

ARTICLE

Defense and Deference:
Empirically Assessing Judicial Review of Freedom of Information Act's National
Security Exemption

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Abstract

Described by some scholars as the “crown jewel of transparency,” the Freedom of Information Act (“FOIA”) allows the public to request records from executive agencies in order to provide insight into government activities and their legal justifications. To balance competing interests in public disclosure and government secrecy, FOIA also contains nine exemptions under which agencies may withhold requested information. However, FOIA’s first exemption, which allows the government to withhold information properly classified by executive order in the interest of national defense or foreign policy, has proven nearly impenetrable. Despite congressional efforts to establish *de novo* review of withholdings under FOIA, many commentators suspect that courts rubberstamp the government’s Exemption 1 arguments. This Article is the first to test that claim empirically. It systematically classifies agencies’ court submissions by quality and analyzes that quality’s effects on case disposition. In this study, courts upheld the government’s Exemption 1 claims despite substandard submissions 76.2% of the time, and submission quality did not impact case outcome in any statistically significant way. This finding implicates not only the effectiveness of FOIA, but also key pillars of the American legal tradition, such as the presumption of transparency, democratic principles, the legitimacy of the judicial process, and inter-branch checks on executive authority. The Article finally presents a probability reporting requirement as a novel and practically implementable solution that would not only encourage more meaningful judicial review, but would also incentivize the government to consider more carefully what information merits continued classification.

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Introduction

In 1981, the *Washington Post* submitted a request to the Department of Defense under the Freedom of Information Act (“FOIA”)¹ for “information concerning the failed attempt in April, 1980, to rescue American hostages held in the United States embassy in Teheran.”² Invoking FOIA’s exemption for classified records,³ the Department of Defense “withheld or partially withheld numerous documents . . . in large part due to concern for the national security.”⁴ In accordance with FOIA’s judicial review provision,⁵ the *Washington Post* challenged these nondisclosures in court.

Given the “exceptional condition”⁶ of the ensuing legal battle’s size and scope—the *Post* sought access to 2,000 documents spanning 14,000 pages—the court ultimately took the rare move of appointing a special master to the case. Seven years into the litigation, this special master reviewed a “representative sample” of withheld records and identified several potential issues with nondisclosure.⁷ In response, the Department of Defense agreed to reassess several of its withholdings from the sample.⁸ Upon reexamination, the Department released numerous documents to plaintiffs—including some that seemed improperly classified, such as the text of an Associated Press news report.⁹

Critically, the Department had not noted the nature of these records in its submissions to the court, neither in its declarations nor in its Vaughn Index—a catalog describing specific records withheld as well as the exemptions justifying nondisclosure.¹⁰ Had the court neglected to interrogate the Department’s representations, the government would have continued to improperly withhold information that FOIA had granted the *Washington Post* a legal right to obtain. Yet increasingly few courts choose to review the government’s statements on withheld national security information in any real depth.¹¹

¹ 5 U.S.C. § 552 (2012).

² *Washington Post v. U.S. Dep’t of Def.*, 766 F. Supp. 1, 4 (D.D.C. 1991).

³ 5 U.S.C. § 552(b)(1).

⁴ *Washington Post*, 766 F. Supp. at 4.

⁵ 5 U.S.C. § 552(a)(4)(B).

⁶ *In re U.S. Dep’t of Def.*, 848 F.2d 232, 235 (D.C. Cir. 1988).

⁷ *Washington Post*, 766 F. Supp. at 4–5.

⁸ *See id.* at 5.

⁹ *See* Robert B. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Act*, 37 VILL. L. REV. 67, 93 (1992).

¹⁰ *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (determining that an agency’s burden to justify its exemptions under FOIA with adequate specificity “could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency’s] refusal justification with the actual portions of the document”). *See infra* Parts I.A and II.B for discussion of the Vaughn Index’s origins and importance to FOIA litigation. Note additionally that when this Article refers to an agency’s “submissions,” that term encompasses both affidavits and Vaughn Indices.

¹¹ *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002) (arguing that courts have become more reticent to question the government’s Exemption 1 claims post-9/11).

Described by some scholars as the “crown jewel of transparency,”¹² FOIA establishes a legal presumption of transparency in American government.¹³ It allows members of the public to request records from executive agencies, and so, to inquire into the executive branch’s activities and their legal justifications.

To balance competing interests in public disclosure and government secrecy, FOIA contains nine exemptions under which agencies may withhold requested information.¹⁴ However, many scholars,¹⁵ civil liberties advocates,¹⁶ and even judges¹⁷ have observed that this balance is off-kilter in practice—particularly where national security information is concerned. FOIA’s first exemption,¹⁸ which allows the government to withhold information “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order,”¹⁹ has proven nearly impenetrable.

Agencies currently rely on the classification scheme established by Executive Order (“EO”) 13526²⁰ when invoking Exemption 1. For a record to be “properly classified” under FOIA pursuant to this order, it must be (1) classified by an “original classification authority,” (2) owned, produced, or under the control of the federal government, and (3) fall into one of eight “protected categories” listed

¹² TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 119 (2007), cited in David E. Pozen, *Transparency’s Ideological Drift*, 128 *YALE L.J.* 100, 124 (2018).

¹³ See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 178–79 (1989); see also *What is the Presumption of Openness and Who Issues Guidance to Agencies on the FOIA?*, U.S. DEP’T OF JUSTICE, <https://www.foia.gov/about.html> [<https://perma.cc/BP5T-SGAF>].

¹⁴ 5 U.S.C. §§ 552(b)(1)–(9).

¹⁵ See, e.g., Deyling, *supra* note 9 (examining excessive judicial deference to the government in Exemption 1 cases); Margaret B. Kwoka, *Deferring to Secrecy*, 54 *B.C. L. REV.* 185 (2013) (detailing judicial “super-deference” in FOIA litigation); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 *WM. & MARY L. REV.* 679 (2002) (demonstrating empirically FOIA’s high government affirmance rate); Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 *ADMIN. L. REV.* 1195 (2004) (discussing extreme judicial deference in FOIA cases involving national security information).

¹⁶ See, e.g., *Exemption 1*, FOIA WIKI (Feb. 4, 2020), https://foia.wiki/wiki/Exemption_1 [<https://perma.cc/W7NA-FTHL>] (“In general, a court reviewing a claimed exemption will determine whether the government has satisfied its burden under a de novo standard of review. . . . However, in the context of Exemption 1 withholdings, courts frequently give great deference to assessments on the need to keep certain records classified contained in intelligence agency affidavits supporting the withholding of a record.”).

¹⁷ See, e.g., Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 *U. PITT. L. REV.* 753, 760 (1980) (noting that courts often review information withheld under FOIA’s national security exemption in a “perfunctory way”).

¹⁸ The government also often invokes several national security-related statutes under Exemption 3 alongside Exemption 1. However, since those statutes are narrower and require a slightly different analysis, I consider them outside the scope of this Article.

¹⁹ 5 U.S.C. § 552(b)(1).

²⁰ Exec. Order No. 13526, 75 *Fed. Reg.* 707 (Dec. 29, 2009).

in Section 1.4 of the order.²¹ In addition, an “original classification authority” must determine that disclosure “could be expected to result in damage to the national security,” and must be “able to identify or describe the damage.”²²

When plaintiffs litigate nondisclosures, courts generally allow the government to rely on declarations—usually in the form of affidavits—to support these claims.²³ While courts facially require these declarations to justify Exemption 1 withholdings in reasonably “specific detail,”²⁴ well-established FOIA jurisprudence deems them sufficient so long as they are “logical and plausible.”²⁵ Many FOIA commentators have argued that this standard’s vagueness has led to judicial “super-deference” that has in turn encouraged the emergence and acceptance of “boilerplate” government declarations.²⁶

But just how deferential is the “logical and plausible” standard in practice? How common are boilerplate declarations in FOIA litigation actually, and how often do courts uphold Exemption 1 claims relying on those declarations alone?

²¹ These eight protected categories include:

1. “military plans, weapons systems, or operations”;
2. “foreign government information”;
3. “intelligence activities (including covert action), intelligence sources or methods, or cryptology”;
4. “foreign relations or foreign activities of the United States, including confidential sources”;
5. “scientific, technological, or economic matters relating to the national security”;
6. “United States Government programs for safeguarding nuclear materials or facilities”;
7. “vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security”; or
8. “the development, production, or use of weapons of mass destruction.”

Id. § 1.4.

²² *Id.* §§ 1.1(a)(1)–(4).

²³ See Julia P. Eckart, *The Freedom of Information Act - the Historical and Current Status of Walking the Tight Rope Between Public Access to Government Records and Protecting National Security Interests*, 41 SETON HALL LEGIS. J. 241, 270 (2017).

²⁴ *Id.* (citing *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)); see also OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 1, 5 (2013) (“The Court of Appeals for the District of Columbia Circuit has refined the appropriate standard for judicial review of national security claims under Exemption 1, finding that summary judgment is proper if an agency’s affidavits are reasonably specific and there is no evidence of bad faith. This review standard has been adopted by other courts as well.”) [hereinafter Department of Justice Guide: Exemption 1 (2013)]; Wells, *supra* note 15, at 1207 (explaining that “most courts” follow this analysis). Note that, in practice, the vast majority of Exemption 1 cases are decided at summary judgment. OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 111–12 (Sept. 25, 2019), <https://www.justice.gov/oip/page/file/1205066/download#page=111>, [https://perma.cc/TY8B-Y9DE] (“Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved, because in FOIA cases there is rarely any factual dispute . . . only a legal dispute over how the law is to be applied to the documents at issue.”) (internal quotations omitted).

²⁵ Eckart, *supra* note 23, at 270; see, e.g., *Larson v. U.S. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (“Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’”).

²⁶ See, e.g., Kwoka, *supra* note 15, at 210, 221; Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 172 (2006).

Though many scholars and practitioners suspect that courts regularly “rubberstamp”²⁷ the government’s Exemption 1 claims, no study has systematically examined government declarations’ adequacy or empirically assessed their impact on case disposition.²⁸

This Article does just that. In doing so, it tests many commentators’ intuitions on the purported extreme judicial deference that accompanies Exemption 1 cases. Its results ultimately corroborate these intuitions, finding that the courts in this study upheld the government’s claims when presented with substandard submissions 76.2% of the time, and declaration quality did not impact case outcome in any statistically significant way. Put more simply, the empirical evidence suggests that the judiciary is not seriously interrogating the executive’s in-court assertions, essentially allowing the government to bypass FOIA with scant justification.

Based on these results, the Article argues that the primary threat that Exemption 1 jurisprudence poses to transparency and democratic values is not the asymmetry of its outcomes, but the inadequacy of its process. In other words, the problem lies not simply with requesters’ slim rate of success in contesting Exemption 1’s invocation, but with how superficially courts assess these challenges during FOIA litigation. While FOIA expressly places the burden on the government to justify its withholdings and grants courts *de novo* review to judge whether Exemption 1 should apply,²⁹ that the government has succeeded in its claims without meeting that burden demonstrates that most courts fail to meaningfully grapple with the executive’s national security claims.

²⁷ See, e.g., Kwoka, *supra* note 15, at 221; 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, 726 (2014).

²⁸ The closest existing scholarship to such an assessment is an empirical study by Susan Nevelow Mart and Tom Ginsburg, which models factors that predict whether or not courts will uphold the government’s Exemption 1 withholdings. However, while this study identified factors, such as *in camera* review or panel composition, that may influence the outcome of Exemption 1 cases, it did not examine the quality of the judicial review itself. Moreover, while Nevelow Mart and Ginsburg noted whether or not courts discussed the adequacy of government declarations in their opinions, the researchers did not examine the declarations and their sufficiency themselves—a step I argue is vital to fully understanding the extent to which the government submits boilerplate justifications for Exemption 1 withholdings and the extent to which courts meaningfully review these withholdings. See Nevelow Mart & Ginsburg, *supra* note 27. Similarly, a 2003 American Legal Report compiled a list of Exemption 1 cases where courts expressly considered declaration sufficiency, but did not consider cases where courts did not include such a discussion in their opinions, did not report the contents of the affidavits themselves, and did not analyze the significance of these considerations. Shauna C. Wagner, Annotation, *Use of Affidavits to Substantiate Federal Agency’s Claim of Exemption from Request for Documents Under Freedom of Information Act* (5 U.S.C.A. § 552), 187 A.L.R. Fed. 1 §§ 9–12 (2003).

²⁹ 5 U.S.C. § 552(a)(4)(B).

Of course, deference to the executive occurs in a variety of national security contexts. Only a minority of FOIA requests implicate Exemption 1,³⁰ and an even smaller proportion of requests is ever litigated.³¹ However, of the many contexts in which the judiciary defers to the executive, FOIA Exemption 1, though limited, is particularly important. FOIA's unique³² posture in encouraging judicial interrogation of the executive's national security determinations³³ makes FOIA litigation a prime arena for paring back the executive's near-monopoly on national security issues. Moreover, the legal presumption of transparency in the United States stems in part from FOIA. By failing to require the government to meet its burden of proof for withholding information under Exemption 1, courts have implicitly shifted this presumption of transparency into a presumption of secrecy—a trend that implicates fundamental American democratic values.³⁴ Finally, extreme deference to executive determinations and disregard for the judicial standards prescribed by FOIA also weakens the legitimacy of the judicial process, and breeds government distrust among civil liberties advocates and the public at large. The problem this Article presents thus has implications that reverberate far beyond FOIA itself.

In Part I of this Article, I trace the development of judicial deference in Exemption 1 litigation and narrate Congress's efforts to establish meaningful judicial review of national security withholdings under FOIA. In Part II, I describe the present problem with judicial deference in FOIA cases generally and Exemption 1 cases in particular, reviewing the existing literature on the matter. In Part III, I discuss the design, outcome, and implications of my own study measuring the adequacy of government declarations in Exemption 1 cases and modeling its impact on case disposition. I argue that this study demonstrates courts' tendency to interrogate the government's Exemption 1 claims only superficially. In Part IV, I further argue that the excessive level of judicial deference my study reveals has broader consequences, both for the American presumption of transparency and for other branches' ability to check the executive in the national security arena as a whole. In Part V, I respond to counterarguments that the current level of review is

³⁰ OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2018, 8 (2019), <https://www.justice.gov/oip/page/file/1170146/download> [<https://perma.cc/M5N6-YS2F>] (noting that agencies invoked Exemption 1 in only 0.49% of 2018 requests).

³¹ Kwoka, *supra* note 15, at 206.

³² One might argue that FOIA is not unique in this regard and that courts such as the FISC wield even more such power. While that statement might be true, the Foreign Intelligence Surveillance Act ("FISA") Court's unique procedural set-up makes analogizing to "normal" judicial proceedings not entirely appropriate, and the furtive nature of the FISC makes an in-depth study more challenging.

³³ See Kwoka, *supra* note 15, at 200–04.

³⁴ It is worth noting here that the extreme majority of FOIA cases uphold the government's decisions to withhold materials, regardless of which exemption was claimed. For a study detailing the rate of success of challenges to withholdings under FOIA, see Verkuil, *supra* note 11. However, FOIA remains particularly impenetrable in the national security context and litigation patterns and strategies differ somewhat when different exemptions are involved, so these other exemptions lie outside the scope of this Article.

appropriate. Finally, in Part VI, I propose requiring the government to report in its declarations the probability that disclosure “could be expected to result in damage to the national security” as a novel mechanism to compel both the executive and the judiciary to more meaningfully review Exemption 1 withholdings.

I. The Historical Problem: Shifting Judicial Deference in Exemption 1 Jurisprudence

Allegations of inadequate judicial review have plagued Exemption 1 litigation since FOIA’s inception. Exemption 1’s history reveals a longstanding back-and-forth between congressional efforts to establish *de novo* review on one hand, and judicial reluctance to apply this standard on the other. This Part charts that conflict, rooting the present problems with Exemption 1 litigation in Exemption 1’s past. Section I.A first narrates the popular and political pressures that spurred FOIA’s enactment and the deliberate decision by Congress to prescribe *de novo* judicial review of withholdings under the statute. Section I.B then discusses courts’ mounting reluctance to accept this congressional mandate, culminating with the Supreme Court’s express refusal to review withholdings under Exemption 1 *de novo*. Finally, Section I.C details Congress’ rejoinder, explaining its reaffirmation of *de novo* review in its 1974 amendments to FOIA and setting the stage to understand the present problem with Exemption 1 litigation.

A. Congress’s Effort to Encourage Transparency and Meaningful Judicial Review

FOIA first emerged from mounting popular and congressional frustration with executive opacity.³⁵ As Senator Edward V. Long declared shortly before the Act’s passage: “A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.”³⁶

Prior to FOIA’s enactment in 1966, the Administrative Procedure Act’s³⁷ (“APA”) information-access provision³⁸ governed the public’s ability to access government records. Yet this provision functioned more as a “withholding [statute] than a disclosure statute,”³⁹ and “generally had been recognized as falling far short

³⁵ See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650–51 (1984) (describing the public’s, media’s, and Congress’ growing demands for open government).

³⁶ *Id.* at 652 (citing 110 CONG. REC. 17,087 (1964)).

³⁷ 5 U.S.C. §§ 551–59 (2012).

³⁸ 5 U.S.C. § 1002 (1964) (enacted in 1946, amended in 1966, and now codified at 5 U.S.C. § 552). The provision as originally enacted read: “Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.”

³⁹ S. REP. NO. 88-1219, at 10 (1964); *see also* OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: INTRODUCTION 6 (Feb. 14, 2020), <https://www.justice.gov/oip/page/file/1248371/download#page=6> [https://perma.cc/9J75-66MX] [hereinafter Department of Justice Guide: Introduction].

of its disclosure goals.”⁴⁰ Journalists complained of “government agencies’ random, unexplained denials of access to information about crucial decisions, denials which had covered up the mistakes or irregularities of the time.”⁴¹ Moreover, the APA provided “no remedy . . . [for the] wrongful withholding of information”⁴² and “there [was] no authority granted for any review of the use of this vague phrase by [f]ederal officials who wish[ed] to withhold information.”⁴³

Congress enacted FOIA to cure these issues, deliberately shifting to a legal presumption of transparency.⁴⁴ It replaced the APA’s “vague” standards for denying records, often “cited as statutory authority for the withholding of virtually any piece of information,”⁴⁵ with nine well-defined exemptions.⁴⁶ It also instituted deadlines for agencies to respond to requests,⁴⁷ an administrative appeal process,⁴⁸ and the opportunity to seek remedies in federal court.⁴⁹ Importantly, in addition to revising the APA’s standards for disclosing government information and appealing nondisclosures, FOIA also fundamentally departed from its judicial review standards.

