

SECURING ACCESS TO NATIONAL SECURITY INFORMATION

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INTRODUCTION

Many will need no convincing that there is a pervasive and widely acknowledged problem of over-classification of government records.¹ Likewise, it will come as no surprise that the judiciary affords strong deference to executive claims for the need for secrecy on the basis of national security.² But if you want a compelling account of these two premises, *[Dis-]informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act* by Professors Susan Nevelow Mart and Tom Ginsburg offers detailed evidence starkly portraying this landscape.³ From statements of government officials who spent careers handling classified information to case studies of judicial decisionmaking sanctioning unnecessary secrecy, their account clearly demonstrates that the interaction between over-classification and excessive judicial deference to those classification decisions is a dangerous one for government accountability.⁴

Their biggest contribution, however, is their exploration of why judges

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1. See generally ELIZABETH GOITEIN & DAVID M. SHAPIRO, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY, BRENNAN CTR. FOR JUSTICE (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf (documenting general agreement that over-classification is a problem).

2. See generally Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 VILL. L. REV. 67 (1992) (documenting deference to the Executive Branch in these cases).

3. Susan Nevelow Mart & Tom Ginsburg, *[Dis-]informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725 (2014).

4. *Id.* at 731–44, 751–62.

defer to Executive Branch officials, especially in light of Congress's clear attempts to require true de novo review of national security decisions in Freedom of Information Act (FOIA) cases.⁵ Because this question requires an inquiry into the judges' state of mind, it has been consistently under-investigated and under-theorized.⁶ Drawing on cognitive psychology principles, Professors Mart and Ginsburg compellingly fill this void.

First, they explain, decisionmakers are likely influenced by the "availability" heuristic, which is the natural tendency to afford more weight to information that is readily available than that which is not.⁷ In the case of national security classification decisions, the worst-case scenario involving national security harm from mistaken release of information is easy to imagine. The actual probability of that worst-case materializing, however, is incredibly difficult to quantify.⁸ I would add that the same seems likely true for judges' ability to measure the much more ephemeral harm to society that comes from mistakenly sanctioning secrecy, weighing in the opposite direction. In any event, as Professors Mart and Ginsburg argue, the inability to assess probability of outcomes may lead judges to refuse to make tough decisions, in effect deferring to the Executive Branch view.⁹

Second, Professors Mart and Ginsburg discuss the "secrecy" heuristic, whereby people tend to attribute greater accuracy and weight to secret information than public information.¹⁰ This phenomenon, too, may contribute to judges' deference to Executive Branch classification decisions.¹¹ In my view, it may even contribute to judges' reluctance to review records in camera, a phenomenon I discuss in further detail below, since they may already tend toward accepting the veracity of the records.

Finally, their Article deftly handles the question of executive expertise. Often invoked as the trump card in favor of deference to the Executive Branch in this area, expertise is demonstrated in this Article to be a much more mixed question. Evidence shows that Executive Branch officials often

5. *Id.* at 746–52.

6. The literature contains little more than isolated suggestions about the judicial state of mind in this regard. *See, e.g.*, Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 715–16 (2002) (citing the Supreme Court's "skepticism, if not resistance," toward the Freedom of Information Act (FOIA)); *see also* Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 760–61 (1988) ("Probing even a little into national security matters [in a FOIA case] is not an easy or a pleasant job.").

7. Mart & Ginsburg, *supra* note 3, at 746.

8. *Id.* (explaining that the availability heuristic "distorts the ability to assess low probability events that might have 'high consequence risks'").

9. *Id.* at 747.

10. *Id.* at 760–61.

11. *Id.* at 761.

make classification decisions based on considerations other than their expertise in national security matters.¹² On the flip side, judges may not have the substantive expertise of Executive Branch officials, but the institutional design of the Judiciary is aimed precisely at eliciting expertise.¹³ I wholeheartedly agree with the conclusion of Professors Mart and Ginsburg: “Just because a decision is difficult does not mean that reasoned decisions can be avoided.”¹⁴

Despite ably describing and analyzing judges’ failure to demand a robust review of agency decisions to conceal records, Professors Mart and Ginsburg leave untouched several related inquiries worth considering that, had they done so, would have rounded out their analysis. The first, and perhaps most obvious, shortcoming of their Article pertains to solutions. Apart from an implicit plea for judges to take a more searching and aggressive approach to their responsibilities, the Article lacks concrete suggestions for improving judicial decisionmaking in FOIA cases involving national security. The second is the relationship between judges’ approaches to national security claims brought up in FOIA cases and the approach taken regarding national security secrecy decisions in other contexts. While Professors Mart and Ginsburg at times contend that in other contexts courts exercise greater oversight, the judicial record suggests that, on the contrary, the same problems plague secrecy decisions across many types of legal claims. The remainder of this Response will address these two concerns.

