THE NON-ADVERSARIALITY OF NATIONAL SECURITY SECRECY

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INTRODUCTION

Dispute resolution systems function many important purposes in any organized society. Among others, they fashion rights and remedies, hold bad actors accountable, and provide a legitimate forum for channeling conflict to avoid self-help and social disorder.\(^1\) While traditional societies may have relied on village elders to mediate disputes,\(^2\) modern democratic states typically rely on independent judges in a primarily adjudication rather than mediation model of dispute resolution. Nonetheless, the basic goals of dispute resolution share many similarities, and no matter the method, the goals of dispute resolution systems cannot be met unless they seek to uncover the truth of the disputed matter and to treat the disputants fairly.

Among modern independent judicial models, the U.S. system stands out as an exemplar of an adversarial model. That is, the process for resolving disputes—whether civil or criminal—depends on the litigants themselves to initiate the case, investigate the claims, and present to the court all relevant evidence and arguments. As a general matter, in an adversarial system, a judge should not decide any issue not raised by the parties or gather any evidence outside of that presented to her. Nor should the judge generate legal arguments on her own. Instead, the judge is tasked with playing umpire to the dueling litigants to decide who has the best side of the case.

To be sure, truth seeking is a prime goal of adversarialism. The notion is that adversarial process will produce the strongest arguments for each side, as each litigant is uniquely motivated by self-interest to identify the best evidence and the strongest legal basis for their position. Having seen the strongest presentation of each side of the case, the judge can then choose between proffered theories and evidence to come to the truest outcome. Beyond truth seeking, however, the adversarial model promotes various values, some that especially reflect the American view of a constitutional democracy. In particular, adversarialism vests primary control over the litigation in the litigants themselves in a way that allows each litigant autonomy in shaping their fate. This protection of autonomy is deeply embedded in our view of fundamental liberties including the protection of individual participation, the right to be heard, and the right to


speak.

But even the U.S. justice system is not entirely adversarial. Elements of process have departed from the adversarial model in ways documented by many other scholars. Typically, when adversarialism is, for one reason or another, a poor fit for a particular issue, processes are in place for resolving the dispute by other means. Oftentimes the fallback is to use a more inquisitorial model, vesting the judges themselves with increased control over the litigation, the right to raise issues sua sponte, and the right to investigate beyond the record created by the parties.

This Article argues that in litigation where the government asserts a need for secrecy on the basis of national security, the otherwise-applicable adversarial rules for dispute resolution are jettisoned and that, unlike other cases where adversarialism breaks down, for national security secrecy claims no other dispute resolution process takes its place. Rather, courts abdicate their role in resolving the dispute, defaulting to the status quo of secrecy. Moreover, national security secrecy claims are often raised as threshold matters that prevent adjudication of the merits of the underlying claims.

While claims of national security exceptionalism have surfaced in the literature, this Article is the first to examine national security secrecy in particular across various legal contexts, including civil constitutional claims, criminal prosecutions, administrative immigration hearings, and federal lawsuits over secrecy itself. It also contributes to the literature in disaggregating national security secrecy claims from the treatment of other types of national security issues that arise in litigation, such as the underlying legality of various government actions in that realm. By looking across contexts, the problems posed by national security secrecy are brought into stark relief.

Part I describes the baseline of adversariality in the U.S. justice system, as well as the adaptation of procedure to accommodate unusual circumstances where adversarialism fails. Part II delves deeply into the processes used by courts to adjudicate claims of national security secrecy across a variety of contexts. Starting in each case with the otherwise-applicable procedural rules, this Part demonstrates that the judiciary almost uniformly rejects application of adversarial testing to national security secrets. Moreover, it demonstrates that claims of national security secrecy often play out as threshold matters, the resolution of which in favor of the government prevents the matter from proceeding to the merits at all. Part III explores the negative implications of failing to bring to bear meaningful testing of national security secrecy claims. In particular, it shows how punting on these claims impacts the legitimacy of the judicial system and

3 See, Aziz Z. Huq, Against National Security Exceptionalism, 2009 SUP. CT. REV. 225 (2009) (identifying this trend this the literature and providing counterfactual case studies).
creates significant risks of erroneous decisions. Part IV suggests alternative approaches to adjudicating national security secrecy.