The APA still governs most judicial review of agency decisions and prescribes a set of review standards largely deferential to factual and discretionary agency determinations.⁵⁰ When Congress enacted FOIA, it included a provision for *de novo* review of all agency decisions to review requested records,⁵¹ breaking from the APA’s mandate for judicial deference. It did so purposefully. As Congress itself explained, “[t]hat the proceeding must be *de novo* is essential in order that the ultimate decision as to the propriety of the agency’s action is made by the court and [to] prevent it from becoming meaningless judicial sanctioning of agency discretion.”⁵²

FOIA, however, proved challenging to litigate and to judge; a proceeding where only the government held “all the information necessary”⁵³ to resolve a case was inherently incompatible with the adversarial process. Without knowledge

⁴⁰ Department of Justice Guide: Introduction, *supra* note 39, at 6 (internal quotations omitted).

⁴¹ Wald, *supra* note 35, at 650.

⁴² S. REP. NO. 88-1219, at 10 (1964).

⁴³ S. REP. NO. 89-813, at 5 (1965).

⁴⁴ Wald, *supra* note 35, at 651.

⁴⁵ S. REP. NO. 88-1219, at 10 (1964).

⁴⁶ 5 U.S.C. § 552(b)(1)-(9).

⁴⁷ *Id.* § 552(a)(3)(A).

⁴⁸ *Id.* § 552(a)(6)(A)(i).

⁴⁹ *Id.* § 552(a)(4)(B).

⁵⁰ Kwoka, *supra* note 15, at 188–89. For a deeper discussion of judicial deference under the APA, see *id.* at 188–97.

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

⁵² 111 CONG. REC. 26,823 (1965).

⁵³ Deyling, *supra* note 9, at 72.

about withheld records' identity or content, plaintiffs could not adequately respond to the government's arguments and as a result, courts could not adequately judge them. In their early days, FOIA proceedings thus often took a somewhat inefficient course: to meet its burden of justifying nondisclosure, the government "file[d] a motion for summary judgment along with an affidavit stating that . . . documents were properly withheld because they fell within the scope of one of the nine FOIA exemptions. At that point the burden would effectively shift to the court to determine, through time-consuming review of individual documents, whether the government's arguments were justified."⁵⁴

This early system was not only inefficient, but also "very burdensome" for courts and very difficult to judge fairly.⁵⁵ As the D.C. Circuit explained in *Vaughn v. Rosen*, FOIA litigations were "necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure."⁵⁶ The *Vaughn* court instituted a groundbreaking new solution: the requirement that agencies produce, and provide to plaintiffs and the court, an index listing and describing specific records withheld, as well as the exemptions justifying nondisclosure.⁵⁷ Other courts soon followed the D.C. Circuit's lead and today, the Vaughn Index is a "near-universal" feature of FOIA litigation.⁵⁸

With the advent of this procedural mechanism, the judiciary helped cultivate the robust review role that Congress had designed for it. Yet despite this effort to engage in meaningful oversight, and despite the congressional push to build FOIA as a powerful new tool to encourage transparency and check executive agencies' discretion, courts still remained hesitant to review the executive's determinations *de novo*—particularly where Exemption 1 was concerned.

B. Exemption 1 and Deteriorating De Novo Review

In trying to increase government transparency and to limit the executive's ability to foil that goal, Congress imposed on agencies firmer new parameters for disclosing and withholding information. However, FOIA's design still expressly tied Exemption 1 to the executive's classification scheme, permitting the government to withhold information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . in fact properly classified pursuant to such Executive order."⁵⁹ Accordingly, Congress left decisions regarding what national

⁵⁴ Deyling, *supra* note 9, at 72.

⁵⁵ *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

⁵⁶ *Id.* at 825.

⁵⁷ *Id.* at 827 (determining that an agency's burden to justify its exemptions under FOIA with adequate specificity "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document").

⁵⁸ Deyling, *supra* note 9, at 73.

⁵⁹ 5 U.S.C. § 552(b)(1). This is the text of Exemption 1 as it currently reads. The original provision did not require information to be classified pursuant to an executive order, but was very quickly

security-related information merits classification—and thus, what information Exemption 1 protects—largely dependent upon the executive’s own discretion, both in establishing procedural and substantive classification requirements and in applying them.

While Congress instructed courts to review *de novo* whether withheld information was “in fact properly classified pursuant to [the governing] Executive order,” the judiciary approached this task timidly. Between FOIA’s passage in 1966 and its amendment in 1974, few cases arose involving Exemption 1. However, those that did “reveal that the courts saw their role in FOIA national security cases as extremely limited, reflecting long-standing judicial reluctance to be perceived as second-guessing the executive branch on matters relating to foreign policy and national security.”⁶⁰ As Susan Nevelow Mart and Tom Ginsburg explain, “[c]lassified and pseudo-classified documents began to occupy a special niche in the FOIA practice. Even though the FOIA ‘rejected the traditional rule of deference’ to agency expertise in reviewing an agency’s FOIA determination, courts routinely granted deference to an agency determination that a document was properly classified and therefore exempt from the FOIA.”⁶¹

The decision in *Epstein v. Resor*,⁶² in which a historian sought to enjoin the Secretary of the Army from withholding a record “described as ‘Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul,’”⁶³ provides an illuminating example of such deference. The court rejected the historian’s claim and, in ruling for the government, held that the appropriate standard of review for Exemption 1 cases was not *de novo*, but “clearly arbitrary and unsupported.”⁶⁴ The Ninth Circuit agreed, adding that “[Exemption 1] is couched in terms significantly different from the other exemptions” because “[t]he function of determining whether secrecy is required in the national interest is expressly assigned to the executive.”⁶⁵

amended to include this condition. Nevelow Mart & Ginsburg, *supra* note 27, at 737. Exemption 1’s amended language does not differ materially from its original language, so, for simplicity, I refer only to the current text. Moreover, successive administrations have issued new executive orders to establish the executive branch’s classification policy. *See, e.g.*, Exec. Order No. 10290, 16 Fed. Reg. 9795 (Sept. 24, 1951)(Truman Administration); Exec. Order No. 10501, 3 C.F.R. 398 (1949-1953 Comp.) (Eisenhower Administration); Exec. Order No. 10985, 27 Fed. Reg. 439 (Jan. 2, 1962) (Kennedy Administration); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.) (Nixon Administration); Exec. Order 11862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford Administration); Exec. Order No. 12065, 3 C.F.R. 190 (1978) (Carter Administration); Exec. Order No. 12356, 3 C.F.R. 166 (1982) (Reagan Administration); Exec. Order No. 12958, 3 C.F.R. 333 (1996) (Clinton Administration); Exec. Order No. 12958, as amended, 3 C.F.R. 196 (2004) (George W. Bush Administration); Exec. Order No. 13526, 3 C.F.R. 298 (2010) (Obama Administration). Presently, EO 13526 continues to govern the classification of records.

⁶⁰ Deyling, *supra* note 9, at 73.

⁶¹ Nevelow Mart & Ginsburg, *supra* note 27, at 738.

⁶² 296 F. Supp. 214 (N.D. Cal. 1969), *aff’d*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (cited in Deyling *supra* note 9, at 73).

⁶³ *Id.* at 215.

⁶⁴ *Id.* at 217.

⁶⁵ *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).

Meanwhile, outside the judiciary, congressional concerns over FOIA—and over executive secrecy more generally—brewed. In 1971, litigation over the government’s efforts to suppress publication of the Pentagon Papers,⁶⁶ a report commissioned by the Secretary of Defense to assess U.S. involvement in Vietnam,⁶⁷ prompted a series of congressional hearings on the balance of executive power and citizens’ First Amendment rights.⁶⁸ These hearings, in turn, morphed into a discussion of FOIA’s efficacy as a tool for transparency.⁶⁹ They also inspired a 1972 House Report⁷⁰ on FOIA that noted that while too few cases had been decided to definitively identify any problems or patterns in FOIA litigation, courts were “generally reluctant” to order disclosure in Exemption 1 cases.⁷¹

These concerns over judicial deference and the evolving standard of review in Exemption 1 cases came to a head in *EPA v. Mink*,⁷² a 1973 Supreme Court case involving congressmembers’ request for a report relating to nuclear weapons testing in Alaska. Contradicting FOIA’s provision for *de novo* review, the Court ruled that Congress did not in fact intend for courts to review classification decisions under Exemption 1.⁷³ While Congress had meant for the judiciary to review the propriety of nondisclosure under FOIA’s other eight exemptions *de novo*, the Court reasoned, “Congress chose to follow the Executive’s determination”⁷⁴ on Exemption 1’s coverage due to Congress’s reliance on classification pursuant to executive order. Thus, the Court carved out an exception to *de novo* review in Exemption 1 litigation. The government needed only to attest via affidavit that withheld information was indeed properly classified pursuant to the relevant executive order in order to invoke Exemption 1.⁷⁵ Courts therefore lacked the authority to question these claims in a meaningful manner, or to conduct *in camera* review to confirm them.⁷⁶

Through its decision in *EPA v. Mink*, the Court thus extinguished any remaining embers of *de novo* review in Exemption 1 litigation.

⁶⁶ See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (enjoining the government from imposing a prior restraint on the grounds that the government’s interest in keeping the Pentagon Papers classified did not override reporters’ First Amendment rights).

⁶⁷ See PENTAGON PAPERS, NATIONAL ARCHIVES, (Jan. 23, 2020), <https://www.archives.gov/research/pentagon-papers> [<https://perma.cc/SKJ5-DY86>].

⁶⁸ *United States Government Information Policies and Practices-Administration and Operation of the Freedom of Information Act: Hearings Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 92d Cong., 1st and 2d Sess., pts. 4-6 (1972).

⁶⁹ See *id.*

⁷⁰ COMM. ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 92-1419 (1972).

⁷¹ *Id.* at 71.

⁷² 410 U.S. 73 (1973).

⁷³ *Id.* at 81.

⁷⁴ *Id.*

⁷⁵ *Id.* at 84.

⁷⁶ *Id.*

C. *Clarifying the Exemption 1 Standard of Review: The 1974 Amendments to FOIA*

The Court's decision in *Mink*, coupled with the immense public concern regarding government power and secrecy that the Watergate scandal aroused,⁷⁷ prompted Congress to amend FOIA one year later. Passed by a margin wide enough to override President Ford's veto,⁷⁸ the 1974 amendments flatly overruled *Mink*'s holding, reaffirming Congress's intent to establish *de novo* review to judge withholdings under *all* of FOIA's exemptions—Exemption 1 included.

Robert Deyling summarizes the amendments' changes to judicial consideration of Exemption 1:

First, the amendments directed the courts to evaluate government exemption claims under (b)(1) by determining *de novo* whether records were properly withheld. Second, the amendments specifically authorized in camera inspection of withheld documents at the court's discretion in all FOIA cases, even those involving classified information. Third, the amendments shielded from disclosure only information that was properly classified "pursuant to both procedural and substantive criteria contained in the Executive order." Finally, the amendments required that "any reasonably segregable portion of a record shall be provided after deletion of the portions which are exempt."⁷⁹

As one FOIA expert has argued, these modifications to Exemption 1 were "intended to provide the same type of review for classification decisions as for other FOIA withholdings . . ." ⁸⁰ However, while these changes superficially reflected relatively clear instructions for courts, the legislative history behind the 1974 amendments obfuscated Congress's desired judicial treatment of Exemption 1. This legislative history guided the judiciary's interpretation of its new requirements from Congress—and enabled many courts to "rationalize the deference given to agency positions under Exemption 1. . ." ⁸¹

⁷⁷ Wald, *supra* note 35, at 659.

⁷⁸ SUBCOMM. ON GOV'T INFO. AND INDIVIDUAL RIGHTS, HOUSE COMM. ON GOV'T OPERATIONS & SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (PUB. L. NO. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 276–79 (House vote), 366 (Senate vote), 431–34 (House vote to override veto), 480 (Senate vote to override veto) (Jt. Comm. Print 1975) [hereinafter SOURCE BOOK].

⁷⁹ Deyling, *supra* note 9, at 76–77.

⁸⁰ Kwoka, *supra* note 15, at 213.

⁸¹ Kwoka, *supra* note 15, at 214

The amendments' ambiguity stems primarily from a report⁸² compiled by a Conference Committee appointed to resolve "technical"⁸³ disparities between the House and Senate versions of the FOIA amendments bills. Specifically, courts claiming Congress did not in fact intend to reinstate a *de novo* standard of review in Exemption 1 cases often cite the following passage:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.⁸⁴

Some FOIA commentators, however, argue that the Conference Report authors only included this language to appease President Ford, who had threatened to veto the legislation on constitutionality grounds.⁸⁵ In particular, President Ford considered Congress's proposed judicial review provisions to violate the executive's constitutional powers as they concerned national security information. Supporting this theory is a letter President Ford sent to the Conference Committee, in which he demanded Congress include in its amendments an "express presumption that the classification was proper," subject only to an "arbitrary and capricious" standard of review.⁸⁶

Moreover, other sections of the Report, as well as the legislative history as a whole, reveal congressional intent to establish meaningful judicial review in Exemption 1 cases. The Conference Report re-emphasized Congress's commitment to "de novo" review and, defying President Ford's request for a "presumption that the classification was proper," reiterated that "[t]he burden remains on the government" to demonstrate that Exemption 1 properly applies.⁸⁷ Additionally, the Report doubled down on Congress's provisions for *in camera* review, stressing that, while not always needed, "in many situations it will plainly be necessary and appropriate."⁸⁸ As one scholar concludes, "[t]he conference report accompanying the amendments made clear that Congress intended to overrule *Mink* and provide effective judicial review of executive branch classification decisions."⁸⁹

⁸² SOURCE BOOK, *supra* note 78, at 226 (reprinting H.R. REP. NO. 93-1380 (1974) (Conf. Rep.)).

⁸³ Deyling, *supra* note 9, at 77.

⁸⁴ SOURCE BOOK, *supra* note 78, at 229 (reprinting H.R. REP. NO. 93-1380 (1974) (Conf. Rep.)).

⁸⁵ See, e.g., Deyling, *supra* note 9, at 78.

⁸⁶ SOURCE BOOK, *supra* note 78, at 369 (reprinting Letter from President Ford to Senator Kennedy dated Aug. 20, 1974).

⁸⁷ SOURCE BOOK, *supra* note 78, at 226 (reprinting H.R. REP. NO. 93-1380 (1974) (Conf. Rep.)).

⁸⁸ SOURCE BOOK, *supra* note 78, at 226 (reprinting H.R. REP. NO. 93-1380 (1974) (Conf. Rep.)).

⁸⁹ Wells, *supra* note 15, at 1206.

The individual House and Senate Reports on the proposed amendments reiterated this intent. The House Report underlined that courts “may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.”⁹⁰ Meanwhile, the Senate Report used even stronger language, urging courts to “inquire during *de novo* review not only into the superficial evidence—a ‘Secret’ stamp on a document or set of records—but also into the inherent justification for the use of such a stamp.”⁹¹ Separately, as Robert Deyling argues, “[t]he House and Senate floor debates on the amendments show a Congress nearly unanimous in its desire to direct the courts to review FOIA national security cases in a manner similar to any other type of FOIA case.”⁹²

Nevertheless, Congress’s admonition to apply “substantial weight” to agency declarations eclipsed its express reaffirmation of *de novo* review in Exemption 1 cases. Despite Congress’s intent and instruction in its 1974 amendments to FOIA, courts have largely regressed to the *EPA v. Mink* model of review, dressed in different language. Indeed, the Department of Justice’s Guide to FOIA still cited *EPA v. Mink* when discussing courts’ standard of review under the Act, and referred to its legacy as “an accepted doctrine that continues to this day”⁹³ until its most recent update in 2019. The next Part examines this reversion and the growing judicial deference to the government in FOIA generally and in Exemption 1 in particular. It thus sets the stage for this Article’s study, which empirically approximates the extent of judicial deference to the government and the quality of judicial review in Exemption 1 jurisprudence.

II. The Present Problem: A Lack of Meaningful Judicial Review of Exemption 1 Withholdings

A. *Judicial Deference to the Government in FOIA Generally*

The abnormally high rate of court decisions that uphold agency withholdings under FOIA generally is well-documented. In what some scholars called “the most comprehensive empirical study of district court review of agency decisions,”⁹⁴ Paul Verkuil compared judicial standards of review with affirmance

⁹⁰ SOURCE BOOK, *supra* note 78, at 127 (reprinting H.R. REP. NO. 93-876 (1974)).

⁹¹ SOURCE BOOK, *supra* note 78, at 182 (reprinting S. REP. NO. 93-854 (1974)).

⁹² Deyling, *supra* note 9, at 80. To read transcripts from the debates, see SOURCE BOOK, *supra* note 78, at 235–80 and 281–366 for the House and Senate, respectively.

⁹³ Department of Justice Guide: Exemption 1 (2013), *supra* note 24, at 1 (“As the Supreme Court recognized decades ago, courts must afford deference to the agency’s decision to protect national security information from disclosure, an accepted doctrine that continues to this day.”). While the 2019 Guide has removed reference to *Mink*, it nevertheless notes that “[c]ourts generally defer to agency expertise in national security cases.” OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 1, 15 (Aug. 21, 2019), <https://www.justice.gov/oip/page/file/1197091/download> [https://perma.cc/2H4T-JH9L] [hereinafter Department of Justice Guide: Exemption 1 (2019)].