I. STRENGTHENING JUDICIAL REVIEW

Certainly, as Professors Mart and Ginsburg document, judicial review of all FOIA cases—including those concerning national security—was meant to be a searching and careful inquiry.¹⁵ Not only does FOIA embrace a de novo review standard,¹⁶ but when the Supreme Court interpreted the statute to apply very narrowly in cases concerning classification,¹⁷ Congress amended FOIA to make clear that courts were to review de novo not only the fact of classification, but the propriety of classification as well.¹⁸ While I

12. *Id.* at 752–54.

13. Mart & Ginsburg, *supra* note 3, at 748.

14. *Id.* at 751.

15. *Id.* at 733–44.

16. 5 U.S.C. § 552(a)(4)(B) (2012).

17. See *EPA v. Mink*, 410 U.S. 73, 81–84 (1973), *superseded by statute*, FOIA, Pub. L. No. 93–502 § 2(A), 88 Stat. 1561 (1974), *as recognized in* *CIA v. Sims*, 471 U.S. 159 (1985).

18. While Congress left the de novo review provision intact, it changed the language of exemption one concerning classified records from covering records “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy,” *Mink*, 410 U.S. at 81, to covering records “specifically authorized under criteria established

have contended elsewhere that deference in various forms, including some procedural manipulations that have deferential effects, pervades FOIA cases across substantive categories,¹⁹ deference in the national security context is among the most explicit. In fact, courts openly defer to Executive Branch classification decisions, articulating the scope of the court's inquiry in terms such as "accord[ing] substantial deference to the [agency's] determination that information must be withheld under Exemption 1, and [upholding] the agency's decision so long as the withheld information 'logically falls into the category of the exemption indicated,' and there is no evidence of bad faith on the part of the agency."²⁰ This stated scope of review facially falls far short of the *de novo* review articulated in the statute.

With regard to documenting national security deference and its effect on litigation outcomes, Professors Mart and Ginsburg undertake an ambitious project based on an original dataset containing essentially every national security case decided under FOIA.²¹ The results show startlingly (though not surprisingly) little plaintiff success; for example, out of 163 district court decisions, only six resulted in an order of full or partial disclosure of the requested records.²²

Reaching deeper into the data, they also make an effort to decipher factors that contribute to courts' willingness to order disclosure. Certainly, this effort yielded interesting results, particularly with regard to the effect of party identity on the chance of a FOIA plaintiff prevailing in a national security case. For example, their research suggests that repeat-player plaintiffs are more likely to prevail and that repeat national security defendants are likewise at an advantage.²³

Nonetheless, and certainly through no fault of the researchers, the data fails to offer any promising avenues for reform or aspects of litigation that might be exploited to encourage courts to exercise greater oversight. For example, in camera review of putatively sensitive documents, authorized by Congress in 1974,²⁴ has proven of little value because courts have erected tough standards enumerating when such review is appropriate. As the D.C. Circuit has said, not only is in camera inappropriate if the

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." 5 U.S.C. § 552(b)(1). In addition, Congress for the first time expressly authorized courts to conduct in camera review of withheld records. *Id.* § 552(a)(4)(B).

19. See generally Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013).

20. *Maynard v. CIA*, 986 F.2d 547, 555–56 (1st Cir. 1993) (quoting *Bell v. United States*, 563 F.2d 484, 487 (1st Cir. 1977)).

21. Mart & Ginsburg, *supra* note 3, at 764–75.

22. *Id.* at 768.

23. *Id.* at 775.

24. 5 U.S.C. § 552(a)(4)(B) (2012).

government's affidavits are sufficient, but "in camera inspection is particularly a last resort in national security situations like this case—a court should not resort to it routinely on the theory that 'it can't hurt.'"²⁵ Thus, plaintiffs often face an uphill battle even taking advantage of this procedural opportunity.