I. THE ADVERSARIAL IDEAL

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

One of the most basic goals of justice systems—whether adversarial or inquisitorial—is truth seeking. Indeed, ascertainment of the truth of the dispute is a fundamental requirement for any modern dispute resolution process. It is not, however, the only function of a judiciary. For instance, judicial systems may also function as lawmaking institutions, loci of social change, and protectors of individual dignitary interests.

Adversarialism as it exists in the U.S. in particular promotes a variety of goals beyond truth seeking and that are deeply connected to constitutional

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5 Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 382 (1978) (“The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest.”). See also ABA Model Rules of Professional Conduct, Preamble para. 2 (“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”)
8 GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 35 (2005) (describing how in common law countries, precedential decisions are, in fact, law).
9 See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (“In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.”)
values.\(^\text{11}\) For example, adversarialism protects individual autonomy by allowing individuals to control their own litigation, make strategic choices about the presentation of their claims and defenses, and advocate for themselves.\(^\text{12}\) It also protects the litigants’ rights to fully participate in the litigation process and their right to be heard.\(^\text{13}\) These fundamental liberty interests are evidenced in other parts of the constitution, and are tied to the design of an adversarial judicial process.\(^\text{14}\)

Specific constitutional provisions also promote adversarialism, both in the context of civil litigation and criminal prosecutions. For example, adversarialism is enshrined, to some extent, in the jurisdictional limits of federal courts, which can only hear “cases” and “controversies,”\(^\text{15}\) terms from which the doctrines of standing, mootness, and ripeness police the requirement that the litigants have an actual stake in the dispute.\(^\text{16}\) It also appears, with respect to criminal disputes, in the protection of the rights of a defendant to confront the witnesses against him, have counsel provided, and take advantage of compulsory process to compel witness testimony.\(^\text{17}\) In fact, adversarialism is such a central part of the American justice system it is nearly taken for granted that disputes must be resolved according to adversarial testing.\(^\text{18}\)

Nonetheless, no system of justice is singularly adversarial or inquisitorial; rather these models represent two ends of a spectrum on which a justice system may lie.\(^\text{19}\) While adversariality dominates the U.S. justice system, it does not do so exclusively; inquisitorial elements have taken some hold. Professor Judith Resnick has identified as one example the increasingly “managerial” role of judges in their active involvement in promoting settlement discussions and enforcing broad remedies.\(^\text{20}\) Likewise, Professor Amalia Kessler has contended that the historic role of

\(^{11}\) It has even been suggested that adversariality is so connected to core constitutional values that to relinquish it would threaten the constitutional democracy of the United States. See Martin Redish, The Adversary System and the Tobacco Wars, at 364.

\(^{12}\) This constitutional value is expressed, for example, in the First Amendment’s protection of free speech. See U.S. Const. amend I.

\(^{13}\) Within the constitution, this value is most expressly addressed by the Due Process Clauses of the Fifth and Fourteenth Amendment, and the procedural due process jurisprudence based thereon. See U.S. Const. amend V; IX. Fuller describes the lawyer as “the guardian of due process” in an adversarial system. Fuller, supra note ___, at 384.

\(^{14}\) Redish, supra note ___, at ____.

\(^{15}\) U.S. Const. Art. III cl. 2.


\(^{17}\) U.S. Const. amend. 6.

\(^{18}\) Landsman, supra note ___, at 713.


\(^{20}\) Resnick, supra note ___.
masters was largely inquisitorial in nature. Thus, there remains some role for adapting procedures to novel problems.

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

Another scholar argued that judges have a duty to raise issues far beyond the confines of assessing their own jurisdiction in furtherance of their duty to articulate the meaning of contested questions of law. Yet another contends that when disputes turn on legislative facts (i.e., disputes about the state of the world rather than an issue concerning the particular parties), adversariality in its current form is failing to produce the best available information.

