July 25, 2014, 8:18 AM), <http://justsecurity.org/13189/secrecy-civil-liberties> [<https://perma.cc/94JN-KHH8>]. But secrecy stands as an additional obstacle, and would often preclude litigation even if other threshold obstacles were eliminated.

To be sure, that a law is secret does not always preclude a court's involvement, but it does mean that certain aspects of the adjudication will almost always be conducted in secret, usually *ex parte*, with participation only by the government. This has been the typical practice in the FISC.<sup>98</sup> But ordinary Article III courts have contemplated secret procedures, too.<sup>99</sup> Adjudication in such circumstances is fraught with familiar practical difficulties that are only heightened in the national security context: courts operating *ex parte* cannot have full adversarial argument or benefit from helpful public scrutiny and expert participation.<sup>100</sup>

I do not mean to argue here that there can be *no* checks and balances where the law is secret. At least where the law is not a “deep secret”—in other words, the existence of a law is not itself secret, utterly unknown to coordinate branches of government<sup>101</sup>—there may be opportunities for some interbranch contestation outside of public view.<sup>102</sup> But, as I have argued, such external constraints will be severely compromised when public scrutiny is cut out of the equation.

Moreover, a number of scholars have argued that checks and balances *internal* to the Executive Branch can serve as constraints on the exercise of executive power.<sup>103</sup> There are difficult questions about whether internal adminis-

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98. See FISA Ct. R. P. 7(j), <http://www.fisc.uscourts.gov/sites/default/files/FISC%20Rules%20of%20Procedure.pdf> [<https://perma.cc/5P6D-GHKD>]; Ben Cook, Note, *The New FISA Court Amicus Should Be Able To Ignore Its Congressionally Imposed Duty*, 66 AM. U. L. REV. 539, 551–65 (2016) (detailing the limited role of adversarial proceedings in the FISC and the evolution thereof).

99. See, e.g., *Latif v. Holder*, 28 F. Supp. 3d 1134, 1142 (D. Or. 2014) (“The government may provide to the court *ex parte* and *in camera* information that is part of the administrative record and that the government has determined is classified, Sensitive Security Information, law-enforcement investigative information, and/or information otherwise privileged or protected from disclosure by statute or regulation.”).

100. Cf. *Abourezk v. Reagan*, 785 F.2d 1043, 1060–61 (D.C. Cir. 1986) (“The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts.”).

101. The term “deep secrets” is drawn from David Pozen, who explores the nature and consequences of secrets that are so deep that their existence is a tightly held secret known only to a small group of officials. See Pozen, *supra* note 21, at 257, 260–65. Pozen’s notion of a deep secret in turn draws on the work of Kim Lane Scheppele. See *id.* at 262; see also KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 21–22, 75–79, 84–85 (1988).

102. See *infra* notes 159–62 and accompanying text.

103. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (encouraging debate within the Executive Branch as a means of internal checks and balances); M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal’s Internal Separation of Powers*, 116 YALE L.J. POCKET PART 125 (2006), <http://yalelawjournal.org/forum/can-process-cure-substance-a-response-to-neal-katyal>8217s-a8220internal-separation-of-powersa8221 [<http://perma.cc/7BBD-8DDL>] (discussing internal dissent within the Executive Branch that led to substantive policy reform); Metzger, *supra* note 81 (discussing the efficacy of internal and external checks and balances); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) (explaining the impact of internal checks on the modern state of separation of powers). See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (discussing the effects of internal checks, among other things, on executive action in the aftermath of 9/11).

trative constraints can effectively replicate interbranch contestation, particularly in the face of determined presidential action in the national security context.<sup>104</sup> But even setting aside those general concerns, internal checks on executive power are less likely to have bite when it comes to secret law. As Gillian Metzger has argued, internal constraints within the administration depend on external constraints for their vitality.<sup>105</sup> Officials within the Executive Branch—particularly those charged with developing rules and legal interpretations—will act more carefully and deliberately when they know that the public and other branches of government are likely to check their work.<sup>106</sup> Where the Government adopts rules not made public, external constraints will be weakened and internal constraints will likewise suffer.

#### B. THE REASONS FOR SECRET LAW

Although secret law poses serious threats to principles of individual liberty, democracy, accountability, and checks and balances, the government has nevertheless argued vigorously for the importance of keeping various laws secret. It is necessary to take seriously the reasons that motivate the practice of secret law. Four key rationales have been offered: maintaining the secrecy of a government program, avoiding circumvention of a government program, protecting a government program from being dismantled by misguided public opinion, and protecting the ability of government to freely deliberate in private. I discuss each in turn.

##### 1. Keeping Secret Programs Secret

First and foremost, secret law has been justified by appeal to the need to keep certain government activities secret. The concern is that disclosure of the rules that regulate a government activity will tend to reveal details about the program itself, so that if there is good reason to keep the latter secret then the former must be kept secret, too. Courts have endorsed this rationale, holding that legal rules governing a classified program may be properly withheld on the grounds that the rules themselves would reveal information—such as intelligence methods—protected by statute.<sup>107</sup>

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104. See, e.g., Magill, *supra* note 103; Metzger, *supra* note 81, at 441–42.

105. See Metzger, *supra* note 81, at 442–47.

106. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1596–600 (2007) (“Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the administration’s policy preferences is transparency in the specific legal advice that informs executive action, as well as in the general governing processes and standards.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 703, 749–51 (2005) (“The more the public understands what is at stake in executive constitutionalism, the more pressure it can bring to bear on the executive to do it fully and well.”).

107. See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, 584 F. Supp. 2d 65, 71, 73–74 (D.D.C. 2008) (explaining government may withhold legal opinions regarding Presidential Surveillance Program, even though program was no longer in operation, because to do otherwise would reveal classified information about methods of intelligence gathering); see also *infra* notes 240–43 and



This argument may have significant force where it applies, but on close inspection it applies much more narrowly than it might appear. This is for three reasons. First, the fact that a secret law relates to a secret program does not imply that disclosure of the secret rules would disclose the sensitive parts of the program. For instance, in the foreign surveillance context pre-Snowden, the government consistently refused to disclose the rules that governed how it must treat the communications of U.S. persons collected in the course of targeting foreigners.<sup>108</sup> But keeping such rules—known as “minimization” rules—secret did not serve to protect the secrecy of the surveillance capabilities or activities of the government, but mostly to obscure the protections afforded to U.S. persons caught up in such collection activities.<sup>109</sup> It was therefore arguably unnecessary to keep the minimization rules secret to protect the sensitive aspects of the program.<sup>110</sup> Prompted by the Snowden disclosures, the government has now released the rules with certain redactions.

Second, laws relating to a secret program typically reveal sensitive information about the program only if the laws are highly specific and granular. More general statements of law can often be disclosed without revealing secret operational details.<sup>111</sup> The example of foreign surveillance again offers a useful illustration. Merely disclosing the government’s interpretation of the surveillance authorities need not reveal any operational details about the capacities of the agency to intercept or analyze information or about who is targeted, how they are targeted, or how often. Disclosure of laws at this intermediate level of granularity need only reveal the permissible scope of collection. It is only when one steps down a level of granularity—to, say, determinations about the lawfulness of targeting a specific group of individuals or rules governing how to deploy or install particular collection tools—that disclosing government rules

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accompanying text (collecting cases where the courts have permitted law to be withheld in response to FOIA requests).

108. These minimization rules were first made public by *The Guardian* as a result of the Snowden disclosures. See Glenn Greenwald & James Ball, *The Top Secret Rules That Allow NSA to Use U.S. Data Without a Warrant*, *GUARDIAN* (June 20, 2013, 6:59 PM), <https://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant> [<https://perma.cc/T548-PF9W>]. The government subsequently declassified and released the minimization rules. See Press Release, James R. Clapper, *supra* note 12.

109. The government previously withheld the minimization rules as classified on the grounds that their disclosure would reveal intelligence sources, methods, and capabilities that are properly secret. See *Am. Civil Liberties Union v. Office of Dir. of Nat’l Intelligence*, No. 10-cv-4419, 2012 WL 1117114, at \*1 (S.D.N.Y. Mar. 30, 2012) (upholding agency determination to withhold records under Exemption 1). Although these minimization rules relate to intelligence collection, they do not reveal anything about those intelligence activities per se—for example, who is being targeted, what kinds of communications the government is able to access, how the government collects the information, or how much information is collected. Instead, the minimization rules disclose only what the government may do with U.S. persons’ information *after* it has been acquired.

110. One might make the argument that disclosing the limits on how the government may use information it has collected about U.S. persons could permit a nefarious actor to game those rules to its advantage. This concern—that disclosure of the rules could permit circumvention of government efforts—is discussed in the next section. See *infra* Section II.B.2.

111. See *infra* Section III.C (discussing varying granularity of secret laws).

reveals operational details. These more granular directives threaten to disclose operational details that might legitimately require secrecy. By contrast, the less granular law merely describes the legal limits within which the intelligence agencies operate and discloses far less sensitive information about the government's activities.<sup>112</sup>

Finally, the argument that law must be secret to keep government activities secret only works if the activities in question are, in fact, secret. If it is public knowledge that the government engages in a given practice, withholding the law governing that practice does not serve the stated purpose. The government's previously secret rules regarding targeted killing offer an illustration. The government argued for years that its authoritative legal opinions on the issue could not be disclosed because they were properly classified.<sup>113</sup> All the while, that the United States engaged in targeted killings was a secret to nobody. Indeed, government officials were willing to discuss the program and particular killings both on and off the record.<sup>114</sup> In these circumstances, keeping the detailed legal rationale secret did not serve any interest in keeping the underlying activity secret.<sup>115</sup> Instead, the government's insistence on secrecy appeared to be motivated by a desire to preserve its ability to resist further disclosure in court—or, more charitably, to preserve the fiction that the United States was not behind the targeted killings because official acknowledgment would put foreign governments that acquiesced in the strikes in an awkward position. But these rationales neither required nor justified keeping the law itself a secret.<sup>116</sup>

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112. In the wake of the Snowden disclosures, the government has responded by disclosing previously secret law that precisely straddles these levels of granularity. *See, e.g.*, Memorandum Opinion, No. [REDACTED], at 29–30 (FISA Ct. Oct. 3, 2011) (Bates, J.) (disclosing details about the legal scope of permissible surveillance while redacting information about who is targeted, among other operational details); Press Release, Shawn Turner, Dir. of Pub. Affairs, Office of the Dir. of Nat'l Intelligence, DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA) (Aug. 21, 2013), <http://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents> [<https://perma.cc/7EN7-72HY>] (officially disclosing the opinion above).

113. *See* Am. Civil Liberties Union v. Central Intelligence Agency, 109 F. Supp. 3d 220, 225 (D.D.C. 2015), *aff'd sub nom.* Am. Civil Liberties Union v. U.S. Dep't of Justice, 640 F. App'x 9, 11–12 (D.C. Cir. 2016) (per curiam) (permitting the government to continue to withhold certain legal memoranda regarding drone strikes nearly six years after litigation seeking disclosure commenced).

114. *See* Cora Currier, *How the Gov't Talks About a Drone Program It Won't Acknowledge Exists*, PROPUBLICA (Sept. 13, 2012, 12:14 PM), <https://www.propublica.org/article/how-the-govt-talks-about-a-drone-program-it-wont-acknowledge> [<https://perma.cc/BQC7-5SZ2>]; Lena Groeger & Cora Currier, *Stacking Up the Administration's Drone Claims*, PROPUBLICA (Sept. 13, 2012, 1:15 PM), <http://projects.propublica.org/graphics/cia-drones-strikes> [<https://perma.cc/TYE4-V9DA>] (collecting hundreds of public statements by government officials regarding drone strikes).

115. *Cf.* N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 113–15 (2d Cir. 2014) (holding the cumulative effect of official government statements regarding targeted killings waived claims to secrecy over a particular OLC memo).

116. *See* Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, LAWFARE (Oct. 3, 2011, 7:45 AM), <http://www.lawfareblog.com/2011/10/release-the-al-aulaqi-olc-opinion-or-its-reasoning> [<https://perma.cc/C3RX-UXQ4>].

For these three reasons, the notion that law must be kept secret to protect secret operations can be overblown. There may still be circumstances where the argument is sound; these constitute the hard cases, and I discuss how to deal with them in the next few Parts.

## 2. Secrecy to Prevent Circumvention or Increase Effectiveness

Closely related to the first rationale for secret law—keeping programs secret—is the notion that secret law is justified to avoid circumvention by bad actors<sup>117</sup> or because disclosure of the secret rules would make the government program less effective.<sup>118</sup> Paradigm examples of such laws include internal protocols used by prosecutors in deciding whether to bring charges and internal guidance about how the IRS decides who to audit. In both instances, the concern is that a person who knows the rules by which the government plays could use that knowledge to evade investigation or prosecution to the detriment of the public's interest in enforcing the law. Similar concerns motivate the secrecy of rules governing the conduct of many national security programs, including surveillance<sup>119</sup> and other national security investigatory techniques,<sup>120</sup> watchlisting,<sup>121</sup> and targeted killing.<sup>122</sup> Where the government operates according to detailed rules that could conceivably be avoided by a bad actor to the detriment of the government's objective, there may be an interest in keeping the rules secret.

The concern may be real, but the argument that it can justify secret law proves too much. In any given area of governmental activity, disclosing the applicable rules might create some opportunity for circumvention or at least impede the effectiveness of the government's efforts. But this alone cannot justify keeping the law secret. For instance, disclosing a police department's use of force policy could conceivably lead bad actors to take measures to evade authorities without having force used against them. Yet nearly every law

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117. See Brian H. Bix, *Secrecy and the Nature of Law* 5–6 (Oct. 21, 2013) (unpublished manuscript), <https://www.law.upenn.edu/live/files/2418-bixsecrecy-and-the-nature-of-law-full> [<https://perma.cc/9NZL-EMTF>].

118. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 511 F. Supp. 2d 56, 69 (D.D.C. 2007) (quoting declaration of then-OLC director Steven Bradbury) (crediting government's contention that disclosing legal opinions regarding the terms of the warrantless wiretapping program authorized by President Bush "would compromise the effectiveness of the Program to the detriment of national security" (internal quotations and citation omitted)).

119. See *id.*

120. See Memorandum of Law in Opposition to Plaintiff's Motion to Lift the Nondisclosure Requirement as to the Attachment to the National Security Letter at 5–6, *Doe v. Holder*, 703 F. Supp. 2d 313 (S.D.N.Y. 2010) (arguing that permitting disclosure of the types of information the FBI can seek pursuant to a national security letter would impede effectiveness of national security investigations).

121. Cf. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1154 (D. Or. 2014).

122. See Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 56, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469).

enforcement organization in the country discloses such policies.<sup>123</sup> To take another example, disclosing that customs officers at the border are authorized to copy the contents of hard drives at will may lead bad actors to avoid carrying laptops across the border. But the government cannot seek to avoid such circumvention by keeping this legal authority secret.<sup>124</sup>

Whether and when the anti-circumvention rationale can justify secrecy regarding the scope of the government's authority is a question I hope to explore more fully in further work. But at a minimum, the anti-circumvention rationale will only have bite if the government activity in question is particularly liable to circumvention and if the harms of circumvention go beyond merely making the government's investigatory or other functions incrementally more difficult and instead somehow undermine its ability to carry out a legitimate function at all. It must also be the case that knowing the secret laws in question would, in fact, facilitate circumvention. This will more likely be the case where the secret law in question is disclosed in granular detail.

With respect to use of force policies and border searches, none of these criteria weigh in favor of secrecy. The calculus may be different for other programs. But this determination is essentially case-by-case, and the strength of the anti-circumvention rationale will vary accordingly.