Before reading *[Dis-]informing the People's Discretion*, I would have been tempted to imagine that reforms that mandate in camera review upon the plaintiff's request or at least lower the standard for obtaining such review would nudge courts toward more aggressive oversight. But Professors Mart and Ginsburg's data are sobering in this regard. Whether a court conducted an in camera review during the course of litigation did not have a significant effect on the outcome of the case.²⁶ Likewise, they found no effects emanating from other procedural devices such as Vaughn Indices, or even from the court having discussed the sufficiency of the government's affidavit.²⁷ Perhaps because victories are so few and far between that we simply cannot know enough about what caused them, or perhaps because the particular procedures we have simply are not effective, the data fails to provide the basis for suggested procedural reforms that might improve judicial oversight of national security cases under FOIA.

Professors Mart and Ginsburg seem to recognize the data's failure to illuminate a satisfying procedural path forward. They do not suggest that process can create meaningful review. Instead, using the case of *International Counsel Bureau v. U.S. Department of Defense*²⁸ as a positive example of strong judicial oversight holding the government to exacting standards, Professors Mart and Ginsburg straightforwardly suggest "courts should follow the directives they were given in the revisions to the FOIA in 1974."²⁹ While I have great sympathy for this call for action on the part of the Judiciary, I harbor serious reservations about the feasibility of asking the Judiciary to perform a task it has, for decades, almost categorically refused to do.³⁰

25. *ACLU v. U.S. Dep't of Def. (DOD)*, 628 F.3d 612, 626 (D.C. Cir. 2011) (emphasis omitted) (quoting *Larson v. U.S. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009)).

26. See Mart & Ginsburg, *supra* note 3, at 768.

27. *Id.*

28. *Int'l Counsel Bureau v. DOD*, 906 F. Supp. 2d 1 (D.D.C. 2012); *Int'l Counsel Bureau v. DOD*, 864 F. Supp. 2d 101 (D.D.C. 2012); *Int'l Counsel Bureau v. DOD*, 723 F. Supp. 2d 54 (D.D.C. 2010); *Int'l Counsel Bureau v. DOD*, 657 F. Supp. 2d 33 (D.D.C. 2009).

29. Mart & Ginsburg, *supra* note 3, at 782.

30. See Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD L. REV. 1060, 1086–87 (2014) (suggesting true de novo review has been an experiment that has unfortunately largely failed and that we might want to consider second-best options because the problem is not "easily solved by simply pointing out that judges should perform a function they feel ill-equipped to perform or about which they may be acting on unconscious beliefs about the merits of FOIA as a transparency tool").

Simply asking judges to take the same task and approach it differently is ineffective, and this is evident by Congress's very attempt to restore de novo review of classification decisions in the 1974 amendments.³¹ I fear that if Congress was unable to compel courts to engage in true de novo review of these claims despite repeated unambiguous statutory demands, scholarly nudges for increased judicial oversight will, too, fall on deaf ears.³²

Rather than ask judges to think about these issues differently, more aggressive procedural reforms may offer promise. As Professors Mart and Ginsburg reference, introducing experts to testify on behalf of disclosure, creating specialized courts, and appointing independent referees are proposed reforms that may rebalance FOIA litigation in this regard.³³ Their research calls for more serious inquiry about the merits of such proposals.

II. FOIA MAY NOT BE UNIQUE

Government claims of secrecy based on an asserted national security interest are hardly unique to FOIA. In fact, the government makes such assertions in civil litigation, including litigation over constitutional rights,³⁴ criminal prosecutions,³⁵ and various types of administrative proceedings ranging from certain immigration cases³⁶ to prisoner conditions cases.³⁷ Professors Mart and Ginsburg point to various other contexts, but largely conclude that in at least some of those other types of cases, “judges make difficult decisions and are not seemingly paralyzed by fear of consequences, even in the national security context.”³⁸

31. *Id.* at 1086.

32. It is for this reason that I have suggested, with regards to FOIA procedures, that, at the very least, litigants take certain steps to push courts to rethink habits and practices. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 276 (2011); Kwoka, *Deferring to Secrecy*, *supra* note 19, at 240–41.

33. *See* Mart & Ginsburg, *supra* note 3, at 750, 752.