These contributions to the literature have helped shape the landscape in understanding when courts chafe against the confines of formal adversariality. As the rest of this article demonstrates, national security secrecy falls squarely within this paradigm. However, national security secrecy differs from these other disputed issues in one key respect: In each of the other contexts, courts are employing some sort of second (or perhaps third or fourth) best option in order to reach a decision, despite the failure of adversariality to fully assist in the process. With national security secrecy, a vacuum develops instead. Faced with the perception that adversariality cannot be brought to bear, courts often abandon the decisionmaking task altogether.

To suggest that non-adversariality in litigating national security secrets is problematic is not to unquestioningly acclaim adversariality. The U.S. brand of adversarialism has, of course, come under serious critique. One central critique is that adversarialism fails to effectuate the most important end of the justice system. As one federal district court judge declared, “our adversary system rates truth too low among the values that institutions of justice are meant to serve,” and argued that “the process often achieves

21 Kessler, supra note ___, at 1253-60.
23 Amanda Frost, The Limits of Advocacy,
truth only as a convenience, a byproduct, or an accidental approximation.”

Experimental evidence, however, suggests that adversarial systems may better combat judicial bias than inquisitorial ones, perhaps having a positive effect on the accuracy of outcomes. Whatever the merits of adversarialism as a truth-seeking method, it is likely here to stay. As a result, this Article will consider reintroducing adversariality, along with other remedies, to the national security secrecy litigation failures.

II. ADVERSARIAL BREAKDOWNS

In a variety of litigation contexts, when national security secrecy claims are raised, adversarialism fails, and nothing takes its place. As described below, rather than fashioning ad hoc procedures for testing these types of claims, when adversariality, as it often is, is perceived to be a poor fit to resolve national security secrecy conflicts, courts often abandon their obligations entirely. The result is the parties’ inability to proceed, sometimes completely, with the litigation, and a resulting enforcement of the status quo by default. That status quo, as we will see, is secrecy.

A. State Secrets Privilege

A prominent context in which national security secrecy claims arise is during the process of discovery in civil litigation. Under the federal rules, parties “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” The applicability of a privilege, in turn, is determined by the rules of evidence, which have left it to the federal courts to apply common law privileges “in light of reason and experience.” One such common law privilege is the state secrets privilege.

The current form of the state secrets privilege can be traced to two Supreme Court cases. The first is United States v. Reynolds, a wrongful death action brought by the families of three civilians who were killed when a military plane crashed. When the families sought the Air Force’s official report from the investigation and statements of surviving crew members, the government claimed the material was privileged. In siding with the

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26 Frankel, supra note ____, at 1037.
27 John Thibaut et al, Adversarial Presentation and Bias in Legal Decisionmaking, 86 Harv. L. Rev. 386 (1972).
30 United States v. Reynolds, 345 U.S. 1, 3 (1953).
31 Id. at 3-5.
government, the Court declared that the state secrets privilege applies when there is a “reasonable danger that compulsion of the evidence [would] expose military matters which, in the interest of national security, should not be divulged.”\(^{32}\)

Related to the *Reynolds* privilege is what is known as the *Totten* bar. *Totten* is a precursor case in which the Supreme Court enacted a categorical bar against certain litigation, in that case a breach of contract claim brought by a spy employed by Abraham Lincoln during the Civil War.\(^{33}\) In *Totten*, the court reasoned that there the very contract that was agreed upon was agreed upon to be a secret one, and enforcing it in court would disclose secrets that would harm government interests in wartime.\(^{34}\) As a result, the court pronounced, “public policy forbids the maintenance of any suit in a court of justice the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”\(^{35}\)

Typically in discovery when a party invokes a privilege to withhold requested information, the party must “describe the nature of the documents, communications, or tangible things not produced or disclosed— and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”\(^{36}\) This procedure, now known as the requirement of a so-called privilege log, safeguards the adversariality of the process by allowing the other party an opportunity to respond to the claim of privilege and sufficient information with which to evaluate the claim.

State secrets privilege claims, however, have been subject to their own unique set of procedures without regard to the typical discovery rules. These procedures arose from *Reynolds* itself. There, on the one hand, the Court cautioned that the privilege “is not to be lightly invoked,” and that it must be asserted by the head of the department after his or her personal consideration.\(^{37}\) However, *Reynolds* emphasized deference to the executive branch determination.\(^{38}\) While “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,” it refused to require disclosure *even to the court in camera* of the contested information.\(^{39}\) The depth of the court’s inquiry is to depend on the

\(^{32}\) Id. at 10.