⁹⁴ Kwoka, *supra* note 15, at 204 n.122 (citing Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84 (2011)).

rates.⁹⁵ For agency determinations reviewed *de novo*, such as agencies' decisions not to release records under FOIA, Verkuil predicted an affirmance rate between forty and fifty percent.⁹⁶ In a drastic deviation from his hypothesis, Verkuil found that courts affirmed agencies' decisions to withhold requested information under FOIA ninety percent of the time—the affirmance rate that Verkuil predicted for “arbitrary or capricious” review, the most deferential standard.⁹⁷

It is instinctually tempting to dismiss this divergence by noting FOIA's particularities. First, Verkuil himself posits that the Supreme Court holds some degree of skepticism towards FOIA, borne from concerns about the effectiveness of law enforcement and anti-terrorism efforts, the burdens of FOIA compliance on agencies, and the “unsympathetic nature” of most plaintiffs, who are often prisoners or business competitors using FOIA for personal gain, rather than in the public interest.⁹⁸ However, as Richard Pierce has confirmed,⁹⁹ while this skepticism may be one factor driving FOIA's abnormally high affirmance rate, it does not entirely explain its divergence.

Second, government agencies are “the ultimate repeat player[s]” in FOIA litigation,¹⁰⁰ thus gaining a strategic advantage over their opponents. Yet this observation also does not explain FOIA's ninety percent affirmance rate. For one thing, plaintiffs filing suit under FOIA are also often repeat players,¹⁰¹ though to a lesser extent. Agencies, too, are often repeat players in litigation over determinations made pursuant to other laws; however, courts affirm those agency decisions only sixty to seventy percent of the time—not ninety.¹⁰²

There are further empirical limitations of a study that only includes litigated cases, not cases resolved at other stages in the adjudicatory process. The vast

⁹⁵ Verkuil, *supra* note 11, at 682.

⁹⁶ Verkuil, *supra* note 11, at 689. Verkuil also hypothesized an affirmance rate of seventy to eighty percent for the “clearly erroneous” standard of review, seventy-five to eighty-five percent for the “substantial evidence” standard, and eighty-five to ninety percent for the “arbitrary and capricious review” standard. Verkuil's hypothesis did not hold empirically true for review of other agency decisions; for example, courts affirmed the Social Security Administration's benefits determinations only fifty percent of the time, despite an “abuse of discretion” standard equivalent to “arbitrary and capricious.” Verkuil, *supra* note 11, at 719. Similarly, Professor David Zaring found that courts affirm agency decisions at roughly the same rate—between sixty and seventy percent—regardless of the standard of review. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010). FOIA, however, remains a prominent outlier.

⁹⁷ Verkuil, *supra* note 11, at 719.

⁹⁸ Verkuil, *supra* note 11, at 715–16. For a fuller discussion of FOIA's glut of corporate requestors, see generally David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

⁹⁹ Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84–86 (2011).

¹⁰⁰ Kwoka, *supra* note 15, at 209.

¹⁰¹ Kwoka, *supra* note 15, at 209. For example, public interest organizations, such as the American Civil Liberties Union or Judicial Watch, and newspapers, such as the *New York Times*, tend to file many lawsuits under FOIA.

¹⁰² Zaring, *supra* note 96, at 135.

majority of FOIA cases are entirely adjudicated at the agency level.¹⁰³ For example, in fiscal year 2017, the government received a total of 818,271 requests under FOIA¹⁰⁴ and processed 823,222 requests,¹⁰⁵ 21.9% of which were granted in full.¹⁰⁶ However, only 651 FOIA suits were brought in court that year.¹⁰⁷ An analysis of this limited subset of cases may present a skewed depiction of affirmance rates.

Yet, as George Priest and Benjamin Klein famously observed,¹⁰⁸ rational, self-interested parties will only litigate cases that have a reasonable chance of succeeding. Accordingly, only the closest of cases will ever make it to litigation—let alone all the way *through* litigation—and so, we would expect FOIA’s affirmance rate to hover around fifty percent. Priest and Klein explain, however, that differences in the parties’ incentives can raise this rate, adding that the “[s]takes are most clearly symmetrical where the parties seek solely a dollar judgment in a dispute over activities in which neither party ever expects to engage again.”¹⁰⁹ In the FOIA context, neither factor holds true. Plaintiffs can only receive injunctive relief from FOIA, not monetary damages.¹¹⁰ Moreover, as explained, both government agencies and plaintiffs are often repeat players. Accordingly, parties’ incentives when litigating FOIA disputes are particularly asymmetric under Priest and Klein’s theory, and this asymmetry contributes to a higher-than-expected affirmance rate.

However, “[i]t is unlikely . . . that all of the deviation from the 50% affirmance rate hypothesized both by Verkuil’s work and Priest and Klein’s theory can be attributed to the government’s repeat-player status and the nature of the remedies. Were that the case, there should be similarly astronomical success rates for other types of litigation challenging agency decisions, which share the government as the defendant and also involve nonmonetary claims.”¹¹¹ Other factors likely account for FOIA’s abnormally high affirmance rate. Margaret Kwoka posits that one such factor is judicial deference, both “spoken” and “unspoken.”¹¹² Courts both explicitly develop doctrines giving deference to certain agency positions and implicitly grant the government deference through special procedures designed to deal with the information imbalance inherent in FOIA litigation. For example, Kwoka argues that the Vaughn Index—a document in

¹⁰³ Kwoka, *supra* note 15, at 208.

¹⁰⁴ OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2017 2 (2018), <https://www.justice.gov/oip/page/file/1069396/download> [<https://perma.cc/5U3F-92K2>].

¹⁰⁵ *Id.* at 4. Note that this figure includes processed requests that were pending from previous years.

¹⁰⁶ *Id.* at 6.

¹⁰⁷ FOIA Project Staff, *FOIA Lawsuits Surge in Trump Administration’s First Year*, THE FOIA PROJECT (Jan. 16, 2018), <http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/> [<https://perma.cc/RV6M-U86H>].

¹⁰⁸ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984).

¹⁰⁹ *Id.* at 28.

¹¹⁰ 5 U.S.C. § 552(a)(4)(B) (2006). However, victorious plaintiffs may recover attorneys’ fees. *Id.*

¹¹¹ Kwoka, *supra* note 15, at 210.

¹¹² Kwoka, *supra* note 15, at 211–35.

which agencies describe withheld records, as well as the exemptions invoked¹¹³—aims to remedy the informational asymmetry between FOIA litigants, but instead has hampered plaintiff’s ability to challenge the government’s claims in a meaningful manner:

First, *Vaughn* indices have become so boilerplate that they are often not of great use to test the government’s claims. Second, as a result of these boilerplate indices, FOIA litigation often focuses on a dispute about the adequacy of the *Vaughn* index, rather than a dispute about the merits of the exemption claims themselves—that is, parties contest whether the *Vaughn* index provides sufficient detail about documents instead of contesting whether a document falls within a claimed exemption. Finally, and perhaps most seriously, the creation of the *Vaughn* procedure has been used to justify denying FOIA plaintiffs any additional discovery as normally permitted in civil cases.¹¹⁴

This “boilerplate” nature of *Vaughn* indices and accompanying government declarations proves particularly critical in the Exemption 1 context. I discuss both at greater length in the following sections.

B. *Judicial Deference to the Government in Exemption 1 Cases*

FOIA in general evokes extraordinary judicial deference, and Exemption 1 in particular goes even further. While considering the divergence between FOIA’s affirmance rate in practice and the affirmance rate he theorized, Verkuil acknowledges that Exemption 1 jurisprudence is special. As he explains: “[i]n practice, the de facto standard of review is not ‘de novo’ or even ‘arbitrary and capricious’ in Exemption 1 cases; it is closer to ‘committed to agency discretion.’ . . . The courts seem to have effectively amended the FOIA de novo standard without Congress’ concurrence.”¹¹⁵ Verkuil adds that this radical deference persists at the appellate level; after individually reviewing Exemption 1 cases in the 1990s, he found that none “upheld any decisions to reject an agency’s classification claim.”¹¹⁶

Verkuil’s position is hardly new or contested. As Christina Wells explains, “[m]ost observers agree that courts are generally deferential to claims of harm to national security, rarely overriding the government’s classification decisions.”¹¹⁷ Indeed, “[i]n most cases challenging FOIA Exemption 1 determinations as to

¹¹³ This procedure arises from the Supreme Court’s decision to require such indices in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). See *supra* Part I.A for further discussion of the index’s origins.

¹¹⁴ Kwoka, *supra* note 15, at 223 (internal citations omitted).

¹¹⁵ Verkuil, *supra* note 11, at 715. Notably, Verkuil argues that Exemption 1 litigation does not fully account for FOIA’s abnormally high affirmance rate. Repeating the analysis with Exemption 1 cases removed still yielded an affirmance rate of eighty-nine percent.

¹¹⁶ Verkuil, *supra* note 11, at 714.

¹¹⁷ Wells, *supra* note 15, at 1208.

national security, courts have exhibited great deference to agency affidavits and granted the government summary judgment without *in camera* inspection of the requested records.”¹¹⁸ The Department of Justice itself has acknowledged that “[c]ourts generally defer to agency expertise in national security cases.”¹¹⁹

The rate at which courts affirm agencies’ invocations of Exemption 1 supports the notion that this deference exists and suggests that it may be extreme. One study of district and appellate cases in the D.C. Circuit from 1974 to 2012 found that plaintiffs achieved full or partial victories in only six of 163 district court decisions challenging withholdings under Exemption 1—a mere 3.7 percent of the time.¹²⁰ It bears noting again that selection bias is not the culprit behind this astonishingly low rate, as the government does not often concede potential cases before they reach court. For example, though no publicly available concession rates exist, we can estimate that the NSA only administratively concedes Exemption 1 withholdings, in full or in part, approximately 0.2 percent of the time, the CIA, 0.7 percent, and the FBI, close to 0, since no administrative appeals were filed in the past five years.¹²¹ Unfortunately, no datasets exist to estimate the concession rate in the cases that make it *to* litigation, but not all the way *through* it, i.e. cases settled sometime after a complaint is filed. However, while negotiations do occasionally yield additional releases of information, there is not much reason to believe that

¹¹⁸ Fuchs, *supra* note 26, at 163.

¹¹⁹ Department of Justice Guide: Exemption 1 (2019), *supra* note 93, at 15.

¹²⁰ Nevelow Mart & Ginsburg, *supra* note 27, at 768.

¹²¹ Due to limitations in publicly available data, I used proxies to calculate this rate in several steps. First, I found the proportion of the number of times that requestors administratively appealed withholdings under Exemption 1, relative to the number of times that agencies invoked Exemption 1. Wherever requestors did not challenge Exemption 1 withholdings, they very likely accepted their loss and walked away. FOIA generally requires would-be litigants to exhaust administrative appeal remedies prior to seeking judicial review. *See Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citing *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 61–64, 65 n.9 (D.C. Cir. 1990)); *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994) (“The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts.”); *McDonnell v. United States*, 4 F.3d 1227, 1240, 1241 (3d Cir. 1993); *Voinche v. U.S. Dep’t of the Air Force*, 983 F.2d 667, 669 (5th Cir. 1993) (“We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review.”). Requestors do have the option to discuss agency determinations with a FOIA public liaison instead of filing an administrative appeal; however, this liaison only has the authority to explain the exemptions invoked, not to reverse the decision as to their application.

After finding that proportion, I multiplied it by the percentage of appeals that agencies granted or remanded, either in full or in part. This rate is imperfect, as the statistics do not split affirmance by exemption. However, it is likely fairly accurate, because almost all NSA and CIA appeals challenged Exemption 1. (Many appeals also challenged Exemption 3, but agencies often invoke those exemptions in tandem. *See Nevelow Mart & Ginsburg, supra* note 27, at 765–66.)

Thus, to summarize, the government’s administrative concession rate equals the percentage of Exemption 1 invocations appealed, multiplied by the percentage of successful appeals.

Additionally, as backlogs sometimes result in adjudication of appeals from exemptions invoked in previous years, I instead used averages from across five years for better comparison. *See Appendix* for 2013–2017 datasets from the NSA, CIA, and FBI, and for the data source, see *Freedom of Information Act: Data*, U.S. DEP’T OF JUSTICE (Jan. 26, 2020), <https://www.foia.gov/data.html> [<https://perma.cc/T5WB-9UCR>].

this concession rate would be significantly higher than that of the administrative appeal concession rate; after review and after hearing requestors' arguments, the government either continues to consider withheld information properly classified or it does not. While normal parties may be induced to settle when faced with the costs of prospective litigation, government agencies cannot simply release withholdings they deem properly classified. Yet, even without these additional data points, it is plain that a strong pattern of judicial deference persists.

Robert Deyling details doctrinal developments since FOIA's last amendments in 1974 that have re-entrenched judicial deference to the executive in Exemption 1 cases.¹²² First, in a landmark leap towards meaningful judicial review in Exemption 1 litigation, the D.C. Circuit Court of Appeals in *Ray v. Turner*¹²³ permitted courts to review contested records *in camera* at their discretion.¹²⁴ Notably, the court's reasoning relied on Congress's commitment to *de novo* review of Exemption 1 in its 1974 amendments to FOIA and its simultaneous rejection of the idea that courts should affirm all "reasonable" agency decisions. However, if *Ray* advanced meaningful judicial review of Exemption 1 by one step, it also pushed it back two steps. The *Ray* court clarified that courts should order *in camera* review only if uncertainties remained *after* assigning "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."¹²⁵ As Deyling explains:

[I]ater cases . . . refined the standard for judicial review and narrowed a plaintiff's chances of persuading a court either to review documents *in camera* or to order disclosure. These cases turned on the notion that a 'reasonably detailed' government affidavit would justify judicial deference to the 'expert' opinion of the agency, and hence summary judgment in favor of the government.¹²⁶

Indeed, as numerous courts have stated, because judges "lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case,"¹²⁷ they "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."¹²⁸ Though courts do

¹²² Deyling, *supra* note 9, at 82–88.

¹²³ *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978).

¹²⁴ *Id.* at 1195.

¹²⁵ *Id.* at 1194 (quoting S. REP. NO. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6290).

¹²⁶ Deyling, *supra* note 9, at 82–83 (citing *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980)).

¹²⁷ *Krikorian v. U.S. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (quoting *Halperin*, 629 F.2d at 148).

¹²⁸ *Wolf v. CIA.*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Military Audit Project*, 656 F.2d at 738); *see also* *ACLU v. U.S. Dep't of Justice*, 681 F.3d 61, 70 (2d Cir. 2012) (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)) ("[W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."); *Azmy v. U.S. Dep't of Def.*, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (quoting *Military Audit Project*, 656 F.2d at 738) ("Because the agencies

sometimes exercise the discretion to review records *in camera*, they often instead rely on these affidavits and their accompanying Vaughn Indices.¹²⁹

Additionally, courts have also declined to allow discovery in FOIA cases. Though the Federal Rules of Civil Procedure provide no FOIA exception to the rules governing discovery, as the D.C. Circuit has acknowledged, district courts maintain great discretion to create such an exception in practice.¹³⁰ They have, in turn, used this discretion to “systematically eliminate[] discovery procedures in FOIA cases.”¹³¹ The notion that “discovery is generally unavailable in FOIA actions”¹³² carries special force in cases concerning Exemption 1. As the D.C. Circuit has argued, “[i]n national security cases, some sacrifice[s] to the ideals of the full adversary process are inevitable.”¹³³

Deyling describes how courts have adopted several government arguments that entrench deference to the executive into their Exemption 1 jurisprudence. First, courts have largely accepted the government’s “mosaic theory,” which reasons “that apparently harmless pieces of information, when assembled together, could reveal a damaging picture.”¹³⁴ As Deyling explains, “[t]he government draws authority for this argument from [Executive Order (EO) 12958], which defines ‘classified’ information as that which, if disclosed, would cause damage ‘either by itself or in the context of other information.’”¹³⁵ Though EO 13526 has since eliminated that language, courts continue to rely on mosaic theory in deferring to government affidavits in Exemption 1 cases.¹³⁶ Following the mosaic-theory logic, the judiciary must primarily defer to the executive’s classification determinations as expressed in government declarations “because national security officials are uniquely positioned to view ‘the whole picture’ and ‘weigh the variety of subtle and complex factors’ in order to determine whether the disclosure of information

responsible for national security ‘have unique insights into what adverse [e]ffects might occur as a result of public disclosures,’ courts are ‘required to accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.’”

¹²⁹ See *supra* Section II.B; see also Wells, *supra* note 15, at 1208 (“Many [courts] find that *in camera* review of the government’s documents is not only unnecessary but also inappropriate if the government’s affidavits meet the . . . conditions [specified in the text accompanying footnote 11].”).

¹³⁰ Kwoka, *supra* note 15, at 224.

¹³¹ Kwoka, *supra* note 15, at 224.

¹³² Kwoka, *supra* note 15, at 224–25 (quoting *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003)).

¹³³ *Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981).

¹³⁴ OFFICE OF INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 1, 170 (2009); see also Department of Justice Guide: Exemption 1 (2019), *supra* note 93, at 25–27.

¹³⁵ Deyling, *supra* note 9, at 84 (emphasis omitted). For a fuller discussion on the role of the mosaic theory in Exemption 1 jurisprudence, see David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

¹³⁶ See, e.g., *N.Y. Times Co. v. FBI*, 297 F. Supp. 3d 435 (S.D.N.Y. 2017); *Ctr. for Constitutional Rights v. U.S. Dep’t of Def.*, 968 F. Supp. 2d 623 (S.D.N.Y. 2013); *Hetzler v. Record/Info. Dissemination Section, FBI*, 896 F. Supp. 2d 207 (W.D.N.Y. 2012).

would damage national security.”¹³⁷ Adopting the mosaic-theory argument into Exemption 1 jurisprudence therefore reinforces the notion that courts lack expertise to review the executive’s classification claims meaningfully.

Second, courts have also confirmed the validity of a “Glomar response” or “Glomar denial,” in which the government refuses to either confirm or deny the existence of requested records on the grounds that revealing even this information would endanger the national security. The term originates in *Phillippi v. CIA*,¹³⁸ a case involving a reporter’s request for records on the CIA’s decision to finance construction of the “Glomar Explorer,” a deep-sea salvage vessel, in order to raise a sunken Soviet submarine. Despite the press publishing leaked documents detailing the CIA’s involvement at length,¹³⁹ the *Phillippi* court accepted the government’s argument that even the existence of records relating to the operation was a classified fact. Glomar responses have become par for the course in Exemption 1 litigation,¹⁴⁰ reducing the amount of information that courts and plaintiffs receive and so, leaving them even less able to question—let alone refute—the government’s claims.