In short, arguments that arise from the mere possibility of circumvention alone say little about the nature of the harms that may result from disclosure. And even where there are legitimate concerns regarding circumvention, it remains necessary to weigh the benefits of preventing circumvention against the significant costs of keeping the government's internal decision rules secret.<sup>125</sup>

### 3. Paternalistic Lawmaking

Philosopher Duncan MacIntosh has argued that law may be kept secret not just to prevent bad actors from subverting it, but also to prevent a well-intentioned but misguided public from "destroying" laws that are, in fact, in the public's interest, even if unpopular.<sup>126</sup> This is a concededly paternalistic argument, resting on the presumption that elite insiders understand better than the public itself what is in the public's interest. The argument is so discordant with

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123. See *Use of Force Policy Database*, POLICE USE OF FORCE PROJECT, <http://useofforceproject.org/database> [<https://perma.cc/9X5C-FFM7>] (compiling use of force policies for the 100 largest U.S. city policy departments).

124. Indeed, several courts have adjudicated whether border searches are legal and, in the process, they have established public legal rules governing such searches. See, e.g., *United States v. Arnold*, 533 F.3d 1003, 1008–10 (9th Cir. 2008) (setting out Fourth Amendment standards that generally permit suspicionless searches of a laptop at the border, with two narrow exceptions); *United States v. Ickes*, 393 F.3d 501, 505–06 (4th Cir. 2005) (holding that border searches can be conducted without suspicion).

125. See Dan-Cohen, *supra* note 27, at 665–67, 673–74 (explaining that the legitimacy of transmitting internal government rules hidden from public view requires "evaluating competing substantive moral considerations").

126. See Duncan MacIntosh, *Logically Private Laws 2* (Oct. 25, 2013) (unpublished manuscript), <https://www.law.upenn.edu/live/files/2453-macintoshlogically-private-laws-full> [<https://perma.cc/H6J8-5DDR>].

common democratic assumptions that it has rarely been publicly advanced by the government,<sup>127</sup> but it nevertheless may underlie efforts to keep the law secret. Particularly in areas like national security, where the government has special access to information about the nature of the problems, a unique responsibility to address them, and a special expertise and capacity to deal with them, there may be a great temptation—perhaps even a sense of obligation—for government officials to pursue their vision of the public interest even if they understand that it would meet a tempest of political opposition if it became public. But the dangers of such a course are obvious. Who gets to decide whether, in a particular case, the paternalistic judgments of insiders can override the likely will of the people? And what are the limits on such undemocratic exercises of authority?

Some have defended a vision of the Executive Branch in which officials simply exercise power as they deem necessary in times of emergency, unconstrained by rules or laws.<sup>128</sup> This “Schmittian” view of administrative governance is one of essentially unfettered executive discretion.<sup>129</sup> But on this vision—whatever its merits—the problem is not that the law governing the Executive is being kept secret; it is that there is no law at all. The kind of paternalism demanded by a Schmittian Executive is paternalism not about what rules should guide government, but about what a government unconstrained by rules should do.

The problem of secret law, by contrast, only arises where the government has chosen to bind itself to rules or is forced to do so by coordinate branches of government or other forces. And, as it stands, the contemporary national security state is not devoid of rules at all. The examples of surveillance, targeted killings, and watchlisting make the point: Each program is regulated by detailed internal guidance, legal opinions, and directives. Given that these laws exist, the question is whether officials may keep them secret on the basis that those officials would prefer to shield them from encountering a public they expect would be hostile.

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127. A version of the argument has sometimes been invoked to justify keeping certain judicial decisions secret. The idea is that a redacted (or summarized) judicial decision adjudicating mostly classified subject matter is more likely to confuse the public than illuminate it. *See, e.g., In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13–02, 2014 WL 5442058, at \*5 (FISA Ct. Aug. 7, 2014) (considering this argument but finding it inapplicable); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 495 (FISA Ct. 2007) (“The benefits from a partial release of declassified portions of the requested materials would be diminished, insofar as release with redactions may confuse or obscure, rather than illuminate, the decisions in question.”).

128. *See generally* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (arguing that contemporary administrative law contains various legal doctrines that create domains in which the Executive Branch is free from legal constraint).

129. *Compare id.* at 1108 (calling the Executive Branch’s power in times of crises “Schmittian” and suggesting the Executive will always find loopholes to act without constraint), *with* Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271 (2010) (explaining that loopholes giving the Executive Branch so much discretion could be closed without compromising an agency’s ability to respond in an emergency).

If evading public scrutiny for the sake of evading *negative* public scrutiny is an acceptable justification for keeping laws secret, we have travelled a significant way down the road away from the consent of the governed and meaningful democratic control of government. In any case, the premise of the argument—that the public would precipitously and irrationally strip the government of important powers—appears to be severely overblown. If anything, the lesson of the 9/11 era is that when controversial secret programs eventually become public, they will often be ratified and entrenched—perhaps with minor modifications—rather than eliminated.<sup>130</sup>

#### 4. Protecting Government Deliberations

Finally, the government has frequently argued that disclosure of some internal laws, particularly legal opinions, would impair the deliberative process of the government. Opening up such texts to public scrutiny could “chill the ability of the [E]xecutive [B]ranch to obtain legal advice,”<sup>131</sup> impede candor and internal debate, and ultimately threaten the quality of government decisions.<sup>132</sup>

Questions about whether internal law should be protected by deliberative process have been explored most thoroughly with respect to the opinions of the OLC.<sup>133</sup> Such opinions are binding on the Executive Branch unless overruled

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130. Examples abound. Military Commissions established unilaterally by the President, struck down as unconstitutional in *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–95 (2006), were subsequently enacted by Congress. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, 42 U.S.C.). Revelations about warrantless spying carried out by the President and aided by telecommunications companies—all apparently in violation of FISA—were followed by an enactment ratifying the President’s surveillance activities and giving telecommunications companies retroactive immunity. See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007); EDWARD C. LIU, CONG. RESEARCH SERV., RL34600, RETROACTIVE IMMUNITY PROVIDED BY THE FISA AMENDMENTS ACT OF 2008 (2008); James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES (Aug. 6, 2007), <http://www.nytimes.com/2007/08/06/washington/06nsa.html> [<https://nyti.ms/2jBuhqu>]. One notable exception is the government’s practice of torture, which ceased part way through the Bush Administration and was subsequently repudiated by the Obama Administration. See S. SELECT COMM. ON INTELLIGENCE, *supra* note 58, at 15–16 (summarizing the demise of the Bush-era torture program); Exec. Order No. 13,491, 74 Fed. Reg. 4,893–96 (Jan. 22, 2009) (strictly limiting the interrogation techniques that may be used by U.S. agencies). More recently, however, President Trump has openly discussed bringing back torture, although the Administration has taken no formal public steps in that direction. See Adam Serwer, *Can Trump Bring Back Torture?*, ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-torture/514463> [<https://perma.cc/YL52-PRJH>]. Congress has now enacted legislative reforms regarding NSA bulk collection of domestic calling records, although many NSA surveillance programs remain untouched. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015); David Cole, *Reining in the NSA*, N.Y. REV. OF BOOKS (June 2, 2015, 3:40 PM), <http://www.nybooks.com/daily/2015/06/02/nsa-surveillance-congress-sunset> [<https://perma.cc/7YVN-9MH9>].

131. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice, 584 F. Supp. 2d 65, 76 (D.D.C. 2008).

132. See Memorandum in Support of Defendants’ Motion to Dismiss at 35–38, Citizens for Responsibility and Ethics in Wash. v. U.S. Dep’t of Justice, 164 F. Supp. 3d 145 (D.D.C. 2016) (No. 13-cv-1291).

133. In addition, the attorney–client privilege is sometimes invoked as a ground to keep authoritative legal opinions secret. This argument fails to appreciate the unique function of legal advice by certain

by the Attorney General or President, yet they are often unpublished.<sup>134</sup> Many former officials of the OLC have expressed the view that such opinions should presumptively be published, acknowledging that absent special circumstances, publishing such opinions would not harm the deliberative process of government and might, in fact, improve it.<sup>135</sup>

The concern for protecting the deliberative process of government seems misdirected in a fundamental way when the question is whether to disclose *law*—the rules and interpretations that government officials regard as binding. When one speaks of secret law, one is no longer in the realm of “deliberating” over policy, but rather establishing it or carrying it out. To be sure, some legal opinions may play an important role in deliberations over all manner of government policy, but it cannot harm the integrity of those deliberations to disclose their outcomes, including the legal positions and parameters accepted as authoritative.<sup>136</sup>

In this Part, I have examined the normative terrain on which battles about secret law are fought. I have surveyed the considerations that militate against secret law and also those that motivate its use. But this broad account of the normative concerns about secret law is perhaps too abstracted from the concrete details of any particular case to offer guidance as to whether secret law is justified. Accordingly, in the next Part, I identify five distinct and independent criteria against which a particular instance of secret law can be measured. Each of these criteria engages one or more of the broad normative considerations just offered. By paying attention to these more concrete measures, it is possible to

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government lawyers. Unlike an attorney advising a private client, legal opinions of Executive Branch lawyers can, if regarded as binding statements of law, actually *establish* the law that the government follows—not merely provide guidance about the law. See Brennan Ctr. for Justice v. U.S. Dep’t of Justice, 697 F.3d 184, 207–08 (2d Cir. 2012).

134. See Morrison, *supra* note 24, 1725.

135. See, e.g., *id.* at 1724–26 (arguing that publication of OLC opinions is desirable to permit meaningful checks and balances and to motivate OLC lawyers to write opinions that live up to the standards of the office); see also *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 186 (2008) (joint statement of David J. Barron, Walter E. Dellinger, Dawn E. Johnsen, Neil J. Kinkopf, Martin S. Lederman, Trevor W. Morrison, and Christopher H. Schroeder); *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 126–27 (2008) [hereinafter *Secret Law Hearing*] (statement of Dawn E. Johnsen); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 517 (1993); Setty, *supra* note 18, at 601–10. These authors—and OLC itself—have typically identified deliberative process concerns as obstacles to disclosure only in narrow circumstances and instead cite the need to protect classified information or circumvention of law enforcement as legitimate reasons for withholding. See, e.g., Morrison, *supra* note 24, at 1725; Memorandum from David J. Barron, Acting Assistant Attorney General, for Attorneys of the Office 5–6 (July 16, 2010).

136. In some instances, legal opinions are peppered with information that could reveal the deliberative process of the government. For instance, a legal opinion may include descriptions of rejected policy options, the views of various stakeholders, or the internal history of a given proposal. But the inclusion of such material cannot be grounds for keeping the *legal content* in an opinion secret; the solution is simply to redact the deliberative material. Even if redaction is not feasible, it will often be possible to prepare a legal summary divorced from sensitive facts.

identify what is truly in dispute in debates about the legitimacy of secret law and what might be done about it.

### III. EVALUATING SECRET LAWS

Too often, disputes about whether secret law is justified are pitched as a simple contest between the government's interests in secrecy and the public's desire for greater transparency. The dominant metaphor is the zero-sum game: less secrecy would come at the expense of an increase in risk to national security.<sup>137</sup> In some instances, the question may indeed come down to intractable value contests of this kind. But this picture is too simple. As demonstrated in the prior Part, there are multiple competing values at stake in debates over secret law. And, as I seek to show in this Part, whether any one of these competing norms is engaged depends on the extent to which the secret law displays certain characteristics. Specifically, I identify five key characteristics of secret laws that are particularly salient when assessing the merits of secrecy. In many cases, it will be possible to modulate these characteristics—say, by disclosing a more granular account of the secret rules without revealing operational details—in a way that better accommodates transparency values with little increase in national security risk.

Put simply, secret laws vary. And in what follows, I discuss five key attributes that characterize this variation. They are (1) the extent to which a secret law has external effects on members of the public, (2) the extent to which the content of the secret law is novel or unforeseeable in light of the publicly available laws on the books, (3) the level of granularity at which the content of the law is disclosed, (4) the likely duration of secrecy—in other words, whether the secret law will predictably become public within a certain time frame, and (5) the depth of the secret, or how broadly within and across branches of government a secret law's existence or its content have been disseminated. Each of these attributes can be understood as defining a continuum. By paying attention to where a given instance of secret law lies along these five axes, it may be possible to see ways of reducing the tension between normative commitments favoring transparency and those that press toward secrecy. At the very least, this way of disaggregating the problem of secret law should permit a more nuanced understanding of what is really at stake in any particular dispute about whether secret laws should be kept secret.

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137. See, e.g., David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SEC. L. & POL'Y 209, 273–75 (2014) (explaining, with respect to the Covert Action statute and FISA laws, that “it might be impossible, in many cases, to explain those [legal] interpretations [of the Covert Action statute] without revealing the most sensitive classified information” and that for years the Intelligence Community “concluded . . . that the legal interpretation [of FISA permitting bulk collection] was so embedded in its factual and operational context that revealing it would harm national security”).



## A. EXTERNAL EFFECTS

Disputes about secret law can turn on the extent to which the law in question affects the public, as contrasted with a law whose effects are solely internal to the government. Although mere housekeeping rules that structure internal government operations will rarely draw criticism when kept secret, internal rules that regulate how the government interacts with the public will often raise grave concerns.<sup>138</sup> Rules attaching penalties or other negative consequences to private conduct will be the most controversial.<sup>139</sup> Thus, disputes over secret law may turn on the degree to which the law in question affects the public. The greater and more direct the effects are on the public, the stronger the case against secrecy.

Isolating external effects as an important characteristic of secret law makes sense in light of the normative concerns, discussed above, that militate against secret law.<sup>140</sup> In particular, threats to individual liberty and democratic participation tend to grow in direct proportion to a secret law's effects on the public. This is because objections to secret law on the grounds of individual liberty are strongest where individuals are directly affected by exercises of state power according to secret rules. Likewise, democratic concerns are heightened where the public is prevented from having a meaningful say about rules that directly affect them.

This dynamic with respect to external effects can be neatly illustrated with an example from the context of targeted killings and drone strikes. The legal standards and procedures that set out when the government may engage in targeted killings are directed internally—to the officials who decide and ultimately carry out the targeted killing—but they also have momentous external effects because they set out the circumstances in which a person is liable to be killed without process.<sup>141</sup> Secrecy in this context arouses strong opposition. By contrast, the internal rules governing administrative aspects of the targeted killing program—for example, the rules governing maintenance and testing of remotely piloted aircraft used to carry out targeted killings<sup>142</sup>—typically have fewer, if any, effects outside the government. Even if the two sets of rules were equally hidden from the public, the targeting rules would provoke much more justifiable opposition than the maintenance rules. This is precisely because only

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138. Secret surveillance laws are a prime example of the latter type.

139. Examples of secret laws of this type include rules governing the No-Fly list and targeted killings.

140. *See supra* Section II.A.

141. *See* N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 124–51 (2d Cir. 2014) (Appendix A) (setting forth a redacted version of the OLC memo that provided the legal framework governing the targeting of a U.S. citizen in Yemen).

142. *See* Whitney Amstutz, *Reaper Maintainers Ensure ISR Mission Accomplishment*, U.S. AIR FORCE (Mar. 30, 2015), <http://www.af.mil/News/Article-Display/Article/581953/reaper-maintainers-ensure-isr-mission-accomplishment/>.

the former rules immediately affect the public and, therefore, directly engage anti-secrecy values of individual liberty and democratic oversight.

#### B. NOVELTY AND FORESEEABILITY

Another important dimension on which secret laws vary is the extent to which they depart from the law available to the public. Put another way, one might ask to what extent a member of the public with access only to the laws on the books could reasonably foresee the content of the rules or interpretations that the government has adopted in secret. Where secret rules depart aggressively from foreseeable interpretations, the public is kept in the dark about what the law is and—even more troubling—the public’s ability to rely on the published laws is undermined. By adopting aggressive or unforeseeable interpretations in secret, the government creates a smokescreen: the law on the books provides a false sense that the public knows what the rules are, what powers the government has, and what limits it must obey.