\(^{33}\) Totten v. United States, 92 U.S. 105, 105 (1875).

\(^{34}\) Id. at 106.

\(^{35}\) Id. at 107.


\(^{37}\) United States v. Reynolds, 345 U.S. 1, 7-8 (1953).


\(^{39}\) *Reynolds*, 345 U.S. at 7-8, 10.
opposing party’s showing of necessity for the disputed information, but no amount of necessity may overcome an otherwise applicable state secrets privilege.\textsuperscript{40} In fact, the Court also emphasized deference to the executive: “Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect.”\textsuperscript{41}

There has been a steep increase in the invocation of the state secrets privilege since 9/11, though not all claims, by any means, are successful.\textsuperscript{42} Invocation of the state secrets privilege has played a particularly prominent role in litigation over two post-9/11 phenomena: extraordinary rendition and NSA warrantless wiretapping.\textsuperscript{43} In each of these contexts as litigation has played out, assertions of state secrets privilege have failed to, according to the procedures outlined above, be subjected to meaningful adversarial testing or, as a fallback, inquisitorial review. This preliminary failure of adversariality, in turn, has prevented the litigation from moving forward at all, and resulted in a complete bar to judicial review of questionable government practices.

1. Dismissal for inability to proceed

Perhaps the most famous example is the case of \textit{Mohamed v. Jeppesen Dataplan, Inc.}, in which the Ninth Circuit ruled en banc that the state secrets privilege asserted by the government barred the litigation from proceeding in its entirety.\textsuperscript{44} There, five plaintiffs sued a subsidiary of Boeing allegedly responsible for providing logistical support for the extraordinary rendition program, under which each plaintiff alleges he was apprehended and transferred to a foreign facility and subjected to various unlawful detention conditions and interrogation methods.\textsuperscript{45} Immediately after they filed their complaint, the United States moved to intervene as a defendant and to dismiss the complaint under the state secrets doctrine.\textsuperscript{46}

The first procedural circumvention occurred as a result of the state secrets privilege and its invocation, as well as the executive’s reluctance to provide any information that might be useful to the plaintiffs. This reluctance, combined with the judicial deference, has resulted in a complete bar to judicial review of questionable government practices.

\textsuperscript{40} Id. at 11.
\textsuperscript{41} Id. at 8.
\textsuperscript{42} Prior to 9/11, the privilege was asserted on average in 2.4 cases per year, and after 9/11, it was asserted in an average of 11.4 cases per year. Daniel R. Cassman, \textit{Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine}, 67 STANFORD L. REV. 1173, 1188 (2015). Cassman reports: “In general, when courts decide state secrets claims, they uphold the privilege 67% of the time, deny it 18% of the time, and uphold it in part 15% of the time. In 21% of cases in which the privilege is raised, courts never rule on the issue.” Id.
\textsuperscript{43} Frost, \textit{supra} note __, at 1942.
\textsuperscript{44} \textit{Mohamed v. Jeppesen Dataplan, Inc.}, 614 F.3d 1070 (9th Cir. 2010) (en banc).
\textsuperscript{45} Id. at 1073-74.
\textsuperscript{46} Id. at 1076.
secrets privilege claim being raised absent any discovery request: no particular records or information is yet at issue, and thus the debate happens entirely in the abstract. Because of this oddity, the government framed the nature of the conflict by listing four categories of information it asserted were entitled to state-secrets privilege, including a general catch-all category of “any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.” 47 There is virtually no way for the plaintiffs to engage in a meaningful argument about whether given information is in this category and should be privileged. In addition, the court’s ruling provides very little guidance. After explaining that it cannot explain much, the Court reasons, essentially in its entirety, “We can say, however, that the secrets fall within one or more of the four categories identified by the government and that we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.” 48