34. These claims typically arise as claims of privilege under the state secrets doctrine. *See* *United States v. Reynolds*, 345 U.S. 1, 3–4 (1953).

35. In fact, the Classified Information Procedures Act is designed to handle exactly these kinds of matters—criminal cases in which classified material is relevant to the prosecution. *See* 18 U.S.C. app. III (2006).

36. *See, e.g.,* *Am.-Arab Anti-Discrimination Comm. v. Reno*, 883 F. Supp. 1365, 1377–78 (C.D. Cal. 1995) (holding that the use of undisclosed classified information to support removal of permanent residents violated the noncitizens' due process rights), *rev'd on other grounds*, 525 U.S. 471 (1999).

37. *See* Andrew Dalack, Note, *Special Administrative Measures and the War on Terror: When do Extreme Pretrial Detention Measures Offend the Constitution*, 19 MICH. J. RACE & L. 415, 423 (2014) (detailing how prisoners can be subject to restrictive conditions based on alleged terrorist threats from their communications with the outside world, all while asserting the basis for the need cannot be revealed).

38. *See* Mart & Ginsburg, *supra* note 3, at 748.

To be sure, the prime example on which they rely supports their contention: the infamous Pentagon Papers case in which the Supreme Court refused to issue a prior restraint on publication of a leaked set of classified records documenting the history of the U.S. involvement in Vietnam.³⁹ However, there is a case to be made that the same heuristics and decisionmaking impediments Professors Mart and Ginsburg identify as at work in the FOIA context may operate in largely the same way with respect to national security secrecy decisions in other types of cases. Their research in this regard may have broader implications than FOIA cases alone.

Take, for example, civil cases in which the government invokes the state secrets privilege, an evidentiary privilege the government can invoke to withhold information when the release of which would harm national security.⁴⁰ In the post-9/11 context, state secrets privilege claims have arisen in constitutional litigation over the legality of various government enforcement programs, including most notably mass surveillance methods executed without a warrant and extraordinary rendition of terrorist suspects to foreign detention sites.⁴¹ While an empirical analysis of the overall success rate of state secrets claims has demonstrated perhaps more judicial oversight than in FOIA cases,⁴² the sweeping nature of the rulings in cases in which the state secrets privilege claim is upheld demonstrates some of the same deference documented by Professors Mart and Ginsburg in the FOIA context.

Take, for example, *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen Dataplan)*,⁴³ in which the Ninth Circuit, sitting en banc, upheld the state secrets privilege asserted by the government in a case brought by a group of individuals who alleged they had been subjected to unlawful detention and treatment conditions as part of the extraordinary rendition program.⁴⁴ Rather than bar the introduction of privileged evidence, however, the Ninth Circuit went much further and required dismissal of the litigation in its entirety, concluding that “further litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories

39. See generally *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

40. See *United States v. Reynolds*, 345 U.S. 1, 3–4 (1953) (recognizing the privilege).

41. See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1941–42 (2007).

42. See Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 *STAN. L. REV.* 1173, 1188 (2015) (reporting that in cases where the state secrets privilege claim is decided, courts uphold the claim in 67% of cases, deny it in 18% of cases, and uphold it in part in 15% of cases).

43. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

44. See generally *id.*

Jeppesen would choose to advance during a defense.”⁴⁵

Notably, the Ninth Circuit’s en banc opinion is replete with statements that seems to be explained, at least in part, by the “availability” heuristic documented to operate in the FOIA context by Professors Mart and Ginsburg. Specifically, the Ninth Circuit’s opinion repeatedly weighs as of paramount importance the magnitude of the possible harm from disclosure, even when its own rationale demonstrates that the risk of that harm materializing is necessarily miniscule. At the first level, it relies on the government’s in camera declarations to make a decision regarding the national security harm that might arise from disclosure without any input from an independent expert of any kind and without even looking at the underlying evidence claimed to be privileged in camera.⁴⁶ This process represents an admitted deference to the Executive Branch analysis of the potential harm based on their expertise, the same kind of expert-based reasoning shown to be faulty in the FOIA context by Professors Mart and Ginsburg. Moreover, the court in *Jeppesen Dataplan* contended that even disclosure *to the Judiciary* poses a risk to national security.⁴⁷ Thus, essentially no matter how miniscule the risk, if the harm is seen as potentially quite serious, that harm will outweigh any probability analysis.