As former D.C. Circuit Judge Patricia Wald noted as far back as 1980, the result is that courts review Exemption 1 cases “in a perfunctory way”¹⁴¹ and “may be approaching too timidly . . . their clear responsibility to inquire into whether national security claims override traditional constitutional rights or liberties.”¹⁴² Modern commentators agree, and add that these concerns over judicial “super-deference”¹⁴³ to national security claims have only increased since the mid-1980s, with no reason to abate in a post-9/11 world.¹⁴⁴ A cause and consequence of this super-deference is an influx of “boilerplate” government affidavits and Vaughn indices that contain little specific information or argumentation on how release of information would potentially harm national security—but that courts nevertheless accept as sufficient justification for Exemption 1 withholdings.¹⁴⁵

Consistent with this deference, courts have explained that:

¹³⁷ Department of Justice Guide: Exemption 1 (2019), *supra* note 93, at 16 (internal citations omitted).

¹³⁸ 655 F.2d 1325, 1327 (D.C. Cir. 1981).

¹³⁹ See, e.g., Seymour Hersh, *C.I.A. Salvage Ship Brought Up Part of Soviet Sub Lost in 1968, Failed to Raise Atom Missiles*, N.Y. TIMES (Mar. 19, 1975), <https://www.nytimes.com/1975/03/19/archives/cia-salvage-ship-brought-up-part-of-soviet-sub-lost-1968-failed-to.html> [<https://perma.cc/MK6C-9HG5>].

¹⁴⁰ See, e.g., *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016); *Freedom Watch, Inc. v. NSA*, 783 F.3d 1340 (D.C. Cir. 2015); *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013); *Houghton v. NSA*, 378 F. App’x 235 (3d Cir. 2010); *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519 (S.D.N.Y. 2018); *ACLU v. U.S. Dep’t of Def.*, 322 F. Supp. 3d 464 (S.D.N.Y. 2018); *Bin Ali Jaber v. U.S. Dep’t of Def.*, 293 F. Supp. 3d 218 (D.D.C. 2018); *Moore v. FBI*, 883 F. Supp. 2d 155 (D.D.C. 2012).

¹⁴¹ Wald, *supra* note 17, at 760.

¹⁴² Wald, *supra* note 17, at 764.

¹⁴³ Kwoka, *supra* note 15, at 210.

¹⁴⁴ See, e.g., Verkuil, *supra* note 11, at 715.

¹⁴⁵ See, e.g., Deyling, *supra* note 9, at 99–102; Kwoka, *supra* note 15, at 223.

[i]f an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone.¹⁴⁶

“Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’”¹⁴⁷ Indeed, as one court has put it, if the government's arguments are simply logical or plausible, then “the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency.”¹⁴⁸

But just *how* deferential is this “logical or plausible” standard—and the judiciary as a whole to the government’s Exemption 1 invocations—in reality? Just how often do courts summarily approve the government’s Exemption 1 claims based on “boilerplate” affidavits? Affirmance rates alone do not necessarily reveal the extent to which judicial review of Exemption 1 is meaningful, and snapshots of cases and trends in Exemption 1 jurisprudence do not fully capture the level of deference across the federal judiciary either. Most everyone agrees that courts do not review the government’s Exemption 1 claims *de novo*; as this Article discusses in Part IV, some level of deference to the executive may be warranted. Understanding the true extent of the judiciary’s deference remains an important—but open—question. In the next Part, this Article’s empirical study attempts to answer it.

III. Study: The Adequacy of the Government’s Declarations Does Not Statistically Impact its Chances of Affirmance

As the previous Part illustrates, professors, practitioners, and judges alike have written extensively about the “super-deference” that courts grant the government in FOIA cases generally and Exemption 1 cases in particular. Yet little empirical work has been performed on the subject—and no empirical work has been done to approximate the quality of judicial review and extent of judicial deference in Exemption 1 cases.¹⁴⁹

¹⁴⁶ *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). *See also* Department of Justice Guide: Exemption 1 (2013), *supra* note 24, at 5 (“The Court of Appeals for the District of Columbia Circuit has refined the appropriate standard for judicial review of national security claims under Exemption 1, finding that summary judgment is proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith. This review standard has been adopted by other courts as well.”); Wells, *supra* note 15, at 1207 (explaining that “most courts” follow this analysis).

¹⁴⁷ *Larson v. U.S. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)).

¹⁴⁸ *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

¹⁴⁹ *See supra* note 28 and accompanying text.

This Article's study aims to do just that by analyzing the quality of the government's declarations in Exemption 1 cases relative to courts' already-deferential standard, and modeling how that quality impacts case disposition. As explained in the previous Section, courts base their decisions almost entirely on government declarations in Exemption 1 litigation. If courts uphold government withholdings at statistically similar rates (no matter the underlying declarations' level of quality—even below courts' professed standards for sufficiency) and courts explicitly base their decisions on government declarations, then there is a strong implication that courts are not meaningfully questioning the validity of Exemption 1 withholdings. In sharper terms, such rates would mean the majority of courts simply rubberstamp the government's claims.

A. Methodology

1. Data Collection

Using an online legal database, I first compiled a list of all federal court cases citing Exemption 1 of FOIA.¹⁵⁰ Next, I narrowed this set to decisions published after President Obama issued EO 13526 on December 31, 2009, revoking and replacing Executive Orders 12958 and 13292 as the authority pursuant to which the government classifies information. I did so in order to best capture recent trends in Exemption 1 jurisprudence, and in particular, the shift in government attitude towards classification that EO 13526 intended, or at least professed, to produce.¹⁵¹ In a minority of these cases, the government's Exemption 1 invocations still relied upon EO 12958; I included those decisions as well, since their *reasoning* came after the new Order signaled a high-level change in the government's classification principles.

I did not, however, review every case that my search identified, due to constraints on time and resources. I examined each case I found within every other circuit, and then used a random number generator to select a sample set of cases from the D.C. Circuit.¹⁵²

¹⁵⁰ Specifically, I used Lexis's annotation tools to generate a list of all federal cases citing Exemption 1 of FOIA. Some of these cases only cited Exemption 1 and did not actually consider any issues involving the exemption; I eliminated those cases from the dataset. While Lexis's technology may have missed a few stray cases, this number is likely negligible.

¹⁵¹ See, e.g., Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.2(c) (Dec. 29, 2009) (revising the previous Order in part by adding that "[i]f there is significant doubt about the appropriate level of classification, it shall be classified at the lower level").

¹⁵² Readers may properly observe that this method of case selection introduces potential issues with the overall case study sample's randomness and underrepresents decisions from the D.C. Circuit, which could exhibit different rates of deference given greater experience with Exemption 1 cases in that circuit. However, this Article is concerned primarily with the behavior of the entire federal judiciary with regard to Exemption 1 cases, and not the precise mathematical relationship between submission quality and case outcome. It is neither automatic nor random that an Exemption 1 case be filed in the D.C. Circuit; FOIA allows plaintiffs to sue in the D.C. Circuit, in the district in which agency records are located, or in the district in which the plaintiff either resides or has a principal

For each case I reviewed, I first read the decision to ensure that it considered the propriety of Exemption 1 withholdings; I eliminated cases that cited Exemption 1 for other reasons¹⁵³ or did not reach the question. On the other hand, some decisions considered several different sets of withholdings, or withholdings from separate agencies. I logged those cases as distinct entries, and included the corresponding government declarations, declaration sections, or Vaughn Index entries accordingly.

Additionally, some cases featured a series of multiple decisions. In those cases, I logged each decision, both because some cases considered different withholdings at different stages of the litigation and also to reflect times that courts *had* instructed the government to submit additional information. As discussed in greater detail below, I used control variables—variables that keep constant an outcome’s other potential factors, in order to isolate the effects of one factor in particular—to account for issues that may come as a result of such counting. Similarly, I logged each appellate decision as distinct from its district-level decision, as I wanted to reflect each court’s own judgment. Though I had originally planned to analyze appellate and district level cases separately, there were not enough data points at the appellate level to warrant such a split.

Within each case, I collected and coded certain information as follows:

<i>Variable</i>	<i>Assigned Score</i>
Case Disposition	0 = Strikes down withholdings 1 = Orders government to submit additional information or reprocess documents, remands case, or otherwise punts decision 2 = Upholds withholdings
Declaration Quality	0–3, from worst to best ¹⁵⁴
Classified Declaration Submitted?	0 = No 1 = Yes

place of business. 5 U.S.C. § 552(a)(4)(B). Therefore, all jurisdictions are potentially relevant to Exemption 1, and given the large proportion of cases arising in the D.C. Circuit, random sampling of the entire population or weighting cases to accurately reflect this proportion risk focusing the study on a particular subset of judges. However, to assuage concerns about the data’s representativeness, this Article also provides descriptive statistics for D.C. and non-D.C. cases separately. *See infra* note 163 and accompanying text. Any future studies, moreover, may consider building a more exact mathematical model by randomly sampling the entire population of cases, and adjusting for jurisdictional bias.

¹⁵³ For example, many decisions cited Exemption 1 only in passing, by way of example or analogy to the actual question at hand.

¹⁵⁴ See the rest of this sub-section for discussion of adequacy criteria and the Appendix for examples of declarations at each level of adequacy.

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Record Classification Level	0 = Confidential 1 = Secret 2 = Top Secret
<i>In Camera</i> Review Performed?	0 = No 1 = Yes
Panel Composition	0–1, from lowest proportion of Republican-appointed judges to highest

Additionally, I also noted each case’s year and the court in which it was filed. Below, I discuss the relevance of several of these variables and how I assessed their values.

Declaration Quality

First, to score the quality of a government declaration, I considered several factors based on courts’ stated Exemption 1 affidavit standards. A declaration must be “logical and plausible,” reasonably “specific,” and written in good faith.¹⁵⁵ Primarily, I examined the extent to which the government’s justifications went beyond boilerplate language or quotations from an Executive Order. For example, I assigned lower values to declarations professing the government properly classified information because it “contained intelligence sources and methods,” without offering any additional explanation. Similarly, I noted the concreteness of the potential harms to national security identified, and the extent to which the government explained how releasing information would cause that damage. For example, some declarations stated only the conclusion that they “expected damage to the national security to occur.” Those declarations received lower scores. Other declarations cited slightly more specific reasons, such as interference with the ability to gather intelligence or operate. The highest-scoring declarations, however, included concrete, detailed potential harms to national security and explained the causal link between those harms and the release of withheld information. For example, a high-scoring declaration might explain that a document discusses an enemy combatant’s potential transfer to an unnamed foreign ally’s custody, and that revealing such details would compromise the combatant’s own safety, the logistics of the transfer, and the United States’ relationship with the receiving state. I also weighed the extent to which declarations addressed issues with releasing specific documents or redactions, instead of giving blanket justifications for entire sets of withholdings. I did, however, evaluate this criterion in the context of the amount of records at issue in the case. Additionally, to create a harder test for my hypothesis, I gave the government the benefit of the doubt, and scored declarations higher whenever I felt difficulty ascertaining their exact level of quality.

¹⁵⁵ See *supra* Introduction.

Finally, I took steps to address concerns about any personal bias in coding declaration quality. First, after selecting cases and downloading declarations, I assessed each set of declarations for a case randomly and without observing the case disposition, so as not to let outcome affect the coding. Second, in order to test my coding's objectivity, I also asked ten Yale students to score a random set of declarations using my set of criteria, but without divulging any other information about the project or its aims. While some individuals gave higher or lower scores, the average score for each declaration included in the sample matched mine.

For further reference, the appendix contains sample declarations at each level of quality.

Additionally, I also accounted for two factors that can supplement a public declaration's adequacy. First, while courts rely primarily on government declarations in Exemption 1 cases, these declarations often accompany a Vaughn Index. Therefore, where possible, I reviewed the Vaughn Index using similar criteria to those explained above, and included the Index's adequacy when assigning the declaration's score.

Classified Declaration Submitted?

Second, though case law instructs the government to justify its withholdings in as much detail as possible on the public record, the government may also submit supplementary *ex parte* declarations to the court.¹⁵⁶ In those cases, I noted the submission of a classified declaration as a control variable, and scored declaration adequacy as high as possible in order to give the government the benefit of the doubt.

To control for other factors involved beyond the adequacy of the government's submissions, I included the following variables: the classification level of the records at issue, whether or not the court reviewed the records *in camera*, and the proportion of Republican-appointed judges on a case.

Record Classification Level

The first control variable accounts for the three possible levels at which Executive Order 13526 allows government officials to classify information: top secret, secret, and confidential.¹⁵⁷ I hypothesized that courts would be more likely to uphold information classified at the top-secret level. Where neither the government nor the court noted a document's classification level, I assigned it a

¹⁵⁶ See, e.g., *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 110 (2d Cir. 1988); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006).

¹⁵⁷ Exec. Order No. 13526, 75 Fed. Reg. 705 § 1.2 (Dec. 29, 2009).

value of “secret,” since the vast majority of classified records are categorized as such.¹⁵⁸

In Camera Review Performed?

The second control variable considers whether courts exercised their discretion to review records *in camera*, and attributes a binary score, with “yes” coded as 1 and “no” coded as 0. Such review only occurred in a small percentage of cases and, as noted below, did not significantly influence the case’s disposition.

Panel Composition

Finally, the last control variable accounts for potential bias resulting from judges’ political leanings. As the Nevelow and Ginsburg study notes, “[a] large volume of literature in political science and law demonstrates that ideology—typically as measured by the party of the appointing president—has significant explanatory power as a determinant of judicial behavior.”¹⁵⁹ Indeed, the study demonstrated that, while political party does not predict district-level judges’ decisions to uphold Exemption 1 withholdings in any statistically significant way, panel composition does perhaps impact case disposition at the appellate level.¹⁶⁰ Accordingly, I assigned each case a score to indicate what proportion of its judges was Republican-appointed.¹⁶¹ This proportional system accounted for the difference between the district level, where only one judge decides a case, and the appellate level, where (ordinarily) a three-judge panel rules.

Readers may find this data compiled in the Appendix.

2. Data Analysis

This study analyzes two questions to measure the effect of declaration quality on courts’ decisions.

First, how often did courts uphold the government’s claims even when its declarations fell clearly below the standard for affidavit adequacy? Ideally, in such situations, courts would at the very least ask the government to submit more information. Thus, the greater this percentage, the greater the level of judicial deference. To design a more stringent test, I only considered declarations scored “0” for quality as clearly substandard. Declarations scored “3” clearly met the standard, and declarations scored either “1” or “2” fell into an ambiguous “gray

¹⁵⁸ INFO. SEC. OVERSIGHT OFFICE, NAT’L ARCHIVES AND RECORDS ADMIN., 2017 REPORT TO THE PRESIDENT 8–9 (May 31, 2018), <https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf> [<https://perma.cc/RT5U-HX86>].

¹⁵⁹ Nevelow & Ginsburg, *supra* note 27, at 769 (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 233–34 (1993)).

¹⁶⁰ Nevelow & Ginsburg, *supra* note 27, at 771, 773.

¹⁶¹ For example, a value of “0.33” in a panel decision would consist of one judge appointed by a Republican president and two judges appointed by a Democratic president.

zone.” A high affirmance rate in cases with clearly inadequate declarations would already betray an alarming amount of judicial deference.

However, in order to paint a fuller picture of judicial deference, I next asked whether declaration quality predicted case disposition in any way. I created two logistic models to measure the impact of declaration quality on case disposition. The first was a univariate model that predicted the probability of case disposition with declaration quality as the predictor, and the second was a multivariate model that controlled for the potentially confounding variables discussed in the previous sub-Section. The code and formulas for these regressions can be found in the Appendix.

3. Potential Sources of Error

Of course, few studies exist without some possible sources of error or ambiguity. First and foremost, while I relied on a set of concrete criteria to determine declaration quality, the process still remains somewhat subjective. To remedy potential bias toward finding excessive judicial deference, which many scholars and practitioners in the field already assume, I deferred to the government whenever I felt undecided between two declaration quality levels by assigning the higher value. I also only took declarations scored “0” as clearly insufficient, though many might argue that those classed “1” or “2” similarly do not meet the standard for adequacy. Additionally, I took steps to address concerns about any personal bias in coding declaration quality. First, after selecting cases and downloading declarations, I assessed each set of declarations for a case randomly and without observing the case disposition, so as to not let outcome affect the coding. Second, in order to test my coding’s objectivity, I also asked ten Yale students to score a random set of declarations using my set of criteria, without divulging any other information about the project or its aims. While some individuals gave higher or lower scores, the average student score for each declaration included in the sample matched mine. Finally, I remind readers that the standard for adequacy itself is already somewhat deferential to the government and this study does not fully account for this “baked-in” deference.

In addition, my initial list of Exemption 1 cases may not have been complete. Though the list generated through an online legal database was likely comprehensive, it remains subject to the database’s own coding. The sample’s size and randomness should negate any bias that any such incompleteness might produce. Similarly, I could not account for cases in which the court did not publish a decision. Such cases may have been settled and likely yielded higher rates of government disclosure. However, the outcome of cases is only relevant insofar as it informs my measurement of judicial deference. Consequently, I excluded cases in which the government *voluntarily* released additional records.¹⁶²

¹⁶² Some might argue that, in these cases, courts prodded agencies to settle, cutting against claims of judicial deference. While such prodding may sometimes exist, the cost of impending litigation is a far likelier incentive to settle.

Finally, any future studies might isolate cases that include repeat players, either in terms of the plaintiff or the judge. Such participants may have more skill and willingness to challenge government assertions, and thus pose an additional confounding variable.