Second, the failure to require a discovery request and response of some sort of privilege log essentially deprives the plaintiff of any opportunity to argue about how the privilege applies to particular records or any possible redactions or segregation that might be possible. While the court in Jeppesen Dataplan acknowledged that segregability analysis applies to state secrets claims like any other claim of privilege, it went on to say that there are times when even non-secret evidence cannot be turned over because of the “risk of inadvertent or indirect disclosures” or because “seemingly innocuous information is part of a . . . mosaic.” 49 But in fact, as described above, no segregability analysis was ever conducted, as particular records were never at issue. In fact, while the court did consider an in camera, classified declaration submitted by the government, it did not look at the disputed evidence itself, to the extent that evidence was even identified. 50

While the Court treated the case as a Reynolds privilege case, it noted that the result of a successful invocation of the Reynolds privilege can be, in some cases, dismissal of the action, in which case “the Reynolds privilege converges with the Totten bar.” 51 This case, in turn, was one such case because “there is no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.” 52 This approach “confuses evidence and information,” by disallowing the same

47 Id. at 1086.
48 Id. at 1086.
49 Id. at 1082 (quoting Bareford v. Gen. Dynamics Corp. 973 F.2d 1138, 1143-44 (5th Cir. 1992) and Kasza v. Browner, 133, F.3d 1159, 1166 (9th Cir. 1998)).
50 See id. at 1086 (“We have thoroughly and critically reviewed the government's public and classified declarations….”).
51 Id. at 1083.
52 Id. at 1087.
information to be used in judicial proceedings if it can be found in non-privileged sources.\(^{53}\) Citing the unpredictable nature of adversarial proceedings as a strike against letting the case go forward, the court refused to consider protective orders or restrictions on testimony sufficient to guard against possible harm.\(^{54}\) That is, the typical law of privilege doesn’t apply and adversarial testing is disallowed. As the dissent rightly pointed out, this approach “ignor[es] well-established principles of civil procedure which, at this stage of the litigation, do not permit the prospective evaluation of hypothetical claims of privilege that the government has yet to raise and the district court has yet to consider.”\(^{55}\)

Of course, the failure to bring adversarial testing to the state secret claim is, when it results in dismissal, a preliminary secrecy ruling that prevents any adversarial challenge on the merits of the litigation, i.e., in *Jeppeson Dataplan*, the legality of extraordinary rendition.\(^{56}\) As a result of this second-layer of adversarial failure, the state secrets privilege has kept insulated from judicial review large swaths of government conduct that is legally suspect.

2. Dismissal for lack of standing

State secrets claims do not need to rise to the level of dismissal to potentially shut down a civil suit. Another line of cases challenging the federal government’s secret surveillance programs have been effectively ended when claims of state secrets evidentiary privilege prevent plaintiffs from amassing evidence needed to demonstrate that they have standing. Standing requirements, rooted in Article III’s case-or-controversy language, dictate that a plaintiff must demonstrate an injury in fact that is fairly traceable to the defendant’s challenged action and redressable by a favorable ruling.\(^{57}\) The requisite injury in fact must be “concrete and particularized” as well as “actual or imminent.”\(^{58}\)


\(^{54}\) Id. at 1089.

\(^{55}\) Id. at 1099 (Hawkins, J. dissenting). Other states secrets cases have suffered the same procedural flaws that jettison the adversarial process, leaving virtually no interrogation of the claims in its place. For example, in *El-Masri v. United States* the Fourth Circuit likewise dismissed a complaint concerning extraordinary rendition immediately at the pleadings stage at the United States’s request. 479 F.3d 296 (4th Cir. 2007).

\(^{56}\) Even the majority in *Jeppesen Dataplan* admitted that, “[a]t a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors.” 614 F.3d at 1091.