This mismatch between public expectations and secret reality about the content of the law powerfully engages anti-secrecy values of democratic participation because the public cannot meaningfully engage with secret laws whose content is unforeseeable. It also threatens individual liberty because the public is kept in the dark as to the scope and limits of government authority.

Three examples make these points. The revelations in 2005 about President Bush’s domestic warrantless surveillance program were so troubling because the President and the NSA had issued secret directives and rules that directly conflicted with the laws on the books.<sup>143</sup> The NSA was operating according to rules that nobody could have foreseen based on the public laws in question; in fact, it was operating in ways *specifically prohibited* by the public laws in question.<sup>144</sup> The mismatch is what made this instance of secret law so shocking.

The foreseeability problem of secret law was again at the core of the Snowden revelations about NSA surveillance. Before the disclosures, Senators Ron Wyden and Tom Udall had been sounding the alarm that surveillance laws had been interpreted, in secret, in ways that no outsider would recognize.<sup>145</sup> From the Snowden documents we learned that, indeed, the FISC had reinterpreted section 215 of the PATRIOT Act, which only authorized “production of [] tangible things” that are “relevant to an authorized investigation,”<sup>146</sup> to

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143. See *Secret Law Hearing*, *supra* note 135, at 124 (testimony of Dawn E. Johnsen) (noting the Bush Administration’s domestic surveillance program did not comply with the requirements of the FISA).

144. *In re Nat’l Sec. Agency Telecommc’ns. Records Litig.*, 700 F. Supp. 2d 1182, 1195–96 (N.D. Cal. 2010) (quoting H.R. REP. NO. 95-1283, pt. 1, at 21 (1978)), *aff’d in part, rev’d in part on other grounds sub nom.* Al-Haramain Islamic Found. v. Obama, 705 F.3d 845 (9th Cir. 2012).

145. See Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. TIMES (May 26, 2011), <http://www.nytimes.com/2011/05/27/us/27patriot.html> [<https://nyti.ms/2nx0ajy>].

146. See 50 U.S.C. § 1861(a)(1), (b)(2)(A) (2012).

permit mass collection of every American's telephone records.<sup>147</sup>

By contrast, where an agency issues secret interpretations that are merely reasonable and foreseeable interpretations of public rules, secret law may not be a concern at all. Thus, for instance, there would be little concern if a secret FBI rule permitted agents to use National Security Letters (NSLs) to obtain telephone calling records not just for traditional landlines but also for cellphones and VoIP phones; a member of the public reading the NSL statute—which authorizes demands for “toll billing records”<sup>148</sup>—would not be surprised to learn that the law covers calling records from all types of phones.

These examples illustrate the general point that secret law becomes more problematic—and more difficult to justify—in proportion to the degree by which it departs from public laws in ways unforeseeable to the public.

### C. GRANULARITY

Secret laws vary with respect to the level of granularity at which they have been described publicly. This constitutes a third dimension along which secret laws can be measured. At the least granular level are descriptions of the broad legal principles governing a national security program. For instance, a public statement that various surveillance activities “shall be conducted in a manner consistent with the [F]ourth [A]mendment to the Constitution of the United States” is an extremely general description of the applicable rules.<sup>149</sup> Such statements reveal little about the specific rules that govern, and so they permit little meaningful democratic participation or accountability regarding the substance of the law.

At the other end of the spectrum are the most detailed, granular rules for a particular program, including the detailed rules that frontline officials must follow when running a program, as well as any specific interpretations or exceptions to those rules. Disclosing such granular details will alleviate transparency concerns but is also more likely to reveal the kind of sensitive facts about secret programs that the government seeks to protect. It is in this terrain—between rules that are uselessly general and revealingly specific—that debates over secret law are typically waged. Indeed, many disagreements over the propriety of secret law are best understood as disputes about the level of granularity at which rules should be disclosed.

Take, again, the example of the NSL statute described briefly above.<sup>150</sup> The statute allows the FBI to order electronic service providers to turn over users' “electronic communication transactional records” without first obtaining authorization from a court.<sup>151</sup> But “electronic communication transactional records” is

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147. *See* *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 815–19 (2d Cir. 2015) (recounting the FISC's interpretation of section 215 and rejecting it as inconsistent with the PATRIOT Act).

148. 18 U.S.C. § 2709(b)(1) (2012).

149. 50 U.S.C. § 1881a(b)(5).

150. *See supra* note 148 and accompanying text.

151. 18 U.S.C. § 2709(a).

not defined in the statute or in any public rule. Without such disclosure, the public only has a general sense of what the statute allows. It is clear, for example, that it permits the FBI to obtain information like the “to,” “from,” and “date/time” headers in emails. But what about, say, location information collected by GPS-enabled phones?<sup>152</sup> Or a history of searches entered into Google? Or a history of websites visited? The FBI has resisted efforts to disclose how it interprets the provision, contending that doing so would reveal a law enforcement technique.<sup>153</sup> At least one court has pushed back against this secrecy and, as a result, we learned that the FBI had secretly interpreted “electronic communication transactional records” to encompass cell-site location information, which can be used to identify the location of a cell phone.<sup>154</sup>

This kind of disagreement is essentially one about the level of granularity at which internal rules and interpretations should be made public. Focusing on the degree of specificity permits a sharper articulation of the normative dispute between secrecy and transparency—in other words, whether disclosure of more granular details is warranted in light of the benefits to transparency values and any marginal risks of disclosure.

#### D. DURATION

A fourth important characteristic of secret laws is how long the public will be kept in the dark. Limiting the length of time a secret law will stay secret serves as a mechanism to modulate the tension with transparency values by setting an expiration date on secret law. At a minimum, a time limit can ensure that the determination of whether secrecy remains necessary will be revisited at regular intervals. These kinds of time limits ease concerns about the separation of powers and democratic oversight of secret law because they promise that such checks and balances will only be postponed, not eliminated.

Although, in theory, time limits on secrecy can serve as important limits on secret law, in practice they are a difficult solution. This is because a secrecy determination, once made, carries with it the considerable weight of inertia. If disclosure poses any conceivable risk, the status quo is likely to prevail. For this reason, expressions of a non-binding commitment to divulge secret law within a certain time period tend to founder.<sup>155</sup> On the other hand, statutory time limits

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152. See Jonathan Manes, *Online Service Providers and Surveillance Law Transparency*, 125 *YALE L.J.F.* 343, 350 (2016), [https://www.yalelawjournal.org/pdf/Manes\\_PDF\\_zarzsda.pdf](https://www.yalelawjournal.org/pdf/Manes_PDF_zarzsda.pdf) [<https://perma.cc/PH68-LDCQ>].

153. See *Doe v. Holder*, 703 F. Supp. 2d 313, 316 (S.D.N.Y. 2010).

154. See Decision and Order at 19, *Merrill v. Lynch*, No. 14-cv-9763 (S.D.N.Y. Aug. 28, 2015), <https://yale.app.box.com/v/nicholas-merrill-sdny-decision> [<https://perma.cc/94PS-EJ36>]. At the time this Article was being written, the Supreme Court was considering a case that could clarify the law that governs searches for cell-site location information, including whether the Fourth Amendment requires a warrant in order to obtain such information. See *Carpenter v. United States*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017).

155. The manner in which the law governing NSA surveillance was disclosed provides an example of this dynamic. For years prior to the Snowden disclosures, President Obama had signaled that he

and other decision-forcing mechanisms<sup>156</sup> can demand serious consideration about whether secrecy remains necessary, requiring officials to make a concerted effort if they wish to prolong the status quo.<sup>157</sup> The expected duration of a secret law thus depends, in part, on the nature of any time limits and how they are likely to be enforced.

#### E. DEPTH

Finally, some secret laws are more closely held than others. At the far end of the spectrum are laws that are “deep secrets”—instances where the existence of the law is closely held to a small group of similarly placed officials.<sup>158</sup> At the other end of the spectrum are laws that are widely shared across all three branches of government and perhaps also with certain security-cleared contractors or other individuals outside government.

Secret laws are often less problematic the shallower they are. The deepest secrets will be immune even from interbranch oversight, but shallower secrets may be amenable to certain checks and balances.<sup>159</sup> For instance, disclosing to Congress (or to at least some of its members)<sup>160</sup> the existence of a secret law

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wished to have a broader debate about the scope of intelligence activities. *See, e.g.*, Howard A. Schmidt, *Protecting Our Values and Cyberspace Together*, WHITE HOUSE BLOG (Dec. 16, 2011, 7:41 PM), <https://obamawhitehouse.archives.gov/blog/2011/12/16/protecting-our-values-and-cyberspace-together> [<https://perma.cc/L6N7-MLC3>]. But no disclosures or meaningful public debate were forthcoming. It was only after the Snowden leaks that the government began to declassify its legal opinions and directives. *See* Spencer Ackerman, *FISA Judge: Snowden's NSA Disclosures Triggered Important Spying Debate*, GUARDIAN (Sept. 13, 2013, 1:14 PM), <https://www.theguardian.com/world/2013/sep/13/edward-snowden-nsa-disclosures-judge> [<https://perma.cc/TG6N-LAWJ>].

156. An example of a decision-forcing mechanism is the requirement that prosecutors disclose to criminal defendants whether FISA surveillance was used to develop evidence in the government's case. *See* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants & The Right to Notice*, 54 SANTA CLARA L. REV. 843, 896–97 (2014).

157. *But see generally* Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777 (2013) (arguing that sunset provisions may not be effective at prompting reconsideration of national security policies).

158. *See* Pozen, *supra* note 21, at 267–75.

159. Pozen doubts that secret laws could ever remain particularly deep secrets, given that it is typically necessary to involve relatively large numbers of people within the Executive Branch to execute a law of any import. *See id.* at 274 n.51. The experience of the President's Surveillance Program illustrates these secrecy dynamics: at least for some length of time, the program was among the deepest secrets of government, known only to a handful of government officials. *See* PSP REPORT, *supra* note 1, at 14–15. As Pozen predicts, however, the program became a shallower secret as it grew, until it was ultimately disclosed to the public by *The New York Times* (and then partially confirmed by the President) approximately four years after it began. *See* Pozen, *supra* note 21, at 280–81; *see also* PSP REPORT, *supra* note 1, at 16–17, 29, 36.

160. According to statute and interbranch practice, the administration often reveals secret law only to a select few members of Congress. *See* Kitrosser, *supra* note 82, at 1054–58. This poses oversight problems of its own. *See id.* at 1068–69 (describing the difficulties of meaningful congressional oversight in this context). With respect to intelligence matters, the Covert Action statute permits the administration to disclose presidential findings only to the so-called “Gang of Eight,” comprising the most senior member of each party in the House and Senate and in the Intelligence Committees of each house. *See* 50 U.S.C. § 3093(c)(2) (2012). The administration has sometimes chosen to disclose secret laws to an even more limited subset of Congress. For instance, the first briefing regarding the

means that those members, in theory at least, can begin to agitate for greater transparency and oversight.<sup>161</sup> By contrast, where the law is known only to certain parts of the Executive Branch, there are no opportunities for external checks and balances and internal checks will be weakened.<sup>162</sup>

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In this Part, I have sought to define a systematic rubric that assists in determining whether secret law is acceptable in any given case, or at least to clarify what is in dispute in any given debate over secret law. In the next Part, I examine how these disputes are actually resolved in practice and when the law permits the Executive Branch to keep the law secret.

#### IV. THE LAW OF SECRET LAW

In this Part, I shift away from normative and evaluative terrain to describe how the practice of secret law is actually regulated. This is the “law of secret law”—the legal ecosystem that governs whether and when internal law can be kept secret from the public. This Part bridges the gap between the normative concerns I have already discussed and the reform proposals that follow. By examining how the practice of secret law is currently regulated, it will become obvious that the existing legal ecosystem sets an equilibrium that produces far too much secrecy. It will also become possible to envision a reform agenda that could shift the equilibrium away from secrecy.

The law of secret law consists of a diverse and untidy set of sources. There is no single constitutional provision or framework statute that enshrines a principle against secret law or prescribes exceptions to such a principle. Instead, there is a patchwork of statutes, constitutional provisions, judicial doctrines, and legislative–executive practices that together constitute the law of secret law. The sources of law include, notably, the Freedom of Information Act (applicable to records held by the Executive Branch, except the President and his close advisors),<sup>163</sup> the Federal Register Act (applicable to the President and other executive agencies),<sup>164</sup> the Due Process Clause’s guarantee of notice (applicable across branches),<sup>165</sup> the common law and First Amendment right of access to courts (applicable to judicial opinions),<sup>166</sup> court rules and practices regarding

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President’s warrantless surveillance program, in late October 2001, included only four members. *See* PSP REPORT, *supra* note 1, at 16. Some months thereafter, the chief judge of the FISC was briefed on the program. *Id.* at 17.

161. *See* Kitrosser, *supra* note 82, at 1069–70.

162. *See supra* notes 103–06 and accompanying text; *see also* Metzger, *supra* note 81, at 437–47 (arguing that external constraints reinforce internal checks within the Executive Branch and that internal constraints can, in turn, permit greater external checks and balances).

163. 5 U.S.C. § 552 (2012).

164. 44 U.S.C. §§ 1501–1511 (2012).

165. U.S. CONST. amend. V; *see* Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 171 (1972) (holding unconstitutional a statute that failed to provide notice of what conduct it prohibited).

166. U.S. CONST. amend. I; *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) (establishing First Amendment right of access to court proceedings); *Co. Doe v. Pub. Citizen*, 749 F.3d

the sealing of judicial opinions,<sup>167</sup> and the Presentment and Journal Clauses of the Constitution (applicable to Congress).<sup>168</sup> The law governing unauthorized leaks might also be regarded as part of the law of secret law insofar as leaks are a significant means by which secret laws come to light.<sup>169</sup>

Each of these sources of law regulates whether and when the law must be made public or may be kept secret. Where these sources of law permit exceptions to a disclosure obligation—or impose no disclosure obligation at all—there is space for the creation of secret law.

It is important to note that the boundaries between domains where the law must be made public and those where it may arguably be kept secret are often unclear or disputed. Determining where these boundaries lie is difficult when the scope—or even the existence—of certain pockets of secret law may remain unknown. In any case, I do not purport to provide a comprehensive statement of the law of secret law, but rather a synoptic view of the most important features of the legal ecosystem that regulates secret law in the Executive Branch. These are the Due Process Clause, the Federal Register Act (and certain other statutory disclosure obligations on Presidential lawmaking), and the Freedom of Information Act. The description provided here will illustrate the overall structure of the law of secret law and the key tensions and tendencies within it. It will also

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246, 267–68 (4th Cir. 2014) (holding First Amendment right of access extends to court opinions); *Lowenschuss v. W. Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976) (“[U]nder our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.”).

167. *See, e.g.*, *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to seal because “decisions of the court are a matter of public record” and no exception applied); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000) (rejecting party’s request to seal proceedings because “judicial proceedings are public” and “genuine trade secrets” exception did not apply); D. CONN. R. CIV. P. 5(e)(1)(b)(3) (discussing local rules for sealing). *See generally* Motion of the American Civil Liberties Union for the Release of Court Records, *In Re Ops. & Orders of This Ct. Containing Novel or Significant Interpretations of Law* at 11–15, No. 16-01 (Foreign Intel. Surv. Ct. Oct. 19, 2016), [https://law.yale.edu/system/files/area/center/mfia/document/2016\\_motion\\_2.pdf](https://law.yale.edu/system/files/area/center/mfia/document/2016_motion_2.pdf) [<https://perma.cc/ETS4-RP26>] (documenting the history of judicial publication of opinions).