B. Results

Overall, the courts in this study upheld the government's Exemption 1 claims given clearly inadequate ("0") declarations, 76.2% of the time (i.e. three out of four cases). Comparatively, these courts upheld the government's claims 75.0% of the time when faced with declarations of ambiguous ("1" or "2") quality, and 85.4% of the time with declarations that were clearly adequate ("3").¹⁶³

<i>Declaration Quality</i>	<i>Total</i>	<i>Gov. Affirmed (%)</i>	<i>Undecided (%)</i>	<i>Gov. Reversed (%)</i>
0	21	16 (76.2%)	3 (14.2%)	2 (9.5%)
1	26	18 (69.2%)	7 (26.9%)	1 (3.8%)
2	18	15 (83.3%)	3 (16.7%)	0 (0.0%)
3	41	35 (85.4%)	4 (9.8%)	2 (4.9%)

While courts affirm agency decisions to withhold at a higher rate when relying on clearly adequate declarations, this difference is likely insignificant. In both my multivariate and univariate regressions, no variable changed the probability that a court would uphold the government's withholdings in any statistically significant way, even with a generous p-level of 0.05. Put more bluntly, the quality of the government's submissions did not matter to the case's outcome in any measurable way. Readers may find complete tables containing these results in the Appendix.

The results do, however, also yield a more optimistic observation. While the study confirms advocates' assumption that courts largely rubberstamp agencies' Exemption 1 claims, it somewhat undercuts the narrative that agencies submit mostly boilerplate affidavits. Nearly thirty-nine percent of declarations were clearly adequate. Of course, as explained in the last sub-section, this standard for adequacy is already a lenient one and likely not searching enough to meet courts' obligation to review *de novo* Exemption 1 claims as a whole.

¹⁶³ As discussed in note 152, judges operating within the D.C. Circuit may display a different level of deference than do judges in other circuits, due to the large amount of cases that arise in D.C. districts. In this study, courts within the D.C. Circuit upheld the government's Exemption 1 claims 80.0% of the time (four of five cases) given clearly inadequate ("0") declarations, 70.0% of the time (seven of ten cases) given declarations of ambiguous ("1" or "2") quality, and 100.0% of the time (seven of seven cases) given declarations that were clearly adequate ("3"). Notably, no D.C. court in this study reversed the government's withholding decisions; at best, four of twenty-one courts asked the government to submit additional information. Consequently, no evidence in this study suggests that D.C. Circuit courts are less deferential to the government than do courts in other circuits.

The finding that the adequacy of the government's filings does not predict the chances of the government's success is perhaps not surprising, given the rate at which courts rule in the government's favor. What *is* surprising, or at least newly reported, is the staggering percentage of clearly inadequate government declarations on the basis of which courts approve government withholdings. In other words, the rate at which courts uphold government withholdings based solely on boilerplate indices and declarations confirms the suspicion that courts grant the government undue deference in Exemption 1 cases.

It is crucial to emphasize that courts possess more than just a binary choice to uphold or strike executive withholdings; they also have the option to reserve judgment and ask for more information from the government, an option that I coded for when collecting data. Only in sixteen instances, or fifteen percent of the time, did a court do so. Moreover, courts can also exercise their discretion to review documents *in camera*. It is, however, more understandable that courts abstain from such review, since it taxes court resources, and since there is a clearly articulated standard for when *in camera* review is appropriate.¹⁶⁴ Nevertheless, the point remains: courts can order the government to provide more robust justifications for withholding information, but choose not to. As a result, courts are not simply upholding the government's decisions; they are doing so with limited information and thus upholding the precedential adequacy of boilerplate explanations.

This precedential adequacy is also crucial: deference builds on itself. My study relied upon a relatively fixed professed standard for declaration adequacy, but in practice, precedent has shifted this standard over time. Courts regularly point to substandard declarations held adequate in prior decisions in order to approve substandard declarations currently before them.¹⁶⁵

Finally, it is irrelevant whether these government withholdings have or have not been properly upheld—the problem is with the process itself, not merely with the outcome. Even when using clearly inadequate declarations, even by currently lenient standards, the government wins its bid to withhold information under Exemption 1 more than three-fourths of the time. If declaration adequacy does not impact the probability of a court upholding the government's withholdings, and courts explicitly base their decisions on government declarations, then there is a strong implication that courts are not meaningfully questioning the validity of Exemption 1 withholdings or, in sharper terms, that the majority of courts simply rubberstamp the executive branch's claims. Accordingly, the issue is not

¹⁶⁴ See, e.g., *Larson v. U.S. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009) (citing *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979): "If the agency's affidavits 'provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.'").

¹⁶⁵ See, e.g., *Schwartz v. U.S. Dep't of Def.*, No. 15-CV-7077, 2017 WL 78482, at *17 (E.D.N.Y. Jan. 6, 2017) (declaring a "brief" CIA declaration adequate based on declarations held adequate in the past).

necessarily whether courts are deciding these cases correctly, but that courts are not engaging in meaningful judicial review when making these decisions.

In the next Part, I explore why it matters beyond the outcome of a particular case that courts engage the executive's Exemption 1 claims with only scant judicial review.

IV. Beyond Exemption 1: Rubber-Stamping's Reverberating Consequences

The judiciary's failure to check the government's Exemption 1 assertions in a meaningful way carries consequences not just for FOIA, but also for the importance of transparency and impartiality in the American legal tradition and for the effectiveness of extra-branch checks on the executive's national security monopoly. Note that this Article considers consequences of insubstantial judicial review only, *not* consequences tied to nondisclosure itself. For example, while it is clear that withholding important national security information from the public reduces transparency,¹⁶⁶ this Article argues that the substandard process by which the information is withheld harms transparency and democratic values in its own way.

It is key here to reemphasize that, even if cases challenging Exemption 1 withholdings compose only a small part of FOIA resolution and only a small subset of cases, the problem with their subpar adjudication remains an important one. First and perhaps foremost, it should be concerning to us any time the judiciary routinely rubberstamps a particular party's claims, even if those claims arise relatively infrequently in the context of all litigation. Second, as illustrated in Part I, Congress affirmatively refused to make an exception for judicial review of Exemption 1 withholdings. Accordingly, this tension between the judiciary and an arguably clear congressional mandate is an important one. Third, due to extremely public scandals that have arisen from national security leaks, such as the Snowden disclosures or Watergate,¹⁶⁷ cases involving Exemption 1 withholdings disproportionately capture attention and breed distrust. Finally, in terms of assessing the judiciary's efficacy in the national security realm, it bears recalling that, unlike in many other contexts, FOIA's text and history allows and encourages meaningful judicial interrogation of the executive's national security determinations during litigation. It is thus highly concerning that, even in a space where Congress has purposely carved out such power for the judiciary—and reasserted it—extreme deference to the executive persists.

A. *Eroding Transparency and Democratic Values*

¹⁶⁶ Of course, sometimes the government's national security interests do outweigh the benefits of transparency. While, as noted in Section II.B, the rate of Exemption 1 withholdings is exceptionally high, this Article does not attempt to argue that such an outcome is *necessarily* improper.

¹⁶⁷ See, e.g., Diana Lee, Paulina Perlin & Joe Schottenfeld, *Gathering Intelligence: Drifting Meaning and the Modern Surveillance Apparatus*, 10 J. NAT'L SECURITY L. & POL'Y 77, 116 (2019).

As President Obama once proclaimed, “[FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails.”¹⁶⁸ That presumption, he continued, applies with equal weight to each of FOIA’s exemptions, and indeed, “to all decisions involving FOIA.”¹⁶⁹

The President’s statements accord with Congress’s intent in legislating the Act.¹⁷⁰ Congress expressly placed “the burden on the agency to sustain” any withholdings.¹⁷¹ Congress recently fortified this presumption with the bipartisan FOIA Improvement Act of 2016,¹⁷² which added other provisions clarifying that the law favors disclosure. For instance, the Act specified that the government “shall withhold information” under FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹⁷³ It also instructed agencies to “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and . . . take reasonable steps necessary to segregate and release nonexempt information.”¹⁷⁴ As Republican representative Mark Meadows told the press once the bill for the Act passed the House, “[t]he most important reform is the presumption of openness.”¹⁷⁵

Yet extreme deference to the government transforms this presumption of transparency into a presumption of secrecy. Allowing agencies to withhold records based on boilerplate explanations alone lowers their practical burden of proof to barely a burden at all. The true burden now falls on plaintiffs to demonstrate that the government is acting in bad faith, or wrongly withholding information. Not only is this result diametrically opposed to FOIA’s purpose and provisions, thus frustrating congressional objectives, but it also makes Exemption 1 nondisclosures nearly impossible to challenge given the asymmetry of information between parties.

On a higher plane, the shift from openness to opacity implicates fundamental American values. As Sissela Bok has reasoned, when a society designs its institutions, “a question arises from the very outset. Should there be a presumption in favor of secrecy or of openness?”¹⁷⁶ In 1966, Congress made a bipartisan determination for the latter, and eight years later, not only reaffirmed it, but reinforced it.¹⁷⁷ Forty-two years after that, it did the same.¹⁷⁸ The shift to

¹⁶⁸ Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

¹⁶⁹ *Id.*

¹⁷⁰ *See supra* Part I.

¹⁷¹ 5 U.S.C. § 552(a)(4)(B).

¹⁷² Pub. L. No. 114-185, 130 Stat. 538 (2016).

¹⁷³ 5 U.S.C. § 552(a)(8)(A)(i).

¹⁷⁴ 5 U.S.C. § 552(a)(8)(A)(ii).

¹⁷⁵ Josh Gerstein, *FOIA Reform Bill Headed to Obama*, POLITICO (Jun. 13, 2016), <https://www.politico.com/blogs/under-the-radar/2016/06/foia-reform-bill-headed-to-obama-224293> [<https://perma.cc/G965-3ECG>].

¹⁷⁶ BOK, *supra* note 13, at 178.

¹⁷⁷ *See supra* Section I.C.

¹⁷⁸ FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

secrecy that the judiciary’s refusal to meaningfully check executive claims has caused thus erases congressional—and popular—will, and erodes the presumption of transparency that has infused American law and politics for at least the past half-century.

The American tradition of transparency, in turn, is central to its democratic values. As the Supreme Court has recognized, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹⁷⁹ Moreover, by providing a conduit for government transparency, the Court has stressed, FOIA “defines a structural necessity in a real democracy.”¹⁸⁰ The executive branch has made similar pronouncements. In 1967, then-Attorney General Ramsey Clark declared: “If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public.”¹⁸¹ And in 2009, President Obama similarly proclaimed that “[a] democracy requires accountability and accountability requires transparency. . . . In our democracy, [FOIA,] which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government”¹⁸² Scholars generally agree. As David Pozen notes, “[a] real democracy must have *some* mechanisms securely in place to shine light on the government’s actions,” even if that mechanism is not FOIA.¹⁸³

By shifting the presumption of openness to a presumption of secrecy, the judiciary undermines the transparency crucial for democracy to function. It weakens the public’s ability to be informed and hold the government accountable—an ability already hindered in the national security arena, where secrecy abounds—and thus damages key democratic values.¹⁸⁴

B. *Secret Law*

Transparency also protects democratic principles by preventing the formation of “secret law”—legal interpretations and conclusions that “create[] or determine[] the extent of the substantive rights and liabilities of a person,”¹⁸⁵ but

¹⁷⁹ NLRB v. Robbins Tire Co., 437 U.S. 214, 242 (1978).

¹⁸⁰ Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

¹⁸¹ U.S. DEP’T OF JUSTICE, A MEMORANDUM FOR THE EXEC. DEPARTMENTS AND AGENCIES CONCERNING SECTION 3 OF THE ADMIN. PROCEDURE ACT AS REVISED EFFECTIVE JULY 4, 1967 (June 1967).

¹⁸² Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

¹⁸³ David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PENN. L. REV. 1097, 1099 (2017).

¹⁸⁴ Lee, Perlin & Schottenfeld, *supra* note 167, at 114–15.

¹⁸⁵ Cuneo v. Schlesinger, 484 F.2d 1086, 1090 (D.C. Cir. 1973).

are not shared with the people. As congress-members¹⁸⁶ and scholars¹⁸⁷ alike have recognized, the lack of transparency in the national security arena has proliferated secret law in that space. When courts summarily uphold Exemption 1 withholdings, they exacerbate that problem—not simply because key information may remain withheld, but also due to how *easy* that information is to withhold. When courts allow the government to justify withholdings with blanket assertions and neglect to meaningfully check those justifications, they lower the bar for the government to keep information hidden and also raise the likelihood that segregable¹⁸⁸ legal analysis is improperly withheld.

Legal norms and principles in the United States embody a robust presumption against secret law, and for good reason. Since, by definition, secret law imposes binding rights and obligations without informing the public what these rights and obligations are, it violates key tenets of the American legal tradition, such as open justice, fair notice, and reliance on precedent. Thus, as the D.C. Circuit has proclaimed, “[t]he maintenance of secret law would weigh heavily against the public interest.”¹⁸⁹

Congress has specifically sought to guard against the development of secret law in the national security sphere. To take a particularly prominent example, in 2015, it reformed the USA FREEDOM Act to “end[] the era of secret law in America”¹⁹⁰ and mandated declassification of any Foreign Intelligence Surveillance Act “FISA” Court (“FISC”) opinion that includes “a significant construction or interpretation of any provision of law.”¹⁹¹ If the FISC could not declassify an opinion for national security reasons, then the Act required it to provide an unclassified summary of its legal conclusions.¹⁹² That change resulted from revelations that the *ex parte* FISC had surpassed its “ministerial” role authorizing “classic FISA” warrants and had instead begun producing precedential legal conclusions, such as an interpretation of section 215 of the USA PATRIOT Act that Congress and multiple national security experts later disagreed with.¹⁹³

¹⁸⁶ I discuss congressional efforts to combat secret law in national security later in this section.

¹⁸⁷ See, e.g., Jonathan Manes, *Secret Law*, 106 GEORGETOWN L.J. 803 (2018); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SECURITY J. 241 (2015).

¹⁸⁸ 5 U.S.C. § 552(a)(8)(A)(ii) (requiring agencies to “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and . . . take reasonable steps necessary to segregate and release nonexempt information”).

¹⁸⁹ *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 716 (D.C. Cir. 1971).

¹⁹⁰ 161 CONG. REC. S36,52 (daily ed. June 3, 2015) (statement of Sen. Merkley).

¹⁹¹ USA FREEDOM Act, Pub. L. No. 114–23, § 402, 129 Stat. 268, 281 (2015).

¹⁹² *Id.*

¹⁹³ Rudesill, *supra* note 187, at 302. As Rudesill further explains, “in its classified orders authorizing and supervising these programs, the FISC departed from its “classic FISA” role in important ways. First, instead of issuing only short orders and warrants that would be familiar to any prosecutor, the FISC was now doing statutory and constitutional law reasoning in extensive opinions. Second, the FISC, despite disclaimers, was de facto creating precedents for itself and the agencies it oversees, in secret. Third, the FISC was no longer confining its work to particularized warrants regarding individual surveillance targets, but was reviewing and supervising bulk collection programs

As one Senator stated during the hearings on these reforms, “there is a difference between secret operations and secret law . . . the law always ought to be public.”¹⁹⁴ FOIA similarly distinguishes between technical information and “pure” legal interpretation, requiring agencies to release any non-classified material that can reasonably be segregated from material that *is* properly classified.¹⁹⁵ Many courts have recognized that legal analysis may be withheld under Exemption 1 only to the extent it is inextricably intertwined with properly classified facts.¹⁹⁶ If courts allow the government to withhold entire documents under blanket assertions that they contain properly classified material, then they raise the possibility that any segregable legal analysis that exists within these documents slips through the cracks as well. Though, in some instances, courts do order segregability reviews or view documents *in camera*, as the data in Section II.C shows, such cases remain rare.

C. Delegitimizing the Judicial Process

Courts’ failure to meaningfully interrogate the government’s assertions undermines the rule of law in other ways. Extreme deference to executive determinations and disregard for the judicial standards prescribed by FOIA also delegitimizes the judicial process, and breeds distrust among civil liberties advocates and the public at large.

Many advocates already believe that the FOIA process is skewed in favor of the government and that courts do not play a meaningful role in reviewing government withholdings that implicate national security.¹⁹⁷ If courts are indeed rubberstamping government declarations, then they are substantiating and swelling that perception. Again, it is not simply the outcome of Exemption 1 cases that drives this consequence, but the process of courts’ decision-making as well. Even if courts continue to uphold the majority of government withholdings, they should still review nondisclosures’ propriety more rigorously, in order to reassure the public that they take their role in checking the executive seriously. The public must be able to trust in the federal judiciary’s impartiality and propriety for it to function as a credible institution.¹⁹⁸

implicating the privacy interests of millions of people. The net result, as Orin Kerr observes, is that the FISC became a hybrid of a ministerial *ex parte* court and a common law court—one that created law out of view of the public and all but a handful of Members of Congress . . .” Rudesill, *supra* note 187, at 303. *See also* 161 CONG. REC. S3421-03, S3430 (Statement of Senator Leahy) (“[W]e have to have this ability to know what the court is doing because we have known for years that the FISA Court secretly misinterpreted Section 215 . . .”).

¹⁹⁴ 161 CONG. REC. S3421-03, S3430 (Statement of Senator Wyman).

¹⁹⁵ 5 U.S.C. § 552(a)(8)(A)(ii).

¹⁹⁶ *N.Y. Times Co. v. U.S. Dep’t of Justice* (N.Y. Times I), 756 F.3d 100, 119–20 (2d Cir. 2014).

¹⁹⁷ *See, e.g., Kwoka, supra* note 15, at 213; Fuchs, *supra* note 26, at 163–68; Eckart, *supra* note 23, at 270–71; Pozen, *supra* note 183, at 1119–21; *see generally* Wells, *supra* note 15.

¹⁹⁸ Gregory C. Pingree, *Where Lies the Emperor’s Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1098 (2007) (defining judicial legitimacy broadly as “the overall product of the public’s confidence in the lawfulness, impartiality, and propriety of the judiciary”).

D. *Entrenching Judicial Deference in National Security Cases*

Of course, the judiciary's impartiality is already questionable in the national security context. FOIA's unique posture in encouraging judicial interrogation of the executive's national security determinations makes FOIA litigation a prime arena for paring back the executive's near-monopoly on national security issues and injecting democracy into national security decisions. However, it is highly concerning that even where Congress has purposely carved out such power for the judiciary, extreme deference to the executive persists.