Moreover, in *Jeppesen Dataplan*, despite the fact that much about the extraordinary rendition program had become publicly known, and the fact that “district courts are well equipped to wall off isolated secrets from disclosure,” the Ninth Circuit concluded that allowing the litigation to proceed would create too much risk of inadvertent disclosure of privileged information.⁴⁸ In other words, because the government contends the harm from disclosure would be severe, disclosure *to the court in camera* poses an unacceptable risk (no matter how small), as does disclosure of *nonprivileged information* in the course of litigation if it may relate to other, protected information about which a mistaken release might be made. This conclusion holds true no matter how unlikely the risk or how closely the court oversees the process. An analysis such as this one strikes me as directly in line with the “availability” heuristic as described by Professors Mart and Ginsburg.

The “availability” heuristic is also evidenced in other contexts involving national security secrecy assertions by the government. Under the Foreign

45. *Id.* at 1089.

46. *Id.*

47. *Id.* at 1082 (quoting *United States v. Reynolds*, 345 U.S. 1, 8 (1952)) (explaining a court must review the state secrets privilege claim “without forcing a disclosure of the very thing the privilege is designed to protect. . . . Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses”).

48. *Id.* at 1088–89.

Intelligence Surveillance Act (FISA),⁴⁹ the government, with the Foreign Intelligence Surveillance Court's authorization, may collect various data by surveillance methods targeted at persons outside the United States that would not otherwise be lawful as to domestic individuals without a regular criminal warrant based on probable cause.⁵⁰ If, at a later date, information gathered under FISA authorization is used in a criminal prosecution, the defendant must be notified and the court must allow the defendant access to the underlying FISA materials "where such disclosure is necessary to make an accurate determination of the legality of the surveillance."⁵¹ However, there has not once been a case in which a criminal defendant has ultimately won access to the underlying materials under this statutory authorization.⁵² This track record is worse than the plaintiffs' success rate in FOIA cases.

In one case in which a district court did order disclosure under this FISA provision, the Seventh Circuit quickly reversed, citing the same kind of reasoning concerning even tiny risks as the Ninth Circuit did regarding the state secrets privilege.⁵³ For example, the district court had ordered disclosure of the FISA materials only to security-cleared defense counsel, but the Seventh Circuit explained that the lawyers might make mistakes and inadvertently disclose classified information, which it viewed as an unacceptable risk, no matter how small.⁵⁴

While I certainly do not endeavor to make the same type of carefully proven claims regarding decisionmaker psychology as to these other contexts as Professors Mart and Ginsburg do regarding FOIA cases, preliminary evidence certainly suggests that there may be more similarities than differences. While there may be times, like the Pentagon Papers case, where competing rights force courts to exercise greater oversight as to national security secrecy claims,⁵⁵ the state secrets cases and FISA cases have constitutional rights at stake and still may fail to invoke the kind of judicial policing that may be appropriate.

49. 50 U.S.C. §§ 1801–85c.

50. *Id.* §§ 1804(a)(3)(A), 1805(a), 1881a(a) (2012).

51. *Id.* § 1806(f).

52. *United States v. Daoud*, 755 F.3d 479, 481 (7th Cir. 2014).

53. *Id.* at 484–85.

54. *Id.* at 484 ("Though it is certainly highly unlikely that Daoud's lawyers would, Snowden-like, publicize classified information in violation of federal law, they might in their zeal to defend their client, to whom they owe a duty of candid communication, or misremembering what is classified and what not, inadvertently say things that would provide clues to classified material.").

55. *See* Mart & Ginsburg, *supra* note 3, at 748 (using the Pentagon Papers case as an example of litigation in which judges were not "seemingly paralyzed by fear of consequences").

CONCLUSION

Professors Mart and Ginsburg have documented a true gap in government checks and balances. The Executive Branch, due to a variety of mostly benign motivations, routinely over-classifies government information, and the Judiciary, again without malice, routinely defers to those classification decisions when they are challenged under FOIA. This research provides an important foundation upon which broader inquiries are worth taking up. Does the same set of psychological tendencies and heuristics apply to national security secrecy decisions reviewed in other litigation contexts? And how can we best restore meaningful judicial oversight in this area? The Article is thus a great success in provoking those further discussions and providing a compelling account of the current failure of FOIA litigation to check national security secrecy.