168. U.S. CONST. art. I, § 5, cl. 3; *id.* art. I, § 7, cl. 2.

169. Unauthorized leaks are usually—but not always—illegal. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 490–512 (2014) (discussing the legal framework that governs leaks); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 522–27 (2013) (same); Morton H. Halperin, *Criminal Penalties for Disclosing Classified Information to the Press in the United States*, RIGHT2INFO.ORG (2012), [http://www.right2info.org/resources/publications/Halperin\\_CriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStates.pdf](http://www.right2info.org/resources/publications/Halperin_CriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStates.pdf) [<http://perma.cc/5RYB-9K39>] (same). Commentators disagree about whether the First Amendment protects some leaks of classified information. *Compare* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT’L SEC. L. & POL’Y 409, 411 (2013) (arguing in favor of First Amendment protection for classified information leaks), *and* Papandrea, *supra*, at 453 (same), *with* GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 81 (2010) (contending that the First Amendment does not protect unauthorized disclosures of classified information), Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1167–68 (2002) (same), *and* Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477, 485 (2012) (same).

motivate the reform proposals I describe in the next Part, which aim to make the law of secret law more attentive to anti-secrecy values already discussed.

A. DUE PROCESS OBLIGATIONS TO DISCLOSE THE LAW

“Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids.’”<sup>170</sup> The Due Process Clause has thus been interpreted to impose a constitutional obligation on the state to say what the law is—at least sometimes. The principle has its home in criminal law, where statutes defining offenses will be struck down if they are too vague,<sup>171</sup> will be interpreted narrowly where they are ambiguous,<sup>172</sup> and will only be applied prospectively.<sup>173</sup> These constitutional rules protect the principle that individuals may not suffer criminal penalties or “grave” civil consequences<sup>174</sup> if they cannot know in advance the law to which they are subject.

These constitutional rules implicitly forbid secret law, but only where the law quite directly regulates the public and only where it implicates constitutionally protected interests. Under the Due Process Clause, there can be no criminal prosecution, for example, for violating a secret law. But these safeguards apply only where the law treads upon an individual’s constitutionally cognizable interests in life, liberty, or property.<sup>175</sup> Moreover, even where cognizable interests are engaged, the notice requirements of the Due Process Clause are weaker where the law prescribes no criminal sanction or grave civil penalty.<sup>176</sup> For example, with respect to civil laws prescribing only monetary penalties, the courts have required, in most cases, only “fair notice,” which can be satisfied simply by informing the regulated entity, rather than the public at large, that they are in violation of the law.<sup>177</sup> Where an agency chooses to enforce its own internal interpretations of a law or regulation, the Due Process Clause does not require the agency to publish those internal—in other words, secret—interpretations to the general public. Instead, the Due Process Clause is satisfied if the agency simply provides the regulated entity with a private warning in advance of enforcement that the agency believes particular conduct to be

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170. *Papachristou*, 405 U.S. at 162 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (alteration in original)).

171. *See, e.g.*, *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

172. *See, e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971).

173. U.S. CONST. art. I, § 10, cl. 1.

174. *See Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (considering vagueness challenge to law specifying when an immigrant may be deported).

175. *See* U.S. CONST. amend. V.

176. *See Jordan*, 341 U.S. at 231 (applying due process protections established in criminal cases to the context of civil deportation proceedings because of the “grave” consequences at stake).

177. *See, e.g.*, *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (applying “fair notice” standard to EPA regulation enforceable by civil fine); *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (applying “fair notice” standard in context of sanctions for violating OSHA regulation).



illegal.<sup>178</sup>

Due process obligations to publish the law are therefore fairly circumscribed; in the national security context they may be narrower still. This question was brought to court in the context of the targeted killings of U.S. citizens abroad. In 2009, the American Civil Liberties Union and Center for Constitutional Rights filed suit arguing, among other things, that a planned drone strike targeting a U.S. citizen in Yemen violated the Due Process Clause because the government had failed to disclose the applicable legal rules and standards specifying when citizens could be killed outside of a traditional battlefield context.<sup>179</sup> In response, the government argued that no such disclosure was required,<sup>180</sup> offering two reasons: first, that disclosure of the rules would harm national security,<sup>181</sup> and second, that disclosure of the rules was unnecessary because the targeted individual would know that playing an operational role in a terrorist organization (as the individual in question was alleged to have done) made him liable to be killed under general domestic and international law standards.<sup>182</sup> In other words, the government contended that in the national security context, due process does not require the government to disclose its legal standards even for *killing* U.S. citizens, so long as the citizen is presumed to be on notice that he is liable to have his life taken.<sup>183</sup> Courts in other cases implicating security concerns have dismissed due process arguments for the disclosure of secret law on similar grounds.<sup>184</sup>

Due process is weak protection in the national security context for another reason: although programs like surveillance and watchlisting have serious consequences for individuals and raise significant civil liberties concerns, they may nevertheless fail to trigger any due process notice requirements because

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178. See *Gates & Fox Co.*, 790 F.2d at 156.

179. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12 (D.D.C. 2010). In the interest of full disclosure, the author was among counsel for the plaintiff in the lawsuit.

180. See *Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss* at 29 n.14, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469).

181. *Id.* at 29 n.14, 56.

182. *Id.* at 29 n.14. Of course, what those domestic and international law standards required was precisely what was in dispute in the lawsuit.

183. The court ultimately did not reach the merits of these due process arguments, dismissing the case under the political question doctrine and for lack of standing. See *Al-Aulaqi*, 727 F. Supp. 2d at 54.

184. See, e.g., *Gilmore v. Gonzales*, 435 F.3d 1125, 1135–36 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 929 (2007) (declining to require the TSA to disclose its secret regulations regarding identification for air travel, suggesting that due process notice requirements were diminished or absent because the regulations did not have penal consequences, and that, in any case, the plaintiff received adequate notice of the TSA's policy when airline personnel told him—without permitting him to see the rules themselves—that without identification he would be denied boarding); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141 & n.3 (D. Or. 2014) (refusing to disclose the regulations that govern the No-Fly List and other government watch lists, contending that such information is “Sensitive Security Information”); see also *Amici Curiae Brief of the Electronic Frontier Foundation et al. in Support of the Petition for a Writ of Certiorari* at 5, *Gilmore v. Gonzales*, 435 F.3d 1125 (2006) (No. 06-211) (arguing that public conduct cannot be governed by secret law).

they may not engage constitutionally protected interests in life, liberty, or property.

Take, for instance, the rules governing how the government may collect data pursuant to foreign surveillance authorities or the “minimization” rules that dictate how the government must handle communications of U.S. citizens that are intercepted.<sup>185</sup> It matters a great deal to people whether and when such information may be obtained and retained by the government, how and when it can be shared with other agencies, whether it can be used to enforce ordinary domestic criminal or civil laws, and whether it can be shared with private entities like employers, educational institutions, private security companies, data brokers, and others.<sup>186</sup> Yet the rules governing all of these activities do not appear to implicate due process because surveillance and data collection do not directly set out prohibitions or obligations on individual conduct and probably do not trigger any constitutionally protected liberty or property interests under the Due Process Clause.<sup>187</sup>

Similarly, the secret rules that govern terrorism watchlisting programs typically do not implicate due process, except when a watch list is used as a basis to interfere with a constitutionally protected right, such as the right to travel.<sup>188</sup> Even then, due process may not require the government to disclose the standards it uses to make watchlisting decisions, but may only require notice to individuals that they have, in fact, been watchlisted and perhaps the specific reasons why they were listed.<sup>189</sup>

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185. See *supra* notes 108–10 and accompanying text.

186. There is a large and growing literature exploring the nature of the harms that may result from surveillance. See, e.g., NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (2015); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013); Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013).

187. To be sure, government surveillance may be regulated by the Constitution’s Fourth Amendment. But the Fourth Amendment’s notice requirements are generally understood to require, at most, notice to the target of a search that he or she has been searched. See Toomey & Kaufman, *supra* note 156, 851–59 (arguing that the Fourth Amendment should be interpreted to require notice of a search to targets of government searches); Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment “Rule Requiring Notice,”* 41 PEPP. L. REV. 509 (2014) (documenting the increased use of “sneak and peek” searches in which notice to targets is delayed and arguing that such searches violate a Fourth Amendment “rule requiring notice”). There may be an argument that the Fourth Amendment requires more than individualized notice; perhaps the Fourth Amendment’s notice and reasonableness requirements mean that targets of surveillance must have access to the *rules* that govern such searches and not simply the fact that they have been searched. Such arguments, however, are speculative under existing case law and await further development.

188. See *Latif*, 28 F. Supp. 3d at 1141 (considering a challenge to the No-Fly List).

189. In the No-Fly List case, where the court held that Due Process was implicated, the court did not order the government to disclose the specific detailed criteria that it uses to determine whether to place someone on the No-Fly List or to remove them. *Id.* The government subsequently amended its procedures such that U.S. persons on the No-Fly List may sometimes learn at least some of the reasons why they were listed. See *Latif v. Sessions*, No. 10-cv-750, 2017 WL 1434648, at \*2–3 (D. Or. Apr. 21, 2017), *appeal pending sub nom.* *Kariye v. Sessions*, No. 17-35634 (9th Cir. Aug. 8, 2017).

These examples show that due process is weak medicine against secret law for a broad range of national security programs.<sup>190</sup> Where laws do not prescribe consequences that directly implicate constitutionally protected interests, due process will have nothing to say. And even if due process rights are engaged, they may be satisfied by providing individual notice or warnings, rather than by publicly disclosing the governing rules.

#### B. SECRET PRESIDENTIAL LAWMAKING AND THE FEDERAL REGISTER ACT

The most prominent sources of law currently regulating secret law in the Executive Branch are not constitutional but statutory: The Federal Register Act (FRA) and The Freedom of Information Act (FOIA). These statutes purport to require that legal rules be published but, as I will show, each offers plenty of space for law to hide. I discuss the FRA and other potential legal constraints on *presidential* discretion to make secret law in this section. In the next section, I explain how FOIA regulates secret law in the Executive Branch more broadly.

The FRA was a landmark piece of legislation when enacted in 1935. It established, finally, a centralized place where agency law would be published, the Federal Register.<sup>191</sup> The law was specifically meant to address a problem of secret law; before its enactment, administrative lawmaking was so disorderly and haphazard that even “[t]he officers of the government itself frequently [did] not know the applicable regulations.”<sup>192</sup> Administrative rules were secret not because they were intentionally concealed but because they were buried inside the many new and expanding federal bureaucracies of the New Deal era.

The FRA sought to fix the problem by mandating centralized publication of “Presidential proclamations and Executive orders” of “general applicability and legal effect” so long as they were not “effective only against Federal agencies or persons in their capacity as officers.”<sup>193</sup> In other words, executive laws that regulated the public—those with the most direct external effects—should be published.

Unfortunately, this mandate was mostly voluntary. The statute left it to the President to determine which documents were of “general applicability and

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190. See generally Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008) (describing programs that evade due process protection).

191. Federal Register Act, Pub. L. No. 74-220, § 3, 49 Stat. 500, 500-01 (1935) (codified as amended at 44 U.S.C. §§ 1501-1511 (2012)).

192. See Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 & n.24 (1934). In two particularly embarrassing instances, government lawyers litigated a criminal case up to the Supreme Court before realizing that the regulations in question had been changed or withdrawn. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412 (1935) (explaining that “the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration” in the applicable provision of law, such that “the attack in this respect was upon a provision which did not exist”); *United States v. Smith*, 293 U.S. 633 (1934) (dismissing case upon discovering the regulation had changed); Griswold, *supra*, at 204 & n.24; *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439, 440 & n.15 (1966).

193. See Federal Register Act § 5(a)(1).

legal effect” and therefore required publication.<sup>194</sup> The law’s only unequivocal requirement was to publish “document[s] or order[s] which . . . prescribe a penalty.”<sup>195</sup> This state of affairs continues to this day.<sup>196</sup>

As a result, the FRA is an extraordinarily weak protection against secret law, giving the President broad discretion to determine which executive orders must be published. Indeed, the requirements of the FRA can be entirely evaded simply by calling a presidential directive something other than an “executive order” or “proclamation.”<sup>197</sup> Thus, unsurprisingly, presidents have been issuing unpublished national security directives almost since the FRA was enacted,<sup>198</sup> under names like Presidential Policy Directive or, more recently, National Security Presidential Memorandum.<sup>199</sup> According to the DOJ, such unpublished directives have the same force of law as executive orders promulgated pursuant to the FRA.<sup>200</sup>

The President’s discretion goes beyond issuing secret directives and extends even to secretly modifying *public* directives. The administration of President George W. Bush secretly revoked or modified public executive orders so that the law on the books was not in fact the law being applied internally.<sup>201</sup> Because the changes were made via secret directives, both Congress and the public remained unaware of the discrepancy for years.<sup>202</sup>

Congress has imposed only modest additional constraints on the President’s power to make law in secret in the national security context. In some circumstances, Congress has imposed a requirement, often waivable, that certain

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194. *Id.* § 5(a).

195. *Id.* § 5(a)(3).

196. Since 1954, the President has delegated to the Attorney General and Archivist the authority to determine what must be published, but the applicable statutory requirements of the FRA remain unchanged since enactment. *See* Exec. Order No. 10,530, 19 Fed. Reg. 2709, 2712 (May 12, 1954), *reprinted in* 3 U.S.C. § 301 app. at 666 (2012); 44 U.S.C. §§ 1505–1506 (2012).

197. *See* Federal Register Act § 5(a)(1) (expressly applying only to “Presidential proclamations and Executive orders”).

198. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., RL 98–611, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 9 (2008); John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 357–58 (2010).

199. Each President appears to have chosen a different title for such orders. *See* RELYEA, *supra* note 198, at 8–12; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-92-72, THE USE OF PRESIDENTIAL DIRECTIVES TO MAKE AND IMPLEMENT U.S. POLICY 1–2 (1992); *Presidential Directives and Executive Orders*, FED’N OF AM. SCIENTISTS, <https://fas.org/irp/offdocs/direct.htm> [<https://perma.cc/X6SM-DRND>].

200. *See* Legal Effectiveness of a Presidential Directive, as Compared to an Exec. Order, 24 Op. O.L.C. 29, 29 (2000) (finding no “substantive legal difference between an executive order and a presidential directive” and determining that, like executive orders, directives do not “lapse upon a change of administration” but “remain effective until subsequent presidential action is taken”).

201. *See Secret Law Hearing*, *supra* note 135, at 124 (testimony of Dawn E. Johnsen). In 2008, a bill was introduced in the Senate that would have required the President to publish notice of such secret amendments in the Federal Register or, in the case of classified information, to notify certain members of Congress. *See* Executive Order Integrity Act of 2008, S. 3405, 110th Cong. § 2 (2008). The bill was never enacted. It is unclear whether the current administration claims this authority, or whether it has been used.

202. *See Secret Law Hearing*, *supra* note 135, at 124–25, 128–29 (testimony of Dawn E. Johnsen).

members of Congress—but not the public—must be informed. For instance, if the President makes a determination that a congressional statute is unconstitutional and, on that basis, declines to enforce or apply it, he typically must inform certain members of Congress.<sup>203</sup> Even this minimal requirement only applies to “the promulgation of any *unclassified* Executive order or similar memorandum or order,” thus apparently leaving the President free to determine that a statute is unconstitutional in a *classified* directive without notifying Congress at all.<sup>204</sup> Thus, somewhat startlingly, the President is empowered to make the momentous decision to unilaterally determine a statute is unconstitutional without informing even Congress.

These weak congressional disclosure requirements can also be evaded by creative lawyering. During the George W. Bush Administration, the DOJ often avoided determining that statutes were unconstitutional—potentially triggering a disclosure obligation—and instead deployed the canon of constitutional avoidance to aggressively reinterpret statutes so that they would not apply in a given circumstance.<sup>205</sup> Such avoidance decisions are not subject to any statutory disclosure obligations, allowing the Executive to achieve the same result as a determination of unconstitutionality without triggering any statutory notification requirement.<sup>206</sup>

Presidential discretion to issue secret law is also unregulated by FOIA.<sup>207</sup> The Office of the President and his immediate advisors are simply not subject to FOIA’s disclosure requirements.<sup>208</sup> This is not to say that presidential orders with the force of law are entirely beyond FOIA’s reach; if such directives are distributed beyond the President’s close advisors and a copy ends up residing with another agency, then it may be subject to a FOIA request.<sup>209</sup> But, like the

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203. See 28 U.S.C. § 530D(a), (e) (2012). The President need only notify the leadership of each party in each house, the general counsel of each house, and the chair and ranking members of each house’s Committee on the Judiciary. § 530D(a)(2).