As discussed in Part I, when designing FOIA, Congress specifically created a role for courts to interrogate the executive's assertions in a national security context. As demonstrated in Part II, the courts have declined to meaningfully assume this role. This pattern is both a symptom of and a contributor to the general judicial deference exhibited in most national security cases. Moreover, since the judiciary has refused to meaningfully question government claims even when expressly mandated by Congress to do so, this problem supports the notion that the judiciary is unwilling to check the executive on national security. It thus casts even more doubt on the efficacy of judicial review as a viable mechanism for government oversight in the national security arena, indicating that some reframing or reforming might be necessary before the judiciary can properly fill that role.

V. Counterarguments

Some may counter that judicial deference is proper in this context. These critics might argue that even if Congress had intended to grant the judiciary *de novo* review over the propriety of Exemption 1 withholdings, courts rightly refused it. Constitutionally, classification authority rests with the executive branch and for good reason: agencies, not courts, have expertise in what disclosures would and would not risk damage to the nation's security.

A. *Constitutional Separation of Powers*

A basic separation of powers issue plagues Exemption 1 litigation. Article II of the Constitution names the President commander-in-chief of the U.S. military,¹⁹⁹ vesting the executive branch with primary authority on national security matters. The Supreme Court has endorsed the view that this authority extends to classification determinations, writing that “[the President’s] authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”²⁰⁰ If the executive enjoys complete

¹⁹⁹ U.S. CONST. art. II, § 2, cl. 1. Article II of the Constitution also arguably vests the executive with powers over international affairs, which sometimes—though seldom—also arises as a justification in Exemption 1 cases. *See id.* art. II, § 2, cl. 2.

²⁰⁰ U.S. Dep’t of the Navy v. Egan, 484 U.S. 518, 527 (1988). Similarly, as Justice Stewart once explained, “it is the constitutional duty of the Executive to protect the confidentiality necessary to

classification authority—borne from the Constitution, not Congress—then a troubling question arises as to whether Congress and FOIA even *can* assign the judiciary *de novo* review over classification determinations. This delegation of power would seem to infringe on the executive’s constitutional authority.

Yet as the Supreme Court recognized in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰¹ executive power is not absolute, and the President does not automatically enjoy a monopoly on all national security issues. Justice Jackson’s now-precedential concurrence presents a framework for determining the extent of the executive’s authority in various contexts, based on the degree of congressional action on the matter and the degree of power constitutionally given to the executive in that realm.²⁰² According to this scheme, executive authority to take a given action rests in one of three categories: presidential power crests to its peak when Congress has sanctioned the executive’s action (category one), rests in a murky middle ground when Congress has remained silent (category two), and “ebb[s]” to its lowest when Congress has expressly or impliedly disapproved (category three).²⁰³

FOIA litigation occupies category three. Congress has repeatedly instructed the judiciary to review all FOIA cases *de novo* and has clarified that litigation over Exemption 1 withholdings is no exception,²⁰⁴ despite the executive’s desires to keep certain information undisclosed. This issue thus exists in a space where Congress has deliberately legislated contrary to the executive’s will, pushing executive power to its lowest point. In such circumstances, according to the *Youngstown* framework, “the President can claim plenary authority over classification and withholding decisions only if the President’s own constitutional powers are sufficient to encompass them.”²⁰⁵ As Justice Jackson warned, acknowledging exclusive executive authority in a particular domain compromises the “equilibrium established by our constitutional system.”²⁰⁶ Such power should thus only be recognized sparingly.

Even without explicit *Youngstown* framework analysis, all three branches have tacitly conceded that executive authority in the Exemption 1 context is not absolute. Though Congress did not challenge the executive’s power to decide what information is classified and what criteria is used, it *did* command courts to check whether such classifications are proper. In turn, while the judiciary has rarely complied with Congress’s instruction to conduct such review *de novo*, it has still accepted its role as reviewer, rather than dismissing the entire exercise as a political

carry out its responsibilities in the fields of international relations and national defense.” N.Y. Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

²⁰¹ 343 U.S. 579 (1952).

²⁰² *Id.* at 634. (Jackson, J., concurring).

²⁰³ *Id.* at 635-37.

²⁰⁴ See *supra* Part I.

²⁰⁵ 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, 1401 (2010).

²⁰⁶ *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

question. Finally, though the executive often contends that its classification positions deserve deference, it still participates in the litigation process and releases records in the rare cases where courts instruct it to do so, assenting to the judiciary's authority to review—and reverse—its classification decisions.

Furthermore, not only is the executive authority in the Exemption 1 context incomplete, but the *de novo* review requested by Congress is also a normal judicial activity. Had Congress challenged the government's authority to set its own classification criteria and make its own classification determinations, delineating the scope of the executive's powers relative to other branches might be more difficult. To reiterate, however, it did not. It merely directed courts to verify the propriety of the executive's classifications, a task fundamental to the judiciary's constitutional role in ensuring that the government is acting within its legal bounds.²⁰⁷

Courts can only perform their own constitutional function appropriately, however, if they have enough information to do so. To truly verify that the government's classifications are proper pursuant to its own executive order, courts must review declarations that justify classification in sufficient detail. Most government declarations fall short of this need, however, and courts should not be reticent to question the government's assertions or to require more explanation from the executive branch. Doing so would not upset the constitutional balance, but rather reinforce it.

B. *Agency Expertise*

Yet one might justify the judiciary's deference to the executive's Exemption 1 withholdings not just from a theoretical standpoint, but also from a prudential one. Specifically, as bodies that specialize in protecting the nation's security, agencies likely know better than courts what should and should not remain classified.

In most litigation challenging withholdings under other FOIA exemptions, the agencies involved do not concentrate on issues related to information access. For instance, the Bureau of Prisons is primarily concerned with operating the federal government's prisons; most Bureau officials do not generally consider

²⁰⁷ See Fuchs, *supra* note 26, at 158 (“The separation of powers concerns do not appear to have a strong basis. In FOIA cases, at least, the Executive Order on classification serves as a touchstone for Exemption 1 analysis: it permits withholding of information that is both properly classified under an Executive Order and is ‘secret in the interest of national defense and foreign policy.’ Executive Orders are issued by the President. Courts are not asked to assess what information should be classified; FOIA cases do not challenge the categories of information that Executive Orders list as subject to security classification. Instead, the focus is on whether particular information is properly classified. Courts do not intrude on executive power by considering this issue. Even in cases in which the government invokes the state secrets privilege, concerns over separation of powers do not prohibit courts from considering the legitimacy of the claims. In a democracy, courts are charged with exactly that task—ensuring that power is not improperly invoked.”).

whether public access to information helps or hurts the Bureau's mission. In contrast, many officials at the various intelligence agencies usually involved in Exemption 1 challenges *are* in the business of collecting information and keeping that information secret. Accordingly, these agencies arguably have significant expertise on the very issue at the heart of an Exemption 1 litigation: the relationship between the disclosure of information and the national security's wellbeing. Consequently, deference to agency expertise may well be more appropriate in the Exemption 1 context than in other circumstances. Agencies themselves often invoke this argument's thrust when presenting the "mosaic theory" discussed in Section I.B, and again, the judiciary has largely accepted this theory. Indeed, as one court has written, "given judges' relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure."²⁰⁸

Yet this portrait of agency expertise does not adequately contemplate the fact that agencies are not neutral arbiters. The government has its own incentives to keep information sealed, despite the virtues of public access. Even when agency officials act in good faith, the pressures of protecting the national security make them over-cautious about disclosing information and under-appreciative of transparency's values.²⁰⁹ Indeed, the prevalence of government over-classification in the national security sphere is almost universally acknowledged.²¹⁰ Accordingly, while agencies may enjoy superior national security expertise to courts, they are *not* superior decision-makers.

C. Conclusion: Courts Can Curtail Their Complaisance

Whether justified theoretically or prudentially, judicial deference is not inevitable. "When courts expect detail, agencies can deliver. When courts are unwilling to insist on a serious specification and indexing of exemption claims, by contrast, agencies take the easy route of relying on boilerplate justifications."²¹¹ And though few and far between, some courts *have* demanded detail. For example, in *Halpern v. FBI*,²¹² the Second Circuit complained that the government's "affidavit [gave] no contextual description" for its redactions and failed to "fulfill the functional purposes addressed in Vaughn." In *Campbell v. DOJ*,²¹³ the D.C. Circuit declared that the FBI's declaration failed to "draw any connection between the documents at issue and the general standards that govern the national security exemption," and remanded to the district court. On remand, the district court similarly held the FBI's affidavit inadequate where the agency concluded that "disclosure of [intelligence information] . . . could reasonably be expected to cause

²⁰⁸ N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002).

²⁰⁹ Notably, transparency can also benefit the national security. See Kwoka, *supra* note 15, at 213–14 for further discussion.

²¹⁰ See Wells, *supra* note 15, at 1209–13 for further discussion.

²¹¹ Fuchs, *supra* note 26, at 172.

²¹² 181 F.3d 279, 293 (2d Cir. 1999).

²¹³ 164 F.3d 20, 31, 37 (D.C. Cir. 1998).

serious damage to the national security”²¹⁴ and offered no further elaboration. The Ninth Circuit in *Wiener v. FBI*²¹⁵ likewise rejected the government’s justifications for nondisclosure as “boilerplate” and not sufficiently “tailored” to the particular information being withheld under Exemption 1.

The idea that the judiciary must uphold the government’s Exemption 1 claims based on insufficient declarations is thus simply unfounded, both in theory and in practice. Courts *can* and *have* demanded better from agencies²¹⁶—and they *should*. While some executive deference on Exemption 1 claims may be reasonable, and the appropriate degree of deference is debatable, wide-scale rubberstamping is outside the realm of acceptability. Even the government’s 2013 guide to Exemption 1 recognized that:

FOIA provides expressly for de novo review by the courts and for in camera review of documents, which can include in camera review of classified documents, where appropriate. In so doing, Congress sought to ensure that agencies properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.²¹⁷

The radical disparity between the design of the judiciary’s role in reviewing Exemption 1 claims and its practical implementation suggests that some change is necessary to enable and encourage the courts to meaningfully interrogate the government’s assertions. The next Part explores possibilities for reform and proposes a novel “probability requirement” as one potential solution.

VI. A New Solution: The Probability Requirement

FOIA commentators have offered some ambitious reforms to improve judicial review of Exemption 1 claims.²¹⁸ However, as this Part explains, these commentators often temper their ambition with pessimism, which is reasonable given the difficulties and drawbacks of spurring large-scale congressional action or establishing new judicial bodies.

This Part introduces a simpler mechanism to encourage the existing judiciary to more meaningfully interrogate the government’s Exemption 1

²¹⁴ 193 F. Supp. 2d 29, 37 (D.D.C. 2001).

²¹⁵ 943 F.2d 972, 978–79 (9th Cir. 1991).

²¹⁶ For more cases where courts have criticized the adequacy of the government’s declarations on Exemption 1 claims, see Department of Justice Guide: Exemption 1 (2019), *supra* note 93, at 17 n.82; Deyling, *supra* note 9, at 86–87.

²¹⁷ Department of Justice Guide: Exemption 1 (2013), *supra* note 24, at 4–5. The 2019 Guide has since removed this passage from its discussion of in camera review. See Department of Justice Guide: Exemption 1 (2019), *supra* note 93, at 19–21.

²¹⁸ This Part does not review reforms aimed at improving FOIA litigation as a whole. It includes only proposals that would tackle the lack of meaningful judicial review of Exemption 1 claims. For more discussion of reforming FOIA more generally, see, e.g., Kwoka, *supra* note 15.

assertions and also to encourage the government itself to more carefully contemplate what information merits continued classification: the institution of a “probability requirement” in government affidavits supporting Exemption 1 claims. While classification levels currently approximate the *magnitude* of potential harm to national security, such a requirement would oblige agencies invoking Exemption 1 to also report the *likelihood* that the harm would occur. This solution allows courts to better understand, and in turn, assess, expected costs of disclosure,²¹⁹ while not requiring the government to volunteer information that might threaten national security if released. It also forces the government to more carefully reevaluate its classification choices in a system rife with over-classification.

After discussing previously proposed reforms, this Part explains the “probability requirement” more fully; argues why it would improve the quality of judicial review without simultaneously harming national security interests; offers paths for the requirement’s implementation; and responds to counterarguments about such a solution’s efficacy and risks.

A. *Previously Proposed Reforms*

In designing mechanisms to improve the judiciary’s willingness and ability to scrutinize the propriety of Exemption 1 withholdings, scholars have primarily proposed ambitious congressional action. These scholars’ suggestions often fit into three major categories of legislation: legislation clarifying classification standards, legislation mandating *in camera* review of withheld information, and legislation establishing special courts or expanding the use of special masters to review nondisclosure of classified information. I review the viability of each proposal in turn.

1. Legislation Clarifying Classification Standards

One way to prevent the government from parroting boilerplate reasons for classification is to make those reasons unavailable. In other words, if justifications for classification, currently set by executive order, were less vague to begin with, the government could less easily apply them in a blanket fashion to its Exemption 1 withholdings.

EO 13526 currently provides broad, malleable criteria for classification. Like its predecessors, the order requires information to fall into one of eight listed categories in order to warrant classification.²²⁰ However, the order defines categories of protected information broadly, with nebulous descriptions such as

²¹⁹ Of course, the astronomical magnitude of potential harm to national security often makes expected costs of disclosure outweigh expected benefits, no matter the tiny probability that such harm would occur. In a similar context, some scholars have recommended instituting a probability threshold to rectify this effect. See Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1298 (2007).

²²⁰ Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.1 (Dec. 29, 2009).

“scientific, technological, or economic matters relating to the national security.”²²¹ More commonly invoked, the expansive “intelligence sources or methods”²²² category allows agencies to withhold a wide range of information with little further explanation. As one scholar argues with regard to this category:

Congress needs to redefine “intelligence sources” in a way that protects legitimate sources of intelligence information, but also recognizes that not every source of information is an intelligence source. An appropriate definition should provide a non-discretionary test to clarify whether a source of information is, first, an “intelligence source,” and, second, deserving of confidentiality.²²³

Though a reissued executive order could also redefine classification categories more precisely than EO 13526, a congressional solution carries more permanence. Whereas a new administration could easily revoke an executive order and replace it with a less specific one, legislation is more difficult to undo. Moreover, the President holds few incentives to narrowly define categories for classification. Though the executive branch does set some limits on its own powers, the tendency to over-classify makes the government unlikely to significantly constrain its own classification capacity.

Accordingly, many commentators call for congressional action to institute more precise standards and definitions for what information merits classification, but these proposals have their faults.²²⁴ While the need for redefinition is apparent, and the executive’s reticence to stringently reset standards equally so, Congress lacks the technical expertise and political will to embark on such an expansive project.²²⁵ Moreover, though Congress may direct courts to *review* whether information has been properly classified according to the executive’s standards, congressionally imposed classification rules would arguably intrude on the executive’s Article II powers. That argument, however, lies beyond the scope of this Article.

2. Legislation Mandating *In Camera* Review

What Congress could do is amend FOIA to require, rather than simply allow, *in camera* review of materials withheld under Exemption 1. Proponents of this option argue that “[s]uch inspection would provide judges information that is often lacking in affidavits. As a result, judges might be more willing to question

²²¹ *Id.* § 1.4(e).

²²² *Id.* § 1.4(c).

²²³ Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT L.J. 79, 127 (2004).

²²⁴ See, e.g., *id.*; Wells, *supra* note 15, at 1217–19.

²²⁵ See Lee, Perlin & Schottenfeld, *supra* note 167, at 115–17 (arguing that Congress is often unwilling and unable to meaningfully legislate technical national security matters).

and overturn officials' claims."²²⁶ Moreover, they add, such a reform would "firmly indicat[e] [congressional] desire for more aggressive review of government claims . . . assuag[ing the] judicial reticence"²²⁷ that Congress' report on the 1974 Amendments to FOIA enabled.²²⁸

However, although such legislation may be politically and legally feasible, it would likely be costly and ineffective. First, though Exemption 1 litigation is relatively rare, it often involves hundreds of pages of withheld information. Requiring courts to pore through these materials line-by-line would thus pose a significant burden.²²⁹ Second, *in camera* review may not improve judicial scrutiny or the public's perception of judicial impartiality to a degree sufficient to outweigh this cost.²³⁰ As the government's mosaic theory argues, courts are not privy to a record's greater national security context. While the government could provide this needed context, *in camera* review alone would not require it to do so. Courts would consequently examine documents without enough information to situate their significance, and thus would continue to feel too apprehensive about inadvertently releasing damaging material to meaningfully question nondisclosure.

Though one study found that *in camera* review correlated with higher disclosure rates at the appellate level,²³¹ that study does not offer enough evidence that mandating such review would yield benefits substantial enough to outweigh its heavy costs. Since courts turn to *in camera* review "as a last resort,"²³² government positions in cases where courts opt to evaluate records *in camera* may be exceptionally weak. That weakness may partially account for higher rates of court-ordered disclosure, diminishing the measurable effects of *in camera* review itself. Perhaps in the long-run, further research will vindicate the efficacy of mandatory *in camera* review; at the moment, however, it is far from clear that such a reform is a necessary or sufficient solution.

3. Legislation Establishing Special Courts or Expanding Use of Special Masters

Finally, some reformers support legislation creating a special court similar to the FISA Court to evaluate the propriety of withholding information in a national security context.²³³ Similarly, others support the more frequent appointments of

²²⁶ Wells, *supra* note 15, at 1220.

²²⁷ Wells, *supra* note 15, at 1220.

²²⁸ See *supra* Section I.C.

²²⁹ See *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (declining to require *in camera* review, in part because such review would overburden courts).

²³⁰ *Id.*

²³¹ Nevelow Mart & Ginsburg, *supra* note 27, at 771.

²³² Deyling, *supra* note 9, at 97.