\(^{58}\) Id.
In an early example of the government’s attempt to use state secrets to deny plaintiffs standing, journalists, lawyers, and scholars sued the NSA alleging it was engaging in warrantless wiretapping in violation of the Constitution and the Foreign Intelligence Surveillance Act (FISA).\(^{59}\) The lawsuit was prompted by a *New York Times* article reporting, based on leaked information, the existence of the program, known as the Terrorist Surveillance Program (TSP).\(^{60}\) The government filed a motion to dismiss, arguing, in relevant part, that the state secrets privilege prevented plaintiffs from obtaining evidence needed to establish Article III standing.\(^{61}\) The district court sided with the plaintiffs, but the Sixth Circuit reversed, reasoning that “the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants.”\(^{62}\) That is, they were unable to show an injury in fact, actual or imminent, because they lacked the evidence that their communications had been targeted.\(^{63}\)

Soon thereafter, the Supreme Court weighed in concerning similar circumstances. In *Clapper v. Amnesty International*, a group of plaintiffs similarly comprised of journalists, lawyers, and human rights organizations challenged a 2008 amendment to FISA that expanded surveillance authority beyond traditional confines.\(^{64}\) Specifically, the amendment allowed the FISA court to authorize surveillance of non-U.S. persons located abroad without the need to demonstrate probable cause that the target is a foreign power or agent thereof.\(^{65}\) Despite the facial nature of the challenge, which would not require divulgence of state secrets to reach the merits, the Supreme Court required dismissal of the case based on the plaintiffs’ failure to demonstrate standing.\(^{66}\)

In particular, the Court rejected the plaintiffs’ assertion of a future injury in the likelihood that their communications would be intercepted, ruling that it was “highly speculative” and thus did not satisfy standing requirements.\(^{67}\) As Professor Stephen Vladeck has noted, “Of course, the only reason why the plaintiffs’ allegations in this regard were so ‘highly speculative’ was because the government’s surveillance operations under

\(^{59}\) Hepting v. AT&T Corp., 439 F. Supp. 2d 287 (N.D.Cal. 2006).


\(^{61}\) Id. at 758-59.

\(^{62}\) ACLU v. NSA, 493 F.3d 644, 653 (6th Cir. 2007).

\(^{63}\) See id.

\(^{64}\) Clapper v. Amnesty International USA, 133 S.Ct. 1138, 1144-45 (2013).

\(^{65}\) Id. at 1144.

\(^{66}\) See id. at 1143.

\(^{67}\) Id. at 1148.
[the FISA amendment] were (and largely remain) secret.\textsuperscript{68}

In a footnote, the court explains the lack of evidence as the plaintiffs’ responsibility:

It was suggested at oral argument that the Government could help resolve the standing inquiry by disclosing to a court, perhaps through an \textit{in camera} proceeding, (1) whether it is intercepting respondents’ communications and (2) what targeting or minimization procedures it is using. This suggestion is puzzling. As an initial matter, it is respondents’ burden to prove their standing by pointing to specific facts, not the Government’s burden to disprove standing by revealing details of its surveillance priorities.\textsuperscript{69}

However, it is entirely routine for courts, when faced with disputes about the factual predicate for standing (in an instance where the legal theory of standing is otherwise adequate), to allow parties discovery on the question of justiciability.\textsuperscript{70} In a particularly salient example, the Second Circuit even issued a mandamus order—an extraordinary remedy—to require the district court to allow discovery on jurisdictional facts, noting that “[t]he order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated.”\textsuperscript{71}

While the \textit{Clapper} Court’s explanation for the lack of evidence departs drastically from ordinary procedure principles, the outcome is nonetheless consistent with courts’ treatment of the state secrets privilege. If typical jurisdictional discovery did take place to uncover the underlying facts necessary to support standing (i.e., whether the plaintiffs’ communications were in fact subject to surveillance under the FISA amendments), the state secrets privilege would be immediately invoked and would prevent discovery of the same. That is, the problem is not that the government is in possession of the relevant information, but that the plaintiff is unable to access it. In that way, invocation (or threatened invocation) of the state secrets privilege can, again, end litigation in its entirety.

\textsuperscript{69} Id. at 1149 n.4 (citations omitted).
\textsuperscript{70} See Pidot, supra note ___, at 73 & n. 353 (discussing jurisdictional fact-finding and appellate review).
\textsuperscript{71} Investment Properties Intern. Limited v. IOS, Limited, 459 F.2d 705, 707 (2d Cir. 1972). \textit{See also} Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 263 Fed. Appx. 348 (4th Cir. 2008) (remanding to the district court for fact-finding on the existence of standing where the record was insufficently developed).
Since *Clapper* was decided, public revelations about the extent of NSA surveillance, in particular those made by former NSA contractor-turned-leaker Edward Snowden, have given potential plaintiffs more information to work with. But post-*Clapper* cases confirm the continuing circular nature of the intersection of non-adversarial testing of state secrets claims and standing doctrine to prevent reaching the merits of challenges to government surveillance.