204. *Id.* § 530D(e) (emphasis added). Only the President enjoys this power. Other Cabinet officials—notably the Attorney General—must always disclose to Congress when they decide not to apply a statute on the grounds of its unconstitutionality. *Id.*

205. See *Secret Law Hearing*, *supra* note 135, at 128–29 (testimony of Dawn E. Johnsen); Johnsen, *supra* note 106, at 1598–600.

206. See *Secret Law Hearing*, *supra* note 135, at 128–29 (testimony of Dawn E. Johnsen). A bill introduced in 2008 would have required congressional notification when the Attorney General interpreted statutes to avoid constitutional concerns under Article II of the Constitution or separation of powers principles. See OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (2008). The bill was never enacted.

207. The disclosure requirements of FOIA are discussed *infra* Section IV.C.

208. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). But not all components of the Executive Office of the President are exempt. Compare *Soucie v. David*, 448 F.2d 1067, 1075–76 (D.C. Cir. 1971) (holding Office of Science and Technology is subject to FOIA), with *Main St. Legal Servs., Inc. v. Nat’l Sec. Council*, 811 F.3d 542, 553 (2d Cir. 2016) (explaining the National Security Council is not subject to FOIA).

209. See, e.g., *Ctr. for Effective Gov’t v. U.S. Dep’t of State*, 7 F. Supp. 3d 16, 29 (D.D.C. 2013) (ordering disclosure of Presidential Policy Directive that had been widely distributed within the government).

FRA, FOIA leaves the President free to keep law secret in the first instance.

The President thus enjoys significant latitude to exercise his lawmaking functions in secret. Where the President decides not to share his determinations with the public, he is essentially free to make that choice. Disclosure to Congress is only sometimes required and these requirements, too, can be evaded. The law of secret law leaves Presidents with remarkable latitude to legislate in secret if and when they choose.

### C. THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act is perhaps the most important element of the law of secret law. FOIA is the principal framework statute governing secrecy in the Executive Branch and the public's most powerful tool to force disclosure of documents, including legal texts.<sup>210</sup> It creates a presumption that all Executive Branch records are public, subject only to certain enumerated exemptions.<sup>211</sup> However, as explained below, those exemptions have increasingly been interpreted to authorize the government to withhold law, threatening to transform FOIA from a statute that was meant as a bulwark against secret law into a statute that legitimizes it.

FOIA was enacted in 1966, establishing a tripartite disclosure regime that persists to this day. It requires, first, that some materials, including formal statements of agency law, must be affirmatively published in the Federal Register.<sup>212</sup> Second, other materials, including agency opinions and interpretations, must also be made available automatically in reading rooms and online.<sup>213</sup> Third, any and all other agency records are presumptively available to everyone—but only upon request.<sup>214</sup>

FOIA is most famous for this last provision, but the first two—which require affirmative disclosure of agency law—are key elements of the law of secret law. Specifically, the Federal Register provision requires disclosure of “substantive rules of general applicability adopted as authorized by law” and “statements of general policy or interpretations formulated and adopted by the agency,” in addition to “the nature and requirements of all formal and informal procedures,” “rules of procedure,” and “statements of the general course and method by

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210. See Pozen, *supra* note 21, at 314 n.204 (describing FOIA as a “super-statute” and explaining that “FOIA introduced a norm of open access to government documents that has commanded deep public loyalty, taken on a quasi-constitutional valence, and spawned a vast network of imitator laws at all levels of United States government and in democracies around the world. FOIA is such a good example of a super-statute that it is surprising no one has assigned it the label yet.” (citing William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) for the term “super-statute”)).

211. See *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976); *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).

212. 5 U.S.C. § 552(a)(1) (2012).

213. See *id.* § 552(a)(2).

214. *Id.* § 552(a)(3).

which [the agency’s] functions are channeled and determined.”<sup>215</sup> The reading room provision supplements these disclosure requirements by mandating that agencies make available any other documents that might constitute authoritative rules or guidance—in other words, “statements of policy and interpretations” that are not otherwise published in the Federal Register, such as those that are not of “general applicability,” as well as agency “opinions,” “orders,” and “administrative staff manuals and instructions to staff that affect a member of the public.”<sup>216</sup>

On their face, these two provisions appear to require affirmative disclosure of much, perhaps all, secret law. On closer inspection they do much less. For starters, the government takes a narrow view of its affirmative disclosure obligations. For instance, the government has repeatedly maintained that OLC opinions do not constitute the kinds of “opinions” or “interpretations” encompassed within FOIA’s reading room provision because such opinions are not always formally “adopted” by the agency for which they are written.<sup>217</sup>

Worse still, FOIA allows agencies to fail to publish without significant consequence. Courts have thus far done little to clarify the scope of the affirmative disclosure provisions of FOIA<sup>218</sup> and have only recently affirmed that courts even have authority to order prospective compliance with those

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215. *Id.* § 552(a)(1). The predecessor to this provision in section 3 of the Administrative Procedure Act (APA) was narrower. For instance, the original provision, which FOIA replaced, limited the publication requirement for “substantive rules . . . and statements of general policy or interpretations” to those “adopted . . . for the guidance of the public.” Administrative Procedure Act (APA), Pub. L. No. 79-404 § 3(a), 60 Stat. 237, 238 (1946). The APA also completely excluded any “matter relating solely to the internal management of an agency.” APA § 3. FOIA eliminated these provisions, suggesting it was intended to require publication of general rules and policies governing internal operations of government, and not just those imposing requirements on public conduct. *See* 5 U.S.C. § 552(a)(1)(D).

216. 5 U.S.C. § 552(a)(2). Again, the parallel provision in the original APA was much narrower, requiring only that “all rules” be published as well as “final opinions or orders in the adjudication of cases.” APA § 3(b). FOIA adds the requirements to disclose “statements of policy and interpretations” not found in the *Federal Register*, as well as “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2).

217. *See, e.g.*, Memorandum in Support of Defendants’ Motion to Dismiss at 25–26, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 164 F. Supp. 3d 145 (D.D.C. 2016) (No. 13-cv-1291).

218. The Campaign for Accountability is currently engaged in litigation seeking a prospective injunction that would require the OLC to affirmatively disclose opinions that constitute binding law for the Executive Branch. *See* *Campaign for Accountability v. U.S. Dep’t of Justice*, No. 16-cv-1068, 2017 WL 4480828, at \*1 (D.D.C. Oct. 6, 2017). The district court dismissed the plaintiff’s complaint on the grounds that its request for an order requiring disclosure of “all [OLC] opinions that have precedential effect within the Executive Branch” failed to identify a sufficiently specific subset of OLC opinions plausibly within the ambit of FOIA’s reading room provision. *Id.* at \*1, \*15–16 (emphasis in original). The plaintiff subsequently identified five specific categories of OLC opinions that it contends are subject to affirmative disclosure. *See* Amended Complaint for Injunctive and Declaratory Relief at 13–19, *Campaign for Accountability*, 2017 WL 4480828 (D.D.C. Oct. 27, 2017), <https://campaignforaccountability.org/work/office-legal-counsel-filings> [<https://perma.cc/Y3FZ-G9GP>]. As of this writing, litigation remains ongoing.

obligations.<sup>219</sup> To be sure, FOIA does include a mechanism meant to incentivize compliance: FOIA prevents agencies from relying on unpublished rules or documents in administrative enforcement proceedings.<sup>220</sup> But this mechanism is perhaps utterly toothless in the national security context because, as explained below, the government contends that it is under no obligation to disclose secret law in the first place if the law has been classified or falls within another exemption to FOIA.<sup>221</sup> Moreover, even if the government were under an obligation to publish secret rules, the provision of FOIA preventing agency reliance on unpublished material has been severely weakened by the courts.<sup>222</sup>

As a result, even authoritative DOJ legal interpretations are not published as a matter of course, and the rules that govern programs in the national security context are even less frequently published.<sup>223</sup> In short, it turns out that agencies can readily evade affirmative disclosure requirements when it comes to secret law.

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219. The D.C. Circuit recently held that courts only have authority to enforce the affirmative disclosure provisions of FOIA by ordering prospective disclosure to a particular requester; they lack authority to order prospective disclosure to the general public. *See* *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017). As of this writing, the same issue is on appeal in the Ninth Circuit. *See* *Animal Legal Def. Fund v. U.S. Dep't of Agriculture*, No. 17-cv-949, 2017 WL 2352009, at \*5 (N.D. Cal. May 31, 2017) (adopting the D.C. Circuit's holding), *subsequent determination*, 2017 WL 3478848 (N.D. Cal. Aug. 14, 2017), *appeal filed*, No. 17-16858 (9th Cir. Sept. 14, 2017).

220. FOIA provides that where an agency fails to publish a legal text as required—be it a rule, opinion, or order—it cannot be used against a member of the public. *See* 5 U.S.C. § 552(a)(1)–(2) (2012). But these preclusion rules are tempered by a statutory exception excluding an affected person who has actual notice of the terms of the unpublished document. *See id.* § 552(a)(1). Thus, this mechanism fails meaningfully to incentivize disclosure to the *general public* because notice to affected *individuals* suffices. Such a weak preclusion rule does not incentivize agencies to publish laws they would rather withhold.

221. As discussed below, the government has refused to disclose secret law by relying on FOIA's exemption for classified national security information and related exemptions. *See infra* notes 230–43 and accompanying text. Courts have largely endorsed this position in lawsuits seeking documents under FOIA's disclosure-upon-request provision. *See infra* notes 242–43 and accompanying text. The same reasoning would appear to exclude classified or otherwise exempt rules from FOIA's affirmative disclosure provisions. *See* 5 U.S.C. § 552(b)(1) (stating that “[t]his section”—that is, the entire FOIA including the affirmative disclosure provisions—“does not apply to matters that are specifically authorized . . . to be kept secret in the interest of national defense or foreign policy and are in fact properly classified.” (emphasis added)).

222. The requirement of individual notice has been weakened by the courts, which have essentially adopted a harmless error rule: The government is precluded from using an unpublished rule against an individual only if the individual can show that “they have been in fact adversely affected by the lack of notice,” in the sense that “[they] would have been able to pursue an alternative course of conduct” or otherwise avoid the consequence envisioned by the secret law had the law in question had been published. *All. for Cannabis Therapeutics v. DEA.*, 15 F.3d 1131, 1136 (D.C. Cir. 1994) (internal quotation marks and citation omitted).

223. *See* Memorandum from David J. Barron, Acting Assistant Attorney General, to OLC Attorneys 1, 5–6 (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/2RFH-RNXE>] (describing “best practices OLC attorneys should follow in providing . . . formal written opinions”); *Campaign for Accountability*, 2017 WL 4480828, at \*4.



Equally important to the law of secret law are the exemptions written into FOIA itself.<sup>224</sup> FOIA includes nine enumerated categories of records not subject to disclosure that permit the government to withhold records even in response to a specific disclosure request.<sup>225</sup> If secret law can be withheld under any of these exemptions, FOIA becomes a license for secret law rather than a limit.

There is good reason to believe that the exemptions were not meant to permit withholding of agency law. FOIA was enacted specifically to correct the deficiencies of its predecessor, the Administrative Procedure Act, which gave agencies essentially unfettered discretion to withhold agency law and other material.<sup>226</sup> Against this backdrop, FOIA's affirmative disclosure provisions were meant to ensure both that law would not remain practically obscure<sup>227</sup> and that officials would be required to publish agency law in the first place.<sup>228</sup> Relatedly, it has long been clear that FOIA's exemptions "must be narrowly construed" to advance "the basic policy that disclosure, not secrecy, is the dominant objective of the Act."<sup>229</sup>

In FOIA's early years, the courts strongly endorsed this view, establishing the "secret law" doctrine (also known as the "working law" doctrine) that limited the scope of FOIA exemptions so that they could not be used to withhold agency law.<sup>230</sup> The Supreme Court explicitly endorsed this anti-secret law

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224. See 5 U.S.C. § 552(b).

225. See *id.*; *Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 564 (2011).

226. Section 3 of the original APA permitted secrecy even of formal rules whenever "there is involved any function of the United States requiring secrecy in the public interest." Pub. L. No. 79-404 § 3, 60 Stat. 237, 238 (1946). With respect to reading room materials, agencies had additional discretion to refuse to publish "for good cause." *Id.* § 3(b). And the APA's catch-all provision for public access to official records—the predecessor to the modern day disclosure-upon-request provision—contained a "double-barreled loophole" allowing disclosure only "to persons properly and directly concerned" and even then allowing agencies to refuse disclosure "for good cause found." S. REP. NO. 89-813, at 5 (1965). The Senate, in passing FOIA, explained that the APA had "been used more as an excuse for withholding than as a disclosure statute." *Id.* at 3.

227. See 5 U.S.C. § 552(a)(2) (2012).

228. See Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 777 (1980) ("[T]he primary objective is the elimination of 'secret law.' Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct.").

229. *U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

230. The secret law doctrine dates to FOIA's early days, when courts recognized that the statute was intended to do away with—or at least limit—secret law. A mere two years after FOIA came into force, the D.C. Circuit ordered the government to disclose an internal memorandum that constituted the legal rationale for a series of decisions ordering repayment of certain subsidies. See *Am. Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 704 (D.C. Cir. 1969). Subsequent cases elaborated this theme, consistently rejecting efforts by the government to withhold a variety of secret laws, including authoritative memoranda providing reasons for agency decisions, see *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971); documents embodying agency policy determinations, see *Ash Grove Cement Co. v. FTC*, 511 F.2d 815, 818 (D.C. Cir. 1975); and legal opinions issued by agency counsel relied upon by frontline staff, see *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 870 (D.C. Cir. 1980). As the D.C. Circuit explained in 1971, "binding agency opinions and interpretations . . . are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public." *Sterling Drug Inc.*, 450 F.2d at 708. This construction of FOIA was

principle in 1975 in *NLRB v. Sears, Roebuck & Co.*<sup>231</sup> In that case, the government argued that certain agency interpretations of law were exempt under Exemption 5, which permits the withholding of internal government communications that are subject to privilege, particularly the deliberative process privilege.<sup>232</sup> The Court rejected this argument, holding that “Exemption 5, properly construed, calls for ‘disclosure of all “opinions and interpretations” which embody the agency’s effective law and policy.’”<sup>233</sup> The Court reasoned that the structure of the Act, particularly the provisions regarding automatic publication of agency law, “represents a strong congressional aversion to ‘secret (agency) law,’ and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’”<sup>234</sup>

Some lower courts subsequently extended the secret law doctrine articulated in *Sears, Roebuck & Co.* to limit the scope of other privileges that can be asserted under Exemption 5, including the attorney–client privilege.<sup>235</sup> The secret law doctrine also acted as a limit on the now-defunct “High 2” exemption, which permitted agencies to withhold documents that could be used to “circumvent agency regulation.”<sup>236</sup>

But in more recent years, the courts have retreated from this anti-secret law principle, progressively narrowing the scope of the secret law doctrine, declining to extend application of the doctrine beyond Exemption 5, and explicitly permitting the government to maintain secret law in cases involving national security and law enforcement exemptions. Indeed, a number of district courts have now found that the secret law doctrine is no limit to Exemption 1 (which permits the withholding of properly classified information),<sup>237</sup> Exemption 3 (which incorporates statutory protections specific to the CIA, NSA, and other

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explicitly described as serving a statutory policy against secret law: “The purpose of this limitation is to prevent bodies of ‘secret law’ from being built up and applied by government agencies.” *Schwartz v. Internal Revenue Serv.*, 511 F.2d 1303, 1305 (D.C. Cir. 1975).