²³³ See, e.g., Halstuk, *supra* note 223, at 131–33. Such a solution would include review of nondisclosure pursuant to other authorities that permit withholding information for national security reasons, such as FOIA's Exemption 3, as well.

special masters to review Exemption 1 cases,²³⁴ or the appointment of a government attorney to argue against continued classification.

Though each of these solutions might improve the quality of judicial review in Exemption 1 litigation by introducing impartial experts into the decision-making process, they are also extremely costly. The establishment of a special court dedicated to reviewing national security withholdings will likely require substantial time and resources to design and implement. Furthermore, the establishment of such a court may not even be warranted given the relatively slim number of Exemption 1 cases that arise.²³⁵ Moreover, even courts specifically established to adjudicate national security matters, such as the FISA Court, often exhibit reticence to check the government's claims.²³⁶ Similarly, as one proponent of special masters notes:

The cost of using special masters in complicated cases may be prohibitive. The issue of who pays for the master likely will generate additional litigation. The issue of how to select special masters for sensitive national security cases also must be resolved. Individuals with proper security clearances, not to mention time to spare, may be in short supply, and the parties may object to the judge's choice of a master. Finally, at least one judge has suggested that using a special master in a (b)(1) case will not save judicial resources, because only the judge can make the final determination regarding exemption.²³⁷

Appointing an executive branch attorney to argue for records' release is also a costly endeavor, particularly given that administering FOIA already consumes an immense amount of government time and resources.²³⁸ Consequently, though establishing a special court or expanding the use of special masters would involve individuals with greater expertise and willingness to question the government's assertions as decision-makers in the process, these options are likely too expensive and time-consuming to be viable.

B. *Introducing a Probability Requirement*

Some of the reforms proposed above may hold long-term potential for improving the quality of Exemption 1 review, particularly if combined. These reforms, however, are simply too costly—in terms of time, resources, and political

²³⁴ See, e.g., Deyling, *supra* note 9, at 105–11.

²³⁵ See *supra* Section II.B.

²³⁶ See, e.g., William Pollak, *Shu'ubiyya or Security? Preserving Civil Liberties by Limiting FISA Evidence to National Security Prosecutions*, 42 U. MICH. J.L. REFORM 221, 227 (2008).

²³⁷ Deyling, *supra* note 9, at 106 (citing *In re U.S. Dep't of Def.*, 848 F.2d 232, 240 (D.C. Cir. 1988) (Starr, J., dissenting) (“If the trial judge carefully reviews each decision made by the master, it is doubtful that the judicial time or resources will have been conserved to any significant degree.”)).

²³⁸ Pozen, *supra* note 183, at 1099–1102.

capital—to implement quickly and without a clearer understanding of the efficacy with which they would curtail judicial rubberstamping. Though a “probability requirement” is unlikely to completely eradicate undue judicial deference in Exemption 1 cases, it presents an easier and cheaper way to encourage more meaningful judicial review. It would also encourage the government to consider more carefully what information truly merits continued classification, promoting a trend toward lasting change in a system where secrecy is an ongoing tug-of-war between agencies and civil liberties advocates rather than a static unchanging standard.

The “probability requirement” would oblige the government to include in its declarations an estimated probability that disclosure of information would damage national security interests. Presently, the government must justify withholding under Exemption 1 by demonstrating that information is properly classified pursuant to the applicable executive order. However, no classification order to date has set a probability threshold for nondisclosure, or required much consideration of the *likelihood* that disclosure will cause damage to national security. EO 13526, consistent with prior orders, only specifies that information may be classified if its release “could reasonably be expected” to harm national security.²³⁹ Instead, the classification levels the order imposes—top secret, secret, and classified—reflect only the *magnitude* of expected harm—“grave damage,” “serious damage,” and “damage,” respectively.²⁴⁰

Expected damage to national security, however, often represents a high-magnitude, low-probability calculation.²⁴¹ Moreover, though the current Executive Order requires that harm “reasonably” be expected, the demands of their positions push many agency officials to accept a far lower probability of damage as “reasonable” grounds for withholding information than many judges and members of the public might.²⁴² As former Vice President Dick Cheney once famously said, “[i]f there’s a one percent chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty”²⁴³

This manner of thinking often influences judges’ minds as well. As recent work on Exemption 1 jurisprudence argues, “the ‘availability’ heuristic leads decision makers to rely overly on information that is more readily available, and to discount that information that is difficult to discern. In the context of national security decision-making, this likely means judges overweigh the severity of harm

²³⁹ Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.4 (Dec. 29, 2009).

²⁴⁰ *Id.* § 1.2(a).

²⁴¹ See, e.g., Masur, *supra* note 219.

²⁴² See Masur, *supra* note 219. Several former members of the Intelligence Community, speaking on background, agreed that this bias exists.

²⁴³ RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, 61–62 (2006).

that could result from mistaken release (e.g., a terrorist learns information enabling an attack), and underweigh the (usually tiny) probability of that harm arising.”²⁴⁴

Current declarations, in line with classification standards, reflect and even emphasize the magnitude of expected harm to national security, but make no mention of its probability, amplifying the availability heuristic’s effects. The government’s mosaic theory argument reinforces this pattern, reminding judges that courts do not understand the full national security context surrounding withheld information and therefore warning them that they cannot truly discern the probability that damage to the national security will occur. Moreover, social science evidence suggests that “the availability heuristic is used only under conditions of uncertainty.”²⁴⁵

A probability requirement directly addresses this problem. It reminds judges of the low likelihood that disclosure would actually have harmful effects and also helps them assess the importance of particular pieces of information, despite their not understanding the full national security context. In turn, a probability requirement reduces judicial uncertainty and increases judicial confidence, empowering the judiciary to meaningfully question the government’s claims.²⁴⁶ Furthermore, it does so without requiring the government to publicly reveal additional classified details,²⁴⁷ striking a balance between better informing the courts and the public and protecting national security interests during the Exemption 1 litigation process.

Moreover, obliging the government to report the probability that disclosure would harm national security also forces the government itself to consider the often-low probability of such harm. Publicly reporting probability statistics may even stir public frustration regarding over-classification, putting additional pressure on agencies to disclose information. As a result, a probability requirement would likely incentivize the government to contemplate more carefully which information truly merits classification. This effect on the government’s mentality and strategy is important. The fight over secrecy between the executive branch and civil liberties advocates is fluid, and national security agencies often take countermeasures to avoid additional disclosure requirements that reformers from time to time

²⁴⁴ Margaret Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 156 (2017) (citing Mart & Ginsburg, *supra* note 27, at 746–47).

²⁴⁵ Leigh Ann Vaughn, *Effects of Uncertainty on Use of the Availability of Heuristic for Self-Efficacy Judgments*, 29 EUROPEAN J. SOC. PSYCH. 407, 407 (1999).

²⁴⁶ Some social science research indicates that knowing a high-impact event’s low probability of occurring does not mitigate fear of that event. See Cass R. Sunstein, *Beyond Cheneyism and Snowdenism*, 83 U. CHI. L. REV. 271, 279 (2016). However, as previously discussed, much of courts’ concern in ordering information released stems from their inability to understand the danger of that release in context.

²⁴⁷ Some might argue that revealing a probability of harm to the national security would itself be damaging. I address this counterargument later in this Section.

impose.²⁴⁸ In the face of such countermeasures and government officials' initial instincts to over-classify information, the key to ensuring lasting reform is changing the government's mind about what and how much information it seeks to protect.

The probability requirement is also not tremendously difficult to implement, at least in comparison to more ambitious reform proposals like those discussed above. Congress, the courts, or less likely, the executive branch, could all impose such a requirement. First, though Congress could incorporate a probability requirement into any classification scheme it may someday legislate, it could also simply amend the language and requirements of FOIA to provide for such a requirement. Although such an amendment may face resistance from stakeholders based on the counterarguments discussed below, instituting a probability requirement is a change narrow and incremental enough that Congress could likely muster sufficient political will to push it through. Second, courts already can, and sometimes do, direct the government to make certain showings in its affidavits,²⁴⁹ and also instituted the Vaughn Index requirement in the first place.²⁵⁰ Thus, it would be acceptable for the judiciary to additionally require the government to report the probability of harm to national security in its declarations, perhaps by asking the government to elaborate on what it considers a "reasonabl[e]" expectation of harm to the national security.²⁵¹ Courts, of course, would first need to find enough resolve to do so. Finally, and most dramatically, the executive branch could issue a new executive order imposing probability thresholds or levels, to complement the existing magnitude levels, used in classifying information. However, the executive is the least likely to task *itself* with determining probabilities of harm to national security.

Of course, many might object to a probability requirement on several grounds. First, critics might argue that assessing the probability of harm to national security is no easy task and that forcing the government to make such estimates would therefore be costly. However, risk is regularly calculated and reported in many prominent contexts, notably investing and insurance. If financiers and actuaries can estimate probabilities of damage, then surely national security agencies, whose very missions center on assessing risk, can do so as well. Moreover, a probability estimate need not be precise to the decimal, but may perhaps be reported as a range of values. While the government may initially struggle with making probabilistic determinations, this difficulty need not prove fatal. For example, the government could potentially scale the learning curve by

²⁴⁸ For example, despite the institution of the Vaughn Index with the intent to level the playing field between the government and FOIA plaintiffs, the government has responded with often vague and unhelpful Indices, as this Article demonstrates.

²⁴⁹ See, e.g., *ACLU v. NSA*, No. 13 Civ. 09198 (KMW) (JCF), 2017 U.S. Dist. LEXIS 44597, at *52 (S.D.N.Y. Mar. 27, 2017) (instructing agencies to conduct a segregability review and attest to it); *Elec. Frontier Found. v. CIA*, No. C 09-3351 SBA, 2013 U.S. Dist. LEXIS 142146, at *16 (N.D. Cal. Sept. 30, 2013) (ordering the government to resubmit its declarations and Vaughn Index to provide more specificity).

²⁵⁰ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

²⁵¹ Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.4 (Dec. 29, 2009).

hiring consultants who specialize in quantifying risk to train or guide its own assessors. Of course, risk associated with rarely occurring events is often challenging even for consultants to estimate, since relatively little past data exists to guide future determinations. Again, however, the task is neither Herculean nor impossible; particularly with rapid technological development, unprecedented threats occur in many sectors, but private businesses often nevertheless estimate these threats' likelihood in order to operate. For example, as cryptocurrencies emerge, investors and developers alike must assess and often estimate the probability and impact of novel financial, technological, and regulatory risks.

Second, given the government's tendency to sidestep transparency measures, others might worry that instituting a probability requirement—particularly one that might not require great precision—might yield overestimates that actually *exacerbate* judicial reticence. However, given the extremely low probability of harm to national security—often approaching zero²⁵²—it is unlikely that the government could, in good faith, puff its estimates enough to make withholding significantly more appealing as an option. Skeptics might fear that the government would consequently turn to *bad faith* probability reporting. While courts generally prohibit perjury and government officials should, of course, always approach their legal obligations in good faith, oversight measures might also prove helpful to prevent this result. For example, periodic inspection, conducted by an oversight body such as the Office of the Inspector General, could accompany the probability requirement to ensure its good faith implementation.

Third, some agencies may argue that if forced to report a probability of harm to national security, revealing this likelihood would itself pose a threat. If such a problem does ever arise, the government should report the probability to the court *ex parte*. However, to prevent government overreliance on *ex parte* submissions, agencies should be obliged to demonstrate why publicly reporting a probability of harm would itself damage the national security. Though such a system risks encouraging meta-litigation with the same judicial deference problems, it seems less likely that the government would resist revealing a probability estimate *publicly* more than it would resist reporting a probability estimate *in general*. Moreover, even if the government did submit its estimates *ex parte*, the reported probability would still serve its function of encouraging meaningful judicial review.

Finally, the institution of a probability requirement raises the obvious question: What probability of harm to the national security is the threshold for withholding information? Or, phrased consistent with the current executive order, what expectation of harm is “reasonable”? I argue that such a threshold need not exist. Reported probability is simply another heuristic for judges to consider regarding whether or not information is properly classified, both to decide if harm to the national security could indeed “reasonably be expected,” as the order requires, and also to contextualize other facts in the case that support or oppose withholding. The point of a probability requirement is not to institute a cut-off or

²⁵² Masur, *supra* note 219, at 1303.

to encourage judges to order disclosure based on a low likelihood of harm alone, but to re-shape how judges and agencies think about classification decisions.

Conclusion

The legitimacy of the American legal system rests not on its outcomes, but on the promise of a just and robust judicial process. While many commentators have decried the slim quantity of plaintiffs' successes challenging Exemption 1 withholdings, it is the quality of the process that might be even more troubling. In this Article's analysis of government declarations and case outcomes in Exemption 1 litigations, courts upheld the government's claims when presented with substandard declarations 76.2% of the time, and moreover, declaration quality did not impact the government's chances of success in any statistically significant way. Put more sharply, this study demonstrates what many scholars and civil liberties advocates have long suspected: despite congressional efforts to establish *de novo* review for nondisclosure under FOIA, courts largely rubberstamp the government's Exemption 1 assertions.

This result implicates not only the effectiveness of FOIA, but also key pillars of the American legal tradition: the presumption of transparency, principles of democracy and fair notice, and the legitimacy of the judicial process. It also demonstrates the extent of courts' reluctance to check the executive branch in the national security context, even when expressly mandated by Congress to do so.

Though others have proposed more ambitious reforms to enable meaningful judicial review of the executive's classification decisions, this Article presents a probability requirement as an easier-to-implement solution. Critically, this requirement would not only encourage courts to question the government's claims, but would also incentivize the government itself to consider more carefully what information merits continued classification in a world where secrecy is not static.

Yet whatever the proper solution, the paucity of Exemption 1's judicial review process gives a sound imperative to act—not just to reduce opacity in the national security arena, but also to preserve fundamental American values of open government, democracy, and judicial legitimacy. Otherwise, adjudication of “the crown jewel of transparency” may be the very means by which that jewel tarnishes and cracks.

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Appendix—Freedom of Information Act Exemption 1 Disposition Data

<i>Case</i>	<i>Disposition on Exemption 1</i>	<i>Highest Declaration Specificity</i>	<i>Classified Declaration</i>	<i>Classification Level</i>	<i>In Camera</i>	<i>Panel Composition</i>	<i>Year</i>	<i>Court</i>
ACLU v. NSA, No. 13 Civ. 09198 (KMW) (JCF), 2017 U.S. Dist. LEXIS 44597 (S.D.N.Y. Mar. 27, 2017) (legal memos/approval packages)	2	3	1	2	0	0	2017	S.D.N.Y.
ACLU v. NSA, No. 13 Civ. 09198 (KMW) (JCF), 2017 U.S. Dist. LEXIS 44597 (S.D.N.Y. Mar. 27, 2017) (IG and compliance reports)	1	3	1	0	0	0	2017	S.D.N.Y.
Broward Bulldog, Inc. v. U.S. Dep't of Justice, No. 16-61289-CIV, 2017 U.S. Dist. LEXIS 26980 (S.D. Fla. Feb. 27, 2017) (Oct. 24, 2014 report)	2	3	1	1	0	1	2017	S.D. Fla.
Broward Bulldog, Inc. v. U.S. Dep't of Justice, No. 16-61289-CIV, 2017 U.S. Dist. LEXIS 26980 (S.D. Fla. Feb. 27, 2017) (Oct. 5, 2012 memo)	2	3	1	1	0	1	2017	S.D. Fla.
Jaber v. U.S. Dep't of Def., 293 F. Supp. 3d 218 (D.D.C. 2018)	2	3	0	1*	0	1	2018	D.D.C.
Am. Ctr. for Law & Justice v. U.S. Dep't of State, 354 F. Supp. 3d 1 (D.D.C. 2018)	2	3	0	0	1	0	2018	D.D.C.
N.Y. Times Co. v. FBI, 297 F. Supp. 3d 435 (S.D.N.Y. 2017)	2	3	1	1*	1	0	2017	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, No. 16 Civ. 6120 (RMB), 2017 U.S. Dist. LEXIS 168276 (S.D.N.Y. Sept. 29, 2017)	2	3	0	2	1	0	2017	S.D.N.Y.
ACLU v. U.S. Dep't of Justice, 229 F. Supp. 3d 259 (S.D.N.Y. 2017)	2	3	1	1*	0	1	2017	S.D.N.Y.
Intellectual Prop. Watch v. U.S. Trade Representative, 205 F. Supp. 3d 334 (S.D.N.Y. 2016) (IP Watch II)	2	3	0	0	0	0	2016	S.D.N.Y.

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<i>Case</i>	<i>Disposition on Exemption 1</i>	<i>Highest Declaration Specificity</i>	<i>Classified Declaration</i>	<i>Classification Level</i>	<i>In Camera</i>	<i>Panel Composition</i>	<i>Year</i>	<i>Court</i>
Intellectual Prop. Watch v. U.S. Trade Representative, 205 F. Supp. 3d 334 (S.D.N.Y. 2016) (IP Watch II) (changes from private sector)	1	3	0	0	0	0	2016	S.D.N.Y.
N.Y. Times Co. v. NSA, 205 F. Supp. 3d 374 (S.D.N.Y. 2016) (PR/TT)	2	3	0	2	0	0	2016	S.D.N.Y.
ACLU v. FBI, No. 11CV7562, 2015 U.S. Dist. LEXIS 43244 (S.D.N.Y. Mar. 31, 2015)	2	3	1	1*	1	0	2015	S.D.N.Y.
ACLU v. FBI, 59 F. Supp. 3d 584 (S.D.N.Y. 2014)	2	3	1	1*	0	0	2014	S.D.N.Y.
Ctr. for Constitutional Rights v. U.S. Dep't of Def., 968 F. Supp. 2d 623 (S.D.N.Y. 2013) (photos)	2	3	0	1*	1	0	2013	S.D.N.Y.
Ctr. for Constitutional Rights v. U.S. Dep't of Def., 968 F. Supp. 2d 623 (S.D.N.Y. 2013) (debriefing video)	2	3	1	1*	0	0	2013	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309 (S.D.N.Y. 2012)	2	3	1	1*	1	0	2012	S.D.N.Y.
ACLU v. Office of the Dir. of Nat'l Intelligence, No. 10 Civ. 4419 (RJS), 2012 U.S. Dist. LEXIS 47786 (S.D.N.Y. Mar. 30, 2012)	2	3	1	1*	0	1	2012	S.D.N.Y.
ACLU v. U.S. Dep't of Def., No. 09 Civ. 8071 (BSJ) (FM), 2012 U.S. Dist. LEXIS 194264 (S.D.N.Y. Mar. 20, 2012)	2	3	1	1*	1	0	2012	S.D.N.Y.
Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479 (S.D.N.Y. 2010)	2	3	1	1*	0	1	2010	S.D.N.Y.
Qatanani v. U.S. Dep't of Justice, No. CIV. 12-4042 KSH CLW, 2015 U.S. Dist. LEXIS 42108 (D.N.J. Mar. 31, 2015)	2	3	1	1*	0	0	2015	D.N.J.