For example, in *Jewel v. NSA*, customers of AT&T alleged that by virtue of their patronage their communications would have been collected and stored for the NSA in a program already publicly acknowledged. The court first concluded that the publicly available information submitted by the plaintiffs was insufficient to establish what data was actually being collected. And it went further to conclude that the state secrets privilege applied to the data collection, and as a result “the Court concludes that even if the public evidence proffered by Plaintiffs were sufficiently probative on the question of standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security.”

Accordingly, civil litigation in which state secrets privileges are raised present a prime example of the failure of adversarialism to meaningfully test claims of national security secrecy, and the lack of fall-back inquisitorial or alternative procedures. Rather, courts simply sanction the status quo of secrecy.

**B. Criminal Prosecutions**

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

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74 *Id.* at *4.
75 *Id.* at *5.
76 U.S. CONST. AMEND. IV reads, in full: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things
Key to ensuring that criminal defendants can enforce their rights is the Supreme Court’s pronouncement, in *Brady v. Maryland*, that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.”77 Criminal procedure rules enforce the defendant’s right to access this so-called *Brady* material. In federal courts, for example, “[u]pon a defendant's request, the government must permit the defendant to inspect and to copy [any records that are] within the government's possession, custody, or control and . . . material to preparing the defense.”78 This information access right is therefore both constitutional and based in procedural rules. However, like in civil litigation, when national security secrets are at stake these usual procedures, designed to permit adversarial testing of the legality of government actions, are often circumvented.

1. **FISA Notices**

   In 1978, Congress passed the Foreign Intelligence Surveillance Act, which established a Foreign Intelligence Surveillance Court (FISC) as a special court on which a rotating cast of federal judges would review warrant applications related to national security.79 As to individualized warrants, the government must identify the target of surveillance, show probable cause that the target is a foreign power or an agent of a foreign power, justify the locus of the surveillance, detail procedures that will be used to minimize any invasion of privacy concerning U.S. persons, and certify that a significant purpose of the surveillance is to obtain foreign intelligence information.80 The 2008 FISA Amendments Act (also known as “Section 702”), created a new authority for collection of intelligence allowing the FISC to authorize foreign intelligence surveillance targeting communications of non-U.S. persons located abroad, without having to find probable cause that the target is a foreign power or agent of a foreign power or justifying the locus of the surveillance.81

   While FISA surveillance is not intended to aid in criminal investigations, but rather in national security and defense, evidence obtained can be used in criminal prosecutions. When the government seeks to use evidence “obtained or derived” from FISA or its amendments, it must notify

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79 FISA, 50 U.S.C. § 1801 et seq.
80 *id.* at § 1804(a).
81 *id.* at § 1881a. *See also Clapper v. Amensty International USA*, 133 S.Ct. 1138 1144 (2013) (describing the FISA Amendments Act).
the defendant, who may then move for disclosure of the applications, orders, or other materials regarding the surveillance or suppression of the evidence. It authorizes a court to order disclosure of the underlying FISA materials to the defendant, using appropriate protective orders, “where such disclosure is necessary to make an accurate determination of the legality of the surveillance.” However, despite the existence of this procedure since FISA’s inception, “no court has ever allowed disclosure of FISA materials to the defense.”

A recent Seventh Circuit case illustrates how the failure to allow FISA disclosure—in appropriate cases and with appropriate safeguards—undermines adversariality about the secrecy itself as well as the merits of the underlying constitutional issues. In United States v. Daoud, a defendant charged with attempting to detonate an explosive in connection with an FBI sting operation was notified that FISA evidence would be used in his case. The defendant moved for disclosure of the FISA application and materials, arguing that it was necessary both for the purpose of conducting a so-called Franks hearing regarding allegations of misrepresentations in the application for a warrant and for challenging the constitutionality of the