231. 421 U.S. 132, 153 (1975).

232. *See id.* at 148; *see also* 5 U.S.C. § 552(b)(5) (2012).

233. *Sears*, 421 U.S. at 153 (citation omitted).

234. *Id.* (citations omitted).

235. *See Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, 697 F.3d 184, 207–08 (2d Cir. 2012); *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997). *But see Am. Civil Liberties Union v. NSA*, No. 13-cv-9198, 2017 WL 1155910, at \*10–11 (S.D.N.Y. Mar. 27, 2017) (holding that the secret law or “working law” doctrine does not apply to the presidential communications privilege).

236. In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), the D.C. Circuit held that Exemption 2, which by its terms permits withholding of documents “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), also encompassed a broad exemption for documents where “disclosure significantly risks circumvention of federal statutes or regulations.” *Crooker*, 670 F.2d at 1053. The Court imported the “secret law” doctrine as a limit on the exemption. *Id.* at 1073 (considering and rejecting whether the documents in question constituted secret law). Thirty years later, the Supreme Court overruled *Crooker*, holding that Exemption 2 does not include any exemption for risks of circumvention at all, and that it is only concerned with personnel and human resources matters. *See Milner v. U.S. Dep’t of Navy*, 562 U.S. 562, 573–77 (2011).

237. 5 U.S.C. § 522(b)(1).

agencies),<sup>238</sup> and Exemption 7(E) (which permits the withholding of law enforcement “techniques and procedures”).<sup>239</sup> The trend in these cases has been to find that the secret law doctrine simply does not apply to these exemptions.<sup>240</sup> In other words, the government can use these exemptions to withhold documents that articulate internal law on the same basis that it can withhold any ordinary document.<sup>241</sup> The Second Circuit, in dicta, brushed aside the notion that the working law doctrine stands as a limit to withholding “documents [that] are classified and thus protected under Exemption 1.”<sup>242</sup> In an unpublished opinion, the D.C. Circuit appears to have held that Exemption 1 permits the withholding of documents even if doing so would, as the plaintiff argued, “effectively sanction secret law in contravention of FOIA’s principal purposes.”<sup>243</sup>

In addition to refusing to extend the secret law doctrine as a limit to national security and law enforcement exemptions, the lower courts have taken a narrow view of what even constitutes law for purposes of the existing secret law doctrine under Exemption 5. The D.C. Circuit requires that the legal text in question be “expressly adopted” by an agency or “incorporate[d] by reference” into its policy.<sup>244</sup> Courts have come to interpret these requirements stringently, rejecting a pragmatic approach to whether a legal text constitutes working law and instead requiring formal, explicit, and overt adoption of a legal rule or opinion for it to come within the secret law doctrine. For instance, the courts have repeatedly held that OLC opinions can be withheld on the grounds that the

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238. *Id.* § 522(b)(3).

239. *Id.* § 522(b)(7)(E).

240. *See* *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, No. 12-cv-7412, 2014 WL 956303, at \*8 (S.D.N.Y. Mar. 11, 2014) (holding that there is no “secret law” exception to the government’s authority to withhold law enforcement investigative techniques pursuant to FOIA Exemption 7(E)); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 535, 540 (S.D.N.Y. 2013) (holding that legal analysis can be classified “if it pertains to matters that are themselves classified” and holding with respect to Exemption 3, that “it may well be that legal analysis in a particular document is inextricably intertwined with information that is statutorily exempt from disclosure, including information about intelligence sources and methods that is statutorily exempt from disclosure”), *rev’d in part on other grounds*, 756 F.3d 100 (2d Cir. 2014); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012) (declining “the invitation to read a ‘secret law’ exception into the FOIA exemptions” and specifically rejecting such an exception in the face of a claim for withholding under Exemptions 1 and 3); *Am. Civil Liberties Union v. Office of the Dir. Of Nat’l Intelligence*, No. 10-cv-4419, 2011 WL 5563520, at \*8 (S.D.N.Y. Nov. 15, 2011) (suggesting that agency could withhold under Exemption 1 “legal memoranda, procedures, policies, directives, practices, or guidelines pertaining to Section 702 surveillance” if it provided adequate explanation for why disclosure “would reveal information about the U.S. Intelligence Community’s capabilities, priorities, and activities”) (internal quotation marks omitted), *subsequent determination*, 2012 WL 1117114, at \*4 (S.D.N.Y. Mar. 30, 2012) (upholding agency determination to withhold records under Exemption 1); *Ctr. for Int’l Envtl. Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 159 (D.D.C. 2007) (holding that government could withhold as classified the U.S. interpretation of terms in a trade agreement if it were able to show harm to U.S. negotiating efforts and foreign relations).

241. *See* *Jaffer & Kaufman*, *supra* note 20, at 242–43.

242. *N.Y. Times Co. v. U.S. Dep’t of Justice*, 806 F.3d 682, 687 (2d Cir. 2015).

243. *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 640 F. App’x 9, 12 (D.C. Cir. 2016) (per curiam) (internal quotations omitted).

244. *See* *Elect. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 10–12 (D.C. Cir. 2014).

agency that sought the legal opinion did not formally adopt or incorporate the entire opinion into its own policy, even if the OLC opinion did, in practice, authoritatively set legal parameters for the agency.<sup>245</sup>

This formalist approach to what constitutes agency law radically narrows FOIA's protection against secret law. So long as the government officially disclaims formal adoption of a legal interpretation or rule, the government may withhold memoranda, directives, and opinions that are—as a matter of social fact and actual agency practice—treated as binding on government officials.<sup>246</sup> Still worse, the courts have placed the burden of proof on the FOIA requester to demonstrate whether the legal opinion sought has in fact been formally adopted as agency policy—even though the government is typically the only party in a position to know whether that is the case.<sup>247</sup>

These developments in the secret law doctrine have essentially drawn a roadmap for agencies to create secret law, rather than putting up a roadblock against it. Agencies wishing to keep law secret simply need to take care not to explicitly or overtly “adopt” a legal interpretation as “policy.” Even when a legal rule or interpretation is officially adopted, it can be withheld just as easily as any other agency record simply by marking it “classified” or invoking another national security or law enforcement exemption.

Thus, paradoxically, FOIA—a statute that was intended to uproot secret law—is being interpreted to codify the Executive's discretion to keep law secret. In the absence of judicial or legislative intervention to reverse this trend toward endorsing secret law, FOIA may serve to institutionalize secret law as a prerogative of the Executive Branch.

In addition, for structural and practical reasons, FOIA would be an imperfect check against secret law even if it had not been interpreted to allow secret law. Most importantly, to file a FOIA request, a member of the public must know what to ask for, and from whom.<sup>248</sup> But there is nothing in FOIA that requires the government to inform the public about the rules or interpretations that it has adopted in secret; secrecy determinations are themselves typically made in secret. So members of the public will often be in a position only to make an educated guess about what secret law may exist—relying on press reports,

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245. See, e.g., *N.Y. Times Co.*, 806 F.3d at 687; *Elect. Frontier Found.*, 739 F.3d at 10 (“Even if the OLC Opinion describes the legal parameters of what the FBI is permitted to do, it does not state or determine the FBI's policy.”); Jaffer & Kaufman, *supra* note 20, at 246.

246. See Jaffer & Kaufman, *supra* note 20, at 249.

247. See *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 546–49 (S.D.N.Y. 2013) (permitting government to withhold OLC memo regarding targeted killing of citizen on grounds plaintiffs could not prove that the memo had been “expressly adopted” or that the memo sought was the basis for public comments of the government legal position on the issue), *rev'd in part*, 756 F.3d 100 (2d Cir. 2014).

248. See 5 U.S.C. § 552(a)(3)(A) (2012) (noting request must be submitted to particular agency and “reasonably describe” records sought). Many agencies have divided themselves into multiple distinct units for FOIA purposes, further complicating the requester's task. See, e.g., 28 C.F.R. §§ 16.1(c), 16.3(a) (2017) (describing DOJ's decentralized system for processing FOIA requests).

anecdotal experience dealing with agencies, or other sources—and then to file FOIA requests on that basis. This is a significant obstacle. When it comes to secret law, the public does not always know what it does not know. Law, in other words, may be an “unknown unknown” in the sense that even the fact of its existence is uncertain.

Even in cases in which members of the public have reason to suspect that secret law exists, the government has many tools at its disposal to delay or deny disclosure in response to a request. For instance, the government can simply fail to respond and hope the requester never files suit to enforce her request.<sup>249</sup> The government can also put up obstacles to disclosure by refusing even to confirm or deny whether a secret law exists.<sup>250</sup> This amounts to a claim that the fact of the secret law’s existence (or nonexistence) is properly kept secret.<sup>251</sup>

Finally, litigation over even a limited subset of legal texts can take years and an enormous commitment of legal resources from public interest organizations or the press.<sup>252</sup> So even where litigation is ultimately successful, the public will typically remain in the dark for years, and disclosure will lag any changes in the substance of the secret law that have occurred while the litigation was pending. For all of these reasons, FOIA is a cumbersome, inefficient, and often ineffective means of enforcing a government obligation to make law public.

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As should be clear by now, the legal ecosystem governing secret law—from Due Process to the Federal Records Act to FOIA—provides broad discretion to create and maintain secret law. Affirmative disclosure rules meant to require publication of agency law turn out to be essentially voluntary or easily evaded. The President has explicit authority to issue—or modify—directives in secret. Agencies can operate according to secret legal interpretations and rules by taking advantage of courts’ formalist view of what counts as working law.

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249. FOIA requires a response within twenty days, but this is perhaps the most frequently violated law in the U.S. Code. *See* 5 U.S.C. § 552(a)(6)(A)(i). The remedy for a violation is that a requester may file suit. *Id.* § 552(a)(6)(C).

250. This is known as a “Glomar” response. *See* Nathan Freed Wessler, “[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, 1382 (2010). For an entertaining history of the Glomar response—including where it got its name—see *Neither Confirm Nor Deny*, RADIOLAB (Feb. 12, 2014, 4:00 PM), <http://www.radiolab.org/story/confirm-nor-deny> [<https://perma.cc/3VJS-N5DZ>].

251. *See* Pozen, *supra* note 21, at 313 n.203 (discussing the relationship between the Glomar response and deep secrets).

252. For example, the first lawsuit seeking disclosure of the legal basis for targeted killings was filed in June 2010. *See* Am. Civil Liberties Union v. U.S. Dep’t of Justice, 808 F. Supp. 2d 280, 284 (D.D.C. 2011) (Note: the author was among counsel for the plaintiffs in the initial stages of that litigation.). It took a separate lawsuit and four years of litigation before a single legal opinion on the issue was disclosed. *See* N.Y. Times Co. v. U.S. Dep’t of Justice, 756 F.3d 100 (2d Cir. 2014). That litigation continued for two more years, producing only a handful of additional documents. *See* Am. Civil Liberties Union v. U.S. Dep’t of Justice, 844 F.3d 126 (2d Cir. 2016). Related litigation remained ongoing at the time of writing. *See* Am. Civil Liberties Union v. U.S. Dep’t of Justice, No. 15-cv-1954, 2016 WL 8259331 (S.D.N.Y. Aug. 8, 2016), *appeal pending*, No. 17-157 (2d Cir. Jan. 18, 2017).

Agencies can also simply stamp the relevant documents “classified” and withhold them under Exemption 1 or take advantage of related FOIA exemptions for national security or law enforcement information. In such cases, the courts will not enforce any secret law doctrine and will almost always defer to Executive Branch determinations.<sup>253</sup> As the courts have retreated from any robust anti-secret law principles, what has been left behind is a system that gives the Executive Branch enormous and mostly unchecked discretion to decide whether to keep its internal law secret.

#### V. REFORMING THE LAW OF SECRET LAW

The legal ecosystem that governs secret law is a surprisingly permissive place. The Executive Branch has broad discretion to adopt rules and interpretation in secret. Seen in this light, it is perhaps not surprising at all that secret law has become a regular feature of national security governance. Although Executive Branch officials may share and respect the transparency values that militate against secret law, the overriding and more immediate interests of the Executive almost always favor secrecy.<sup>254</sup> Without effective checks and balances against secret law in the Executive Branch, the equilibrium between transparency and secrecy will be set in favor of the latter.

As we have seen, the existing legal regime imposes few checks on this discretion. Courts have declined to interpret or enforce FOIA and other laws in ways that would impose real limits on the discretion of the Executive Branch to establish secret law.<sup>255</sup> Congress has some inherent power to act as a check on secret law—for example, by threatening to hold up Executive Branch nominations or by otherwise frustrating administration priorities—but it has been reluctant to use these tools aggressively.<sup>256</sup> In some instances, the combined

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253. See generally Margaret B. Kwoka, *Securing Access to National Security Information*, 67 ADMIN. L. REV. ACCORD 78 (2014); 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 (2014).

254. From the perspective of an official deciding whether to keep rules secret, the risks from disclosure—any incremental threat to national security—will be much more vivid than the dispersed benefits of transparency. Indeed, it is the primary job of those in the national security establishment to look for such risks and avoid them whenever possible. Moreover, once a secrecy decision is made in the bureaucracy, it enjoys the benefit of inertia. Changing course in favor of more disclosure will face often-insurmountable hurdles, typically involving significant interagency consultation and consensus. These and other incentives toward executive secrecy have been widely explored in the literature on government overclassification, and there is little reason to believe they would be any less powerful when it comes to secret law. See, e.g., ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CENTER FOR JUSTICE, *REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY* 21–32 (2011); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 401–04 (2009).

255. See *supra* Section IV.C.

256. As a formal matter, each house of Congress also reserves the right to publicly disclose classified information upon a majority vote, but that mechanism has never been invoked. See Kitrosser, *supra* note 82, at 1080–83.

pressure from litigation, Congress, the media, unauthorized leaks,<sup>257</sup> and the public has—over the course of several years—prompted the administration to voluntarily change course and disclose some secret law.<sup>258</sup> That this kind of “transparency campaign” is necessary to make a particular secret law public demonstrates that our current system is one in which the legal equilibrium permits far too much secrecy. Executive discretion to keep law secret is effectively governed by the vicissitudes of politics and whistleblowers—not by law.

A reform agenda for secret law would reset this equilibrium by creating a legal regime that gives significant weight to transparency values and renders

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257. In recent years, secret law has almost always come to light as a direct or indirect result of unauthorized, extralegal leaks. The Snowden disclosures of NSA surveillance are the prime example, but other examples abound. *See, e.g.,* Glenn Greenwald & Betsy Reed, *Secret Docs Reveal: President Trump Has Inherited an FBI with Vast Hidden Powers*, INTERCEPT (Jan. 31, 2017, 7:38 AM), <https://theintercept.com/2017/01/31/secret-docs-reveal-president-trump-has-inherited-an-fbi-with-vast-hidden-powers/> [<https://perma.cc/T3LZ-W2SQ>] (reporting on leak of previously redacted portions of FBI Domestic Investigations and Operations Guidance and other documents); Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), [http://investigations.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite) [<https://perma.cc/4GSR-HK9P>] (reporting on leaked DOJ white paper describing legal rules governing targeted killings of U.S. citizens); Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html> [<https://perma.cc/7LEB-TMLD>] (reporting on leaked memo authorizing torture); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?smid=pl-share> [<https://nyti.ms/2k90zpQ>] (reporting on leaked details of warrantless wiretapping rules).

258. The disclosure of the memo governing targeted killing of citizens is a prime example of a transparency campaign slowly prying secret law loose. Litigation seeking to force disclosure of the memos began in 2010 but foundered for years, with judges repeatedly deferring to the government’s claims of secrecy. *See* Am. Civil Liberties Union v. U.S. Dep’t of Justice, 808 F. Supp. 2d 280, 301 (D.D.C. 2011) (upholding secrecy), *rev’d sub nom.* Am. Civil Liberties Union v. CIA, 710 F.3d 422 (D.C. Cir. 2013) (holding government could no longer refuse to confirm or deny existence of records but remained free to resist disclosure on other grounds); Complaint, Am. Civil Liberties Union v. U.S. Dep’t of Justice, No. 10-cv-436 (D.D.C. June 1, 2010) (seeking the release of records relating to the use of drones to target and kill individuals); N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508, 553 (S.D.N.Y. 2013) (upholding secrecy), *rev’d*, 756 F.3d 100 (2d Cir. 2014) (holding government waived secrecy and privilege as to legal analysis of OLC memorandum). In the meantime, Congress applied pressure by holding up the nomination of John Brennan to lead the CIA. *See* Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES (Feb. 6, 2013), <http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html> [<https://nyti.ms/2jHsjGD>]. As a result, it seems, Congress disclosed the OLC memo to the congressional intelligence committees. *Id.* At nearly the same time, the press obtained a leaked copy of an unofficial DOJ “white paper” summarizing the still-secret memo. *See* Isikoff, *supra* note 257. The Second Circuit subsequently ordered disclosure of parts of the memo on the grounds that the government had waived its right to withhold it by disclosing the white paper and other information. N.Y. Times Co. v. U.S. Dep’t of Justice, 756 F.3d 100, 116–17, 124 (2d Cir. 2014). Under pressure from Congress, which was holding up the nomination of David Barron, the author of the OLC memo, to a judgeship on the First Circuit, the government elected not to seek further appellate review and voluntarily disclosed the memo with redactions. *See* Ashley Parker, *Memo Approving Targeted Killing of U.S. Citizen to Be Released*, N.Y. TIMES (May 20, 2014), <https://www.nytimes.com/2014/05/21/us/politics/memo-approving-targeted-killing-of-us-citizen-to-be-released.html?smid=pl-share> [<https://nyti.ms/2jHJ84p>].

secret law an exceptional practice that is permitted, if at all, only where truly necessary and justified.<sup>259</sup> In what follows, I offer certain principles that should guide any such reform efforts and outline one promising pathway for reform that calls upon the authority and expertise of both the courts and Congress to rein in the practice of secret law in the Executive.

#### A. PRINCIPLES FOR REFORM OF SECRET LAW

The brief tour of the current law of secret law in Part IV, combined with the distinctions among secret laws introduced in Part III, point to a reform agenda that would rein in the practice of secret law. I propose three essential principles to guide such reform.

First, there should be no such thing as a secret law whose very existence is a secret. When it comes to rules that govern the conduct of officials, the public must always know—at a minimum—that a secret law exists.<sup>260</sup> Second, the extent of secrecy must always be kept to an absolute minimum. This should include a requirement that government officials pay specific attention to the five key characteristics of secret law.<sup>261</sup> It should also require that decisions to keep law secret meet a higher standard of justification than the ordinary standard required to classify mere facts.<sup>262</sup> Third, the legal standards that govern secret law should themselves be established in public by statute and should be enforceable by the courts. Just as FOIA empowers the courts to adjudicate compliance with laws restricting secrecy, the courts should be able to adjudicate whether the Executive Branch is complying with strict and public limits on secret law. In what follows, I briefly elaborate on each of these principles.

##### 1. No Secrets About the Scope of Secret Law

The first principle for reform is that the public should know the true scope of the practice of secret law. Where the public is in the dark about the existence of secret law, concerns about democratic legitimacy, check and balances, and individual liberty are at their zenith. Moreover, if a secret law is unknown to the public, then even the weak checks that currently exist cannot be set in motion. Individuals cannot file FOIA lawsuits seeking judicial review. The public cannot engage its representatives in Congress to press for more transparency. Where the existence of the law is secret, it is essentially immune from democratic

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259. See Margaret Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1455–56 (2015) (reforming national security secrecy laws to permit more disclosure of information through formal means may reduce incentives to leak and could result in a better equilibrium between national security and government transparency); Pozen, *supra* note 169, at 581–82 (“Surely we would have less leaking of classified information if we had less classified information. Not only would there be fewer documents to pilfer, but people might treat the secrecy rules with more respect.”).

260. *Accord* Rudesill, *supra* note 18, at 344; GOITEIN, *supra* note 18, at 68–69.

261. See *supra* Part III.

262. *Accord* GOITEIN, *supra* note 18, at 64–65.



oversight.<sup>263</sup>

It is perhaps no surprise that multiple commentators have endorsed this same principle. Dakota Rudesill, writing about the problem of secret legislation enacted by Congress, has proposed that there should be public notices—or “bell ringers”—every time such a law is enacted.<sup>264</sup> Elizabeth Goitein of the Brennan Center for Justice made a similar proposal with respect to all varieties of secret law.<sup>265</sup> I add my voice to that growing consensus.

## 2. Minimizing the Tension Between Secrecy and Transparency

Decisions to keep law secret implicate fundamental values about democratic decision making, self-governance, and individual liberty. Achieving an acceptable accommodation between these values and countervailing considerations favoring secrecy require that secrecy be limited to circumstances where it is strictly necessary and amply justified.

The five distinctions among secret law described in Part III offer a systematic way to think about minimizing the conflict between competing values favoring disclosure and secrecy. As discussed there, secret laws vary along a continuum with respect to the extent of their external effects, their unforeseeability and novelty, the level of granularity at which they are publicly disclosed, how tightly held the secret is kept (“depth”), and the expected duration of secrecy.<sup>266</sup> As a rule of thumb, secret laws will be most problematic from the perspective of transparency values when they fall toward one end of each continuum. Therefore, requiring government officials to move secret laws as far as possible toward the less problematic end of these axes will minimize the tension between secrecy and transparency.

In many cases it will be possible to shift a secret law along one or more axes to decrease the extent to which the law harms transparency values while incurring few, if any, marginal costs to national security. In any given case, it may be possible to (1) increase the level of granularity at which the law is disclosed, (2) avoid novel or unforeseen interpretations of law and instead conform secret law to settled public expectations,<sup>267</sup> (3) build in limits on the duration of secrecy, and (4) decrease the depth of a secret by disclosing the secret law, at a minimum, to coordinate branches of government. To keep law secret, Executive Branch officials should be legally required to be attentive to each of these characteristics and also take into account the extent of the external effects that a secret law has on the public.

In addition, decisions to keep the law secret should have to meet a higher burden of justification than ordinary secrecy determinations. The existing rules

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263. See *supra* Section II.A.2.

264. Rudesill, *supra* note 18, at 344.

265. GOITEIN, *supra* note 18, at 68–69.

266. See *supra* Part III.

267. Cf. Kerr, *supra* note 18, at 1514 (arguing ambiguity in statutes authorizing national security surveillance should be interpreted narrowly in favor of the individual and against the state).

governing classification impose a strikingly low bar: information can be classified whenever “unauthorized disclosure of the information *reasonably could be expected* to result in damage to the national security.”<sup>268</sup> This standard effectively requires officials to identify the mere possibility of damage to national security, with no requirement to determine that such damage is actually likely to come about or to consider any countervailing public interest in disclosure. When it comes to keeping law secret, the burden should be higher.<sup>269</sup>

A brief example from the context of surveillance law will illustrate how these strategies for limiting secret law can be profitably deployed in practice. The Snowden revelations about the scope of government surveillance authorized by the Foreign Intelligence Surveillance Court provoked at least three significant government responses that ratcheted down the tension over secret law.

First, the government began proactively disclosing a significant number of FISA court decisions.<sup>270</sup> To be sure, the government has redacted these opinions—sometimes heavily—often in an apparent effort to omit specific factual and operational details.<sup>271</sup> But by releasing even redacted opinions, the government has effectively increased the granularity at which (previously) secret law is disclosed.

Second, Congress enacted the USA FREEDOM Act, which contains provisions that specifically limit the depth, duration, and granularity of secret law.<sup>272</sup> In particular, the law now requires the government to conduct a declassification review of each FISC opinion that contains a “significant construction or interpre-

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268. Exec. Order. No. 13,526 § 1.1(a)(4), 75 Fed. Reg. 707 (Dec. 29, 2009) (emphasis added). In addition to this minimal showing of risk, three additional requirements must be met to classify information: an “original classification authority” must be the one to classify; the information must be “owned by, produced by or for, or [be] under the control of the United States Government;” and “the information [must] fall[] within one or more of the categories of” classifiable subject matter. *Id.* § 1.1(a)(1)–(3).

269. One concrete option is to borrow the stringent standard that governs secrecy in the Judicial Branch and other contexts in which the First Amendment right of access applies. In those circumstances, secrecy is permitted only to serve an “overriding interest based on findings that closure is essential to preserve higher values.” *Dhiab v. Obama*, 70 F. Supp. 3d 486, 493 (D.D.C. 2014) (quoting *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984)). More to the point, the “party seeking closure must show a ‘substantial probability’ of harm to an ‘overriding interest,’”—more than merely a “‘reasonable likelihood’ of harm,” as with ordinary classification rules. *See id.* (quoting *Press-Enter. Co.*, 478 U.S. at 13–15). In addition, “any limit on public access . . . must be ‘narrowly tailored to serve that interest,’” *id.* (quoting *Press Enter.*, 464 U.S. at 510), and it must be effective in protecting the threatened interest. *Press Enter.*, 478 U.S. at 14.

270. *See, e.g.*, James R. Clapper, Dir. of Nat’l Intelligence, Testimony at Open Hearing on Foreign Intelligence Surveillance Authorities, U.S. S. Select Comm. on Intelligence (Sept. 26, 2013), <https://icontherecord.tumblr.com/post/62344881129/remarks-as-prepared-for-delivery-by-director-of> [<https://perma.cc/T7KA-WFBW>] (“Over the past three months, I’ve declassified and publicly released a series of documents related to both Section 215 of the PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act. I did that to facilitate informed public debate about the important intelligence collection programs that operate under these authorities.”).

271. *See generally* Letter from Hon. Reggie B. Walton, Presiding Judge, U.S. Foreign Intelligence Surveillance Court to Sen. Dianne Feinstein (Mar. 27, 2013), <https://fas.org/irp/agency/doj/fisa/fisc-032713.pdf> [<https://perma.cc/YTA5-XSS7>].

272. *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

tation of any provision of law.”<sup>273</sup> It requires the government to disclose such opinions “to the greatest extent practicable,” in redacted form if necessary.<sup>274</sup> The government can avoid declassifying FISC decisions only if it determines that doing so is “necessary to protect . . . national security . . . or properly classified intelligence sources or methods,”<sup>275</sup> but in that case the law still requires the government to disclose “an unclassified statement . . . summarizing the significant construction or interpretation of any provision of law.”<sup>276</sup> In addition to mandatory declassification, the USA FREEDOM Act also provides for outside, non-governmental lawyers to participate in FISC proceeding as amici curiae in important cases.<sup>277</sup> The law gives the amicus access to any secret legal precedents or other materials relevant to the proceeding.<sup>278</sup>

These provisions of the Act ratchet down the tension between secrecy and transparency along several of the axes I have identified. The law effectively requires the government to make any unforeseeable interpretations of law public. It implements a requirement to maximize the granularity of disclosure. It effectively limits the duration of secrecy by imposing an affirmative obligation on the government to disclose. And it reduces the depth of secrecy by allowing access to an outside amicus.

A third post-Snowden reform further illustrates how the extent of secrecy can be modulated. Reversing its prior practice, the government now notifies defendants when FISC-authorized surveillance has been used to develop evidence in the case.<sup>279</sup> This policy change effectively decreases the depth of secrecy around FISC decisions by bringing criminal defendants and ordinary Article III courts into the loop.

This is but one example of how concerns about secret law may be ratcheted down by modulating disclosure along each characteristic. Although the particular methods of increasing disclosure may vary from case to case, the objective remains the same: to minimize the conflict between transparency values and secrecy concerns.

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273. 50 U.S.C. § 1872(a) (2015).

274. *See id.* § 1872(b).

275. *See id.* § 1872(c)(1).

276. *See id.* § 1872(c)(2).

277. *See id.* § 1803(i).

278. *See id.* § 1803(i)(6)(A)(i).

279. *See* Stephen I. Vlodeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1170–71 (2015); Jameel Jaffer & Patrick C. Toomey, *The Solicitor General Should Correct the Record in Clapper*, JUST SECURITY (Oct. 18, 2013, 1:30 PM), <http://justsecurity.org/2219/solicitor-general-correct-record-clapper> [<https://perma.cc/TQ8D-VPVS>]; Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html?mcubz=3> [<https://nyti.ms/2tZDU3H>].

### 3. Governing Secret Law According to Public Rules Democratically Adopted and Judicially Enforced

Of course, it may not be possible to modulate the characteristics of a given secret law in a way that fully reconciles interests in transparency and secrecy.<sup>280</sup> There can be genuine impasses between secrecy and transparency. The question is how the legal system should resolve such stalemates. How, as an institutional matter, should we decide whether the law stays secret?

I propose two institutional reform principles in response. First, both Congress and the Executive should be required to agree about when secret law is appropriate. At a minimum, the rules governing secret law should themselves be debated and established in public through the ordinary legislative process. Second, these rules limiting secret law should be subject to independent judicial enforcement. The basic intuition here is that if we are to have secret law at all, then the scope and limits of secret law must be established in the most democratically respectable way we know: via the ordinary, public legislative process, subject to public and independent oversight through the courts.

Congressional action to rein in secret law could of course take multiple forms. Congress could, for example, require the government to disclose all secret laws unless it obtains specific, case-by-case legislative authorization.<sup>281</sup> More practicably, Congress could amend existing transparency laws—notably, FOIA—to tighten the legal framework governing the practice of secret law. I elaborate the latter option here.

Such amendments would affirm that the automatic disclosure provisions of FOIA apply to all types of legal texts that officials regard as binding as a matter of practice. This would reverse the trend in recent jurisprudence toward finding that authoritative legal opinions, like those of the OLC, do not constitute agency law.<sup>282</sup>

The amendments would further specify heightened procedural and substantive requirements for withholding agency law. Congress could clarify that ordinary national security and law enforcement exemptions cannot be used to withhold internal rules and other agency laws—just as the courts have long recognized that the ordinary Exemption 5 protection for deliberative process

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280. See Kris, *supra* note 137, at 275–76 (explaining government sought for years to find ways to disclose FISC opinions without compromising the underlying programs but was unable to do so).

281. A case-by-case approach could be enacted by imposing a strict time limit on how long laws may be kept secret without specific congressional authorization. Congress could, for example, require the Executive to provide an annual report listing secret legal opinions, rules, and other legally binding instruments, and further require that all such texts be published within twelve months unless Congress endorses continued secrecy through subsequent legislation. This kind of statute would effectively impose a uniform sunset provision on all secret laws, making transparency the default rule. Of course, such a law would impose a significant decisional burden on Congress and, in any case, sunset provisions in national security legislation have not turned out to be particularly effective checks on the Executive. See generally Berman, *supra* note 157 (discussing the effectiveness of sunset rules in the national security context).

282. See *supra* notes 244–47.

and attorney–client communications do not apply to agency law.<sup>283</sup>

In place of those exemptions, Congress could craft a new framework governing internal law. Consistent with the principles already articulated above, this framework would require that agencies meet a higher burden of justification to withhold legal texts.<sup>284</sup> The framework could also require agencies to make a series of specific certifications explaining whether they had considered all means of reducing the degree of secrecy and why no further disclosure was possible. These certifications could specifically track the five key characteristics of problematic secret laws identified in this Article. Thus, Congress could affirmatively require the agency to explain and justify whether it has disclosed a given secret law in as much granular detail as possible, whether it has withheld secret laws containing unforeseeable content or that have significant external effects, and whether it has set strict limits on the duration of secrecy—perhaps with a requirement to recertify the need for secrecy on a regular basis. Congress could also require the agency to consider explicitly whether the specific reasons for secrecy outweigh the public interest in disclosure and the transparency values that militate against secrecy.

Equally important, such a reform would enhance the role of the courts by vesting them with authority to review the sufficiency of Executive Branch certifications, explanations, and justifications with respect to each of these requirements.<sup>285</sup> A reform law could also vest the courts with the power to order the government to create and disclose public summaries of internal law—a power that the courts do not currently have under FOIA—so as to enforce a maximum disclosure obligation.<sup>286</sup>

This arrangement would build on the enduring structure that FOIA has created to govern executive secrecy in general, replicating it with respect to secret law in particular. FOIA abolished a system of unilateral executive discretion, establishing in its place a system that dispersed authority over government secrets.<sup>287</sup> Under FOIA, Congress sets the boundaries between public information and legitimate secrets by enumerating nine exemptions.<sup>288</sup> The courts police that boundary by engaging in *de novo* review and ordering disclosure of

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283. *See supra* notes 231–34.

284. *See supra* note 269 (proposing a standard borrowed from the First Amendment right of access).

285. Of course, the courts have often been inclined to defer when faced with government officials strenuously arguing that disclosure would cause harm to important national interests. *See generally* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) (examining the shifting and often deferential posture of the courts toward the Executive on national security matters). But the proposal offered here would mitigate this tendency by requiring greater internal deliberation within the Executive Branch and by requiring courts not to engage in a general assessment of the risks to national security and instead to assess whether the government has adequately proven that no further steps can be taken to increase transparency.

286. *Cf.* 50 U.S.C. § 1872(a) (2012) (requiring the Director of National Intelligence to prepare unclassified summaries of FISC opinions).

287. *See supra* notes 215–16, 226–29 and accompanying text.

288. *See* 5 U.S.C. § 552(b) (2012).

material improperly withheld.<sup>289</sup> The public can press this system of checks and balances into action simply by filing suit seeking disclosure. The genius of FOIA was to split the atom of executive secrecy among all three branches and the public.<sup>290</sup> The framework statute I have proposed is meant to have the same effect with respect to secret law.

Just as FOIA wrested control from the Executive Branch over government secrecy in general, a strong framework statute for secret law is meant to replace a system of executive discretion with one governed by stringent criteria established by Congress and enforceable by the courts and public. The hope is that by cabining executive discretion, such reforms would shift the legal equilibrium to a position that better respects the transparency values that militate against secrecy.

#### B. FORCING PUBLIC DELIBERATION OVER SECRET LAW: A ROLE FOR THE COURTS

The idea that Congress would take up, on its own initiative, something like the framework statute I have envisioned here may seem fantastical. Congress has acquiesced in the practice of secret law for the past fifteen years.<sup>291</sup> In that time, it has legislated limits on secret law only once by requiring the disclosure of redacted FISA court opinions.<sup>292</sup> And that reform was made only as a result of the fallout of the most spectacular and consequential leak of the last forty years. What could motivate Congress to upend the status quo?

I end this Article by proposing a doctrinal innovation that would both limit the practice of secret law and force more robust congressional participation in the ecosystem regulating secret law: the courts should adopt a constitutional presumption against secret law. Specifically, the courts should adopt a canon of statutory interpretation that statutes will not be read to permit secret law unless Congress has clearly and affirmatively said otherwise.<sup>293</sup> Under this kind of clear statement rule, statutes that otherwise permit the government to withhold information would not suffice to authorize it to withhold law. Most notably, the Executive Branch could no longer keep legal texts secret on the basis of

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289. 5 U.S.C. § 552(a)(4)(B).

290. *See* U.S. Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (“[FOIA is] broadly conceived . . . to permit access to official information long shielded unnecessarily from public view[,] and [it] attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.” (quoting *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973))).

291. *See supra* notes 203–06 and accompanying text.

292. *See* 50 U.S.C. § 1872(a) (2012). In addition, Congress passed legislation in 2010 requiring the Executive Branch to share the legal basis of intelligence activities, including covert action, with Congress. *See* Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259 § 331, 124 Stat. 2654, 2685 (2010) (codified at 50 U.S.C. §§ 3092(a)(2), 3093(b)(2)); Rudesill, *supra* note 18, at 298–300. That legislation, however, did not require any public disclosure. The law instead sought to make certain pockets of secret law a “shallower” secret. *See supra* notes 159–62 and accompanying text.

293. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992) (discussing clear statement rules).

ordinary FOIA exemptions for national security and law enforcement information. Instead, the government would need to obtain specific congressional approval to keep law secret, for example, by enacting and following a framework statute governing secret law along the lines proposed above.<sup>294</sup>

### 1. A Constitutional Clear Statement Rule Against Secret Law as a Democracy-Forcing Mechanism

A clear statement rule against secret law would serve the purpose of forcing Congress to deliberate about and determine the lawful parameters of secret law. At the same time, adopting a clear statement rule would not require the courts to make a final decision about whether a secret law stays secret or even to second-guess the government's predictions of harm to national security.<sup>295</sup> Instead, a court that adopts a clear statement rule would simply be forcing a more robustly democratic decision about whether and when law should be kept secret.<sup>296</sup> Indeed, a constitutional presumption against secret law casts the courts in a familiar role as guardians of the separation of powers, promoting checks and balances between the political branches. Indeed, this "democracy-forcing" role is one that U.S. courts have repeatedly taken in post-9/11 national security disputes.<sup>297</sup>

This solution also has the important consequence of shifting the burden of inaction onto the government. Currently, if Congress does nothing, secrecy prevails. A clear statement rule flips the presumption: if Congress does nothing, transparency prevails. This is a healthier scheme because it puts the onus on the Executive Branch to persuade Congress that secrecy is necessary, rather than putting the onus on transparency advocates outside government (who are at a severe informational and institutional disadvantage) to persuade Congress to act in favor of transparency.

In addition, a clear statement rule would force a public decision on whether secret law is appropriate. Currently, the public can potentially be kept in the dark about the decision to keep law secret and the reasons motivating such decisions. Sometimes the public will be unaware that the secret law exists in the first place. By requiring Congress to specifically authorize secret law, the public

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294. This stands in contrast to previous case law, in which the court has observed that "there is no textual basis in FOIA for a freestanding 'secret law doctrine.'" *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012). Had the court applied a presumption against secret law, the inquiry would not have been whether FOIA specifically removes secret law from the government's power to withhold records, but rather whether the law specifically grants the government power to withhold law.

295. See *supra* notes 240–47, 253 and accompanying text (discussing courts' reluctance to order disclosure of information over the national security objections of government).

296. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 132–35 (2006) (explaining that clear statement rules are a form of democracy-forcing statutory interpretation); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing clear statement rules amount to nondelegation rules forbidding the Executive from taking certain actions on its own).

297. See Benson, *supra* note 22; Sunstein, *supra* note 22; Balkin, *supra* note 22.

will be on notice of what may be kept secret and will at least be able to participate in the second-order decision—through the ordinary legislative process—about whether and when to permit law to be kept secret.

There are objections to this proposal. Clear statement rules have come under criticism as an inappropriate exercise of judicial power.<sup>298</sup> Even if a court did adopt a clear statement rule against secret law in a particular case and ordered disclosure on that basis, Congress could simply respond by endorsing secrecy in that particular instance—rather than enacting a broader framework limiting secret law.<sup>299</sup> Moreover, Congress's involvement may not ensure that the line between secrecy and disclosure will be drawn in an appropriate place. To the contrary, Congress could decide to explicitly delegate broad secret lawmaking authority, only further entrenching the problematic practice. But requiring the entire legislative apparatus of government to decide when we will be governed by secret laws seems the best way to make such decisions in a democracy. The courts are in a unique position to force this kind of healthy democratic deliberation.

## 2. Toward a Constitutional Clear Statement Rule Against Secret Law

I conclude by briefly sketching the outlines of a legal argument in favor of recognizing the clear statement rule that I have proposed as a means of beginning to answer the problem of secret law. Courts typically recognize clear statement rules either to protect constitutional norms—often structural features of the Constitution such as federalism or state and tribal sovereignty—or to advance perceived public policy goals.<sup>300</sup> A clear statement rule against secret law can be justified on both of these grounds. I hope by now to have made the policy argument against secret law<sup>301</sup> and in favor of requiring Congress to speak clearly on the question.<sup>302</sup> But I have not yet touched on the constitutional implications of secret law.

Although there is not space in this Article to fully explore the constitutional question, I nevertheless offer here a preliminary sketch of the various constitutional provisions and doctrines that might be brought to bear in support of a constitutional presumption against secret law. For present purposes, I hope

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298. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404 (2010) (arguing the Constitution should not be read to include general constitutional values enforceable through clear statement rules, and instead constitutional values only “find concrete expression in many discrete constitutional provisions, which prescribe the *means* of implementing the value in question”).

299. Cf. *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 40 F. Supp. 3d 377, 380–82 (S.D.N.Y. 2014) (recounting Congress’s enactment of a law specifically empowering the Secretary of Defense to withhold images of detainees being abused, in response to a judicial decision ordering those images disclosed).

300. See Sunstein, *supra* note 296, at 330–37 (“[N]ondelegation canons fall in three principal categories. Some are inspired by the Constitution; others involve issues of sovereignty; still others have their foundations in public policy.”); Eskridge & Frickey, *supra* note 293, at 596–97.

301. See *supra* Parts II–III.

302. See *supra* Section V.B.1.



merely to draw the contours within which such an argument might be constructed. A more sustained examination of the constitutional limits on secret law is a project for another day.

Although there is no single provision of the Constitution forbidding secret law, there are a number of features of the Constitution's text and structure that, taken together, strongly suggest a constitutional presumption that law will be public.<sup>303</sup>

The most obvious of such provisions are the Presentment Clause and the Journal Clause. The latter, which requires each house of Congress to keep a "Journal of its Proceedings," contains an explicit presumption in favor of openness: "Each House shall . . . from time to time publish [its Journal], excepting such Parts as may in their Judgment require Secrecy."<sup>304</sup> Accordingly, the Constitution presumes that when each house passes bills and takes other actions it will do so in public, unless it specifically decides to do so in secret. The Presentment Clause, in turn, requires bills enacted by both houses to "be presented to the President of the United States; [i]f he approve he shall sign it, but if not he shall return it."<sup>305</sup> Although the Presentment Clause does not contain any explicit transparency provisions, it refers back to the Journal Clause, with its explicit presumption of openness.<sup>306</sup> Taken together, the two clauses strongly suggest that the Constitution envisions lawmaking as a presumptively public process.

Additional constitutional support for a presumption against secret law may be found in the First Amendment's guarantees of the rights to freedom of speech, freedom of the press, freedom of assembly, and the right to petition. It is commonly understood that, among other purposes, these protections of the First Amendment are a "method of securing participation by the members of the society in social, including political, decision making."<sup>307</sup> But if the public is kept in the dark about the very law that governs, public participation in political decision making will be severely constrained.

Similar considerations led the Supreme Court to recognize in the First Amendment a qualified right of access to courts and other official proceedings and records.<sup>308</sup> In particular, the Court has held that where there is a tradition of

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303. This discussion draws upon the work of Heidi Kitrosser, David Pozen, Mark Rozell, and Adam Samaha, each of whom has discussed the constitutional status of secrecy in various contexts. See ROZELL, *supra* note 21, at 8–11, 20–29, 44–49; Kitrosser, *supra* note 21, at 514–15; Pozen, *supra* note 21, at 292–323; Samaha, *supra* note 21, at 941–76.

304. U.S. CONST. art. I, § 5, cl. 3.

305. U.S. CONST. art. I, § 7, cl. 2.

306. *See id.* (requiring the objections of the President exercising a veto to be entered on the Journal of the house where the bill originated, and requiring the votes for and against an override of the veto to be "entered on the Journal of each House respectively").

307. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

308. *See, e.g.,* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

openness to a particular proceeding, and where public access to the proceeding “plays a significant positive role in the functioning of the particular process in question,” the First Amendment guarantees a qualified constitutional right of access to the public.<sup>309</sup> These same rationales strongly support a constitutional right—or at least a constitutional presumption—of public access to secret law.<sup>310</sup>

Moreover, the Petition Clause of the First Amendment may provide independent grounds for a presumption against secret law.<sup>311</sup> As Gregory Mark has recounted, the history of the right to petition in colonial America is a history of public participation in lawmaking: for early Americans, presenting a petition was the principal means of prompting legislative solutions to problems, seeking redress for wrongs, and otherwise participating in the legal governance of society.<sup>312</sup> The Petition Clause may therefore be understood to protect the public’s right to participate directly in lawmaking, a right that is significantly impeded when the law itself is hidden from the public.

Other features of the Constitution also support at least a presumption against secret law. For instance, the Constitution’s provisions for electing Representatives, Senators, and the President suggest a presumption that the public knows what the law is. After all, public election of members of Congress to legislate would hardly be meaningful if the public could not know what laws have been enacted.<sup>313</sup> The vesting clauses, too, suggest a presumption of openness, insofar as publicness is inherent in the exercise of the power to make law.<sup>314</sup>

More broadly, the structure of the Constitution supports the broader principle that lawmaking is different from other kinds of governmental activity and that when the government withholds law from the public, it raises concerns that go well beyond those normally implicated by public access to government records. The Constitution is deeply concerned with lawmaking as a function of government, specifying in great detail the manner in which the government can make law, circumscribing the power of the government to do so, apportioning this

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309. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986).

310. Courts have recognized that the right of access is particularly crucial with respect to judicial opinions, precisely because they set out governing law. *See Lowenschuss v. W. Pub. Co.*, 542 F.2d 180, 185 (3d Cir. 1976) (“As ours is a common-law system based on the ‘directive force’ of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions . . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.”).

311. *See* U.S. CONST. amend. I.

312. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2157, 2178–87 (1998).

313. David Pozen has made this point with respect to the constitutional status of secrecy in general, explaining “[f]or federal elections to be meaningful . . . the people must be aware of what their officeholders have been doing.” Pozen, *supra* note 21, at 295–96.

314. *Cf.* Patrick Hayden, *Access as an Article III Value: The Foreign Intelligence Surveillance Court and the Public* 49–80 (Apr. 18, 2014) (unpublished manuscript) (on file with author) (arguing that the “judicial power” vested by Article III implies a judicial obligation to disclose binding precedent).

power among the federal and state governments, delegating to the Executive Branch the power to execute the laws, and otherwise regulating the lawmaking authority of government. To the extent that the Constitution can be read to contain some implicit restrictions on secrecy,<sup>315</sup> they must be strongest with respect to the law itself.

#### CONCLUSION

Secret law has become a regular feature of governance in this country, particularly with respect to national security and law enforcement activities of government. The practice is deeply problematic from a number of perspectives. This Article attempts to clarify what is at stake in disputes over secret law to more rigorously assess the harms of secret law and to suggest how tensions between transparency and secrecy might be mitigated. Ultimately, however, to reconcile the basic tension between secret law and elementary constitutional commitments, it will be necessary to bring the practice out of the shadows and to require every branch of government—and the public, too—to participate in decisions over its proper place.

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315. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–80 (1980) (holding First Amendment limits secrecy where there is a longstanding history of openness); *id.* at 589 (Brennan, J., concurring) (explaining First Amendment limits secrecy where openness in a particular governmental process serves that process itself); Pozen, *supra* note 21, at 292–323 (arguing the Constitution forbids, at a minimum, “deep secrecy”—that is, it prohibits one branch of government from taking actions that no other branch of government is permitted to know exist); Samaha, *supra* note 21, at 963–68 (arguing courts could build on existing statutory structures, including FOIA, to enforce constitutionally grounded expansion or contraction of access rights based on the Constitution’s structural logic and its commitment to democratic popular accountability).