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<i>Case</i>	<i>Disposition on Exemption 1</i>	<i>Highest Declaration Specificity</i>	<i>Classified Declaration</i>	<i>Classification Level</i>	<i>In Camera</i>	<i>Panel Composition</i>	<i>Year</i>	<i>Court</i>
ACLU of N.J. v. U.S. Dep't of Justice, No. CIV.A. 11-2553 ES, 2012 U.S. Dist. LEXIS 142178 (D.N.J. Oct. 2, 2012) (BDA/EC)	2	3	0	1	0	0	2012	D.N.J.
Energy & Env't Legal Inst. v. U.S. Dep't of State, No. 1:15-CV-423, 2017 U.S. Dist. LEXIS 140220 (E.D. Va. Aug. 28, 2017)	2	3	0	0	0	1	2017	E.D. Va.
ACLU of N. Cal. v. FBI, No. C 12-03728 SI, 2014 U.S. Dist. LEXIS 130501 (N.D. Cal. Sept. 16, 2014)	2	3	1	1*	0	0	2014	N.D. Cal.
Elec. Frontier Found. v. U.S. Dep't of Justice, No. 4:11-CV-05221-YGR, 2014 U.S. Dist. LEXIS 110785 (N.D. Cal. Aug. 11, 2014)	2	3	1	1*	1	0	2014	N.D. Cal.
Hiken v. U.S. Dep't of Def., 872 F. Supp. 2d 936 (N.D. Cal. 2012)	2	3	0	1	1	1	2012	N.D. Cal.
Eslaminia v. FBI, No. C 99-03249 MHP, 2011 U.S. Dist. LEXIS 125261 (N.D. Cal. Oct. 28, 2011) (Docs 1, 3, 5)	2	3	1	1*	1	0	2011	N.D. Cal.
Eslaminia v. FBI, No. C 99-03249 MHP, 2011 U.S. Dist. LEXIS 125261 (N.D. Cal. Oct. 28, 2011) (Docs 2, 4, 6)	1	3	1	1*	1	0	2011	N.D. Cal.
Trentadue v. FBI, No. 2:12CV974 DAK, 2015 U.S. Dist. LEXIS 74494 (D. Utah June 8, 2015)	2	3	1	1	1	0	2015	D. Utah
Broward Bulldog, Inc. v. U.S. Dep't of Justice, No. 16-61289-CIV, 2017 U.S. Dist. LEXIS 74234 (S.D. Fla. May 16, 2017)	2	3	1	1*	1	1	2017	S.D. Fla.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4aa)	2	3	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4ab)	2	3	0	1	0	0	2018	D.D.C.
N.Y. Times Co. v. U.S. Dep't of Justice, 806 F.3d 682 (2d Cir. 2015) (NY Times II) (all other exhibits)	2	3	1	1*	1	.33	2015	2d Cir.

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<i>Case</i>	<i>Disposition on Exemption 1</i>	<i>Highest Declaration Specificity</i>	<i>Classified Declaration</i>	<i>Classification Level</i>	<i>In Camera</i>	<i>Panel Composition</i>	<i>Year</i>	<i>Court</i>
N.Y. Times Co. v. U.S. Dep't of Justice, 806 F.3d 682 (2d Cir. 2015) (NY Times II) (Exhibit K)	0	3	1	1*	1	.33	2015	2d Cir.
Ctr. for Constitutional Rights v. CIA, 765 F.3d 161 (2d Cir. 2014)	2	3	1	1*	0	0	2014	2d Cir.
N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014) (NY Times I) (OLC-DOD Memo)	0	3	1	1*	1	.33	2014	2d Cir.
N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014) (NY Times I) (other docs)	1	3	1	1*	1	.33	2014	2d Cir.
ACLU v. U.S. Dep't of Justice, 681 F.3d 61 (2d Cir. 2012)	2	3	1	1*	1	.66	2012	2d Cir.
ACLU v. U.S. Dep't of Justice, 640 Fed. Appx. 9 (D.C. Cir. 2016)	2	3	1	1*	0	.66	2016	D.C. Cir.
Judicial Watch, Inc. v. U.S. Dep't of Def., 715 F.3d 937 (D.C. Cir. 2013)	2	3	1	2	0	0	2013	D.C. Cir.
ACLU v. U.S. Dep't of Def., 628 F.3d 612 (D.C. Cir 2011)	2	3	0	2	0	1	2011	D.C. Cir.
Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Homeland Sec., 331 F. Supp. 3d 74 (S.D.N.Y. 2018) (FBI)	2	2	0	1	0	0	2018	S.D.N.Y.
Kinney v. CIA, No. C16-5777 BHS, 2017 U.S. Dist. LEXIS 67756 (W.D. Wash May 3, 2017)	2	2	0	1*	0	1	2017	W.D. Wash.
Hall v. CIA, 881 F. Supp. 2d 38 (D.D.C 2012)	2	2	0	2	0	1	2012	D.D.C.
N.Y. Times Co. v. CIA, 314 F. Supp. 3d 519 (S.D.N.Y. 2018)	2	2	0	0	0	0	2018	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, No. 14 Civ. 03776 (AT)(SN), 2016 U.S. Dist. LEXIS 139885 (S.D.N.Y. Aug. 18, 2016) (Table of s215 Info)	2	2	0	2	0	0	2016	S.D.N.Y.

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<i>Case</i>	<i>Disposition on Exemption 1</i>	<i>Highest Declaration Specificity</i>	<i>Classified Declaration</i>	<i>Classification Level</i>	<i>In Camera</i>	<i>Panel Composition</i>	<i>Year</i>	<i>Court</i>
N.Y. Times Co. v. U.S. Dep't of Justice, No. 14-CV-03776 (AT)(SN), 2016 U.S. Dist. LEXIS 139885 (S.D.N.Y. Aug. 18, 2016) (Stats on NSL Use)	2	2	0	2	0	0	2016	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, No. 14 Civ. 03776 (AT)(SN), 2016 U.S. Dist. LEXIS 139885 (S.D.N.Y. Aug. 18, 2016) (13 consequences for NSL Disclosure)	2	2	0	2	0	0	2016	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, No. 14-CV-03776 (AT)(SN), 2016 U.S. Dist. LEXIS 139885 (S.D.N.Y. Aug. 18, 2016) (Info about public trials)	2	2	0	2	0	0	2016	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, No. 14-CV-03776 (AT)(SN), 2016 U.S. Dist. LEXIS 139885 (S.D.N.Y. Aug. 18, 2016) (Legal Debate Over PSP)	2	2	0	2	0	0	2016	S.D.N.Y.
Ctr. for Constitutional Rights v. U.S. Dep't of Def., 968 F. Supp. 2d 623 (S.D.N.Y. 2013) (Glomar)	2	2	0	1	0	0	2013	S.D.N.Y.
ACLU v. U.S. Dep't of Justice, No. 11-2553 (ES), 2012 U.S. Dist. LEXIS 142178 (D.N.J. Oct. 02, 2012) (geomap)	1	2	0	1	0	0	2012	D.N.J.
ACLU of Mich. v. FBI, No. 11-13154, 2012 U.S. Dist. LEXIS 141383 (E.D. Mich. Sept. 30, 2012) (DINs)	2	2	0	1*	0	1	2012	E.D. Mich.
ACLU of Mich. v. FBI, No. 11-13154, 2012 U.S. Dist. LEXIS 141383 (E.D. Mich. Sept. 30, 2012) (ecomms)	2	2	0	1*	0	1	2012	E.D. Mich.
Trentadue v. FBI, No. 2:12-CV-974 DAK, 2015 U.S. Dist. LEXIS 74494 (D. Utah June 8, 2015)	1	2	0	1	0	0	2014	D. Utah

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Trentadue v. FBI, No. 2:12CV974 DAK, 2015 U.S. Dist. LEXIS 74494 (D. Utah June 8, 2015)	2	2	0	1	0	1	2010	D. Utah
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4ac)	2	2	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4c)	1	2	0	1	0	0	2018	D.D.C.
Ctr. for Int'l Env'tl. Law v. Off. of the U.S. Trade Representative, 718 F.3d 899 (D.C. Cir. 2013)	2	2	0	0	0	1	2013	D.C. Cir.
Stipulation and Order of Dismissal, ACLU v. NSA, No. 1:16-CV-08936 (RMB) (S.D.N.Y. Dec. 11, 2017) (rules, regs, training materials) (FBI)	2	1	0	1	0	0	2017	S.D.N.Y.
Stipulation and Order Setting Forth Additional Provisions Regarding the Scope of Required Searches and Deadlines for Completion of Certain Searches for and Processing of Responsive Records, ACLU v. NSA, No. 1:16-CV-08936 (RMB) (S.D.N.Y. Feb. 8, 2017) (rules, regs, training materials) (FBI)	2	1	0	1	0	0	2017	S.D.N.Y.
Stipulation and Order Setting Forth Case Management Plan and Related Agreements, ACLU v. NSA, No. 1:16-CV-08936 (RMB) (S.D.N.Y. Jan. 11, 2017) (rules, regs, training materials) (FBI)	2	1	0	1	0	0	2017	S.D.N.Y.
Mosier v. CIA, No. 2:13-CV-00744 (MCE)(KJN), 2013 U.S. Dist. LEXIS 169502 (E.D. Cal. Nov. 26, 2013)	2	1	0	1*	0	1	2013	E.D. Cal.
Moore v. FBI, 883 F. Supp. 2d 155 (D.D.C. 2012)	2	1	0	1*	0	1	2012	D.D.C.

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ACLU v. U.S. Dep't of Def., 322 F. Supp. 3d 464 (S.D.N.Y. 2018)	0	1	0	1*	0	0	2018	S.D.N.Y.
N.Y. Times Co. v. NSA, 205 F. Supp. 3d 374 (S.D.N.Y. 2016)	2	1	0	2	0	0	2016	S.D.N.Y.
Intellectual Prop. Watch v. United States Trade Representative, 134 F. Supp. 3d 726 (S.D.N.Y. 2015)	2	1	0	0	0	0	2015	S.D.N.Y.
Florez v. CIA, No. 14-CV-1002 (SHS), 2015 U.S. Dist. LEXIS 20009 (S.D.N.Y. Feb. 19, 2015)	2	1	0	1*	0	0	2015	S.D.N.Y.
Platsky v. NSA, No. 11-CV-4816 (SLT)(RLM), 2013 U.S. Dist. LEXIS 190947 (E.D.N.Y. Jan. 30, 2013)	2	1	0	1*	0	1	2013	E.D.N.Y.
Hetzler v. Record/Info. Dissemination, 896 F. Supp. 2d 207 (W.D.N.Y. 2012) (McK 96-97)	1	1	0	1	1	1	2012	W.D.N.Y.
Hetzler v. Record/Info. Dissemination, 896 F. Supp. 2d 207 (W.D.N.Y. 2012) (McK 161)	1	1	0	1	1	1	2012	W.D.N.Y.
ACLU v. U.S. Dep't of Def., 752 F. Supp. 2d 361 (S.D.N.Y. 2010)	2	1	0	1*	0	0	2010	S.D.N.Y.
Igoshev v. NSA/Central Sec. Serv., No. CV ELH-17-1363, 2018 U.S. Dist. LEXIS 74091 (D. Md. May 1, 2018)	2	1	0	2	0	0	2018	D. Md.
ACLU of Mich. v. FBI, No. 11-13154, 2012 U.S. Dist. LEXIS 141383 (E.D. Mich. Sep. 30, 2012)	2	1	0	1*	0	1	2012	E.D. Mich.
ACLU of Mich. v. FBI, No. 11-13154, 2012 U.S. Dist. LEXIS 141383 (E.D. Mich. Sep. 30, 2012) (maps)	2	1	0	1*	0	1	2012	E.D. Mich.

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Freedom of the Press Found. v. U.S. Dep't of Justice, 241 F. Supp. 3d 986 (N.D. Cal. 2017)	2	1	0	1	0	0	2017	N.D. Cal.
Elec. Frontier Found. v. CIA, No. C 09-3351 SBA, 2013 U.S. Dist. LEXIS 142146 (N.D. Cal. Sep. 30, 2013)	1	1	0	1	0	1	2013	N.D. Cal.
ACLU v. FBI, No. 12-03728, 2013 U.S. Dist. LEXIS 93079 (N.D. Cal. July 1, 2013)	1	1	0	1	0	0	2013	N.D. Cal.
Council on Am.-Islamic Rels., Cal. v. FBI, 749 F. Supp. 2d 1104 (S.D. Cal. 2010)	2	1	0	1*	1	1	2010	S.D. Cal.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4b)	1	1	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4g)	2	1	0	1	0	0	2018	D.D.C.
Florez v. CIA, 829 F.3d 178 (2d Cir. 2016)	1	1	0	1*	0	.33	2016	2d Cir.
Freedom Watch, Inc. v. NSA, 783 F.3d 1340 (D.C. Cir. 2015)	2	1	0	1*	0	0	2015	D.C. Cir.
ACLU v. CIA, 710 F.3d 422 (2013)	1	1	0	1*	0	.33	2013	D.C. Cir.
Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504 (2011)	2	1	0	0	0	.33	2011	D.C. Cir.
Stipulation and Order of Dismissal, ACLU v. NSA, No. 1:16-CV-08936 (RMB) (S.D.N.Y. Dec. 11, 2017) (CIA 10)	2	0	0	1*	0	0	2017	S.D.N.Y.
Stipulation and Order of Dismissal, ACLU v. NSA, No. 1:16-CV-08936 (RMB) (S.D.N.Y. Dec. 11, 2017) (rules, regs, training materials) (CIA)	2	0	0	2	0	0	2017	S.D.N.Y.
Abdul-Alim v. Wray, 277 F. Supp. 3d 199 (D. Mass. 2017)	2	0	0	1	0	0	2017	D. Mass.

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Schwartz v. U.S. Dep't of Def., No. 15 Civ. 7077, 2017 U.S. Dist. LEXIS 2316 (E.D.N.Y. Jan. 6, 2017) (4/5 CIA redactions)	2	0	0	1*	0	0	2017	E.D.N.Y.
Schwartz v. U.S. Dep't of Def., No. 15 Civ. 7077, 2017 U.S. Dist. LEXIS 2316 (E.D.N.Y. Jan. 6, 2017) (1/5 CIA redactions)	0	0	0	1*	0	0	2017	E.D.N.Y.
Estate of Abduljaami v. U.S. Dep't of State, No. 14 Civ. 7902, 2016 U.S. Dist. LEXIS 1835 (S.D.N.Y. Jan. 7, 2016)	2	0	0	1	0	0	2016	S.D.N.Y.
N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. 2013)	2	0	0	1*	0	0	2013	S.D.N.Y.
ACLU v. Office of the Dir. of Nat'l Intelligence, 2011 U.S. Dist. LEXIS 132503 (S.D.N.Y. Nov. 15, 2011)	0	0	0	1*	0	1	2011	S.D.N.Y.
Hetznecker v. NSA, No. 16-945, 2017 U.S. Dist. LEXIS 134790 (E.D. Pa. Aug. 23, 2017)	2	0	0	2	1	0	2017	E.D. Pa.
ACLU v. U.S. Dep't of Justice, No. 11-2553 (ES), 2012 U.S. Dist. LEXIS 142178 (D.N.J. Oct. 1, 2012)	2	0	0	1	0	0	2012	D.N.J.
McCash v. CIA, No. 5:15-cv-02308-EJD, 2016 U.S. Dist. LEXIS 156485 (N.D. Cal. Nov. 10, 2016)	2	0	0	2	0	0	2016	N.D. Cal.
Barous v. NSA/CSS, No. SACV 14-00698-CJC(JCGx), 2015 U.S. Dist. LEXIS 182109 (C.D. Cal. July 8, 2015)	2	0	0	2	0	1	2015	C.D. Cal.
Elec. Frontier Found. v. CIA, No. C 09-3351 SBA, 2013 U.S. Dist. LEXIS 142146 (N.D. Cal. Sep. 30, 2013) (DoD)	1	0	0	2	0	1	2013	N.D. Cal.

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Elec. Frontier Found. v. CIA, No. C 09-3351 SBA, 2013 U.S. Dist. LEXIS 142146 (N.D. Cal. Sep. 30, 2013) (DAIG)	1	0	0	1	0	1	2013	N.D. Cal.
Al-Turki v. U.S. Dep't of Justice, 175 F. Supp. 3d 1153 (D. Colo. 2016)	2	0	0	1	0	0	2016	D. Colo.
Lynn v. Nat'l Archives & Records Admin., No. CV 18-587 (CKK), 2019 U.S. Dist. LEXIS 19870 (D.D.C. Feb. 7, 2019)	2	0	0	1*	0	0	2019	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4ad)	2	0	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4ae)	2	0	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (1.4af)	1	0	0	1	0	0	2018	D.D.C.
Rosenberg v. U.S. Dep't of Def., 342 F. Supp. 3d 62 (D.D.C. 2018) (DIA)	2	0	0	1*	0	.66	2015	9th Cir.
Carter v. NSA, No. 13-5322, 2014 U.S. App. LEXIS 7642 (D.C. Cir. Apr. 23, 2014)	2	0	0	2	0	1	2014	D.C. Cir.

*The case did not indicate the classification value, so I coded it at as a "1" (for secret) since the vast majority of documents are classified as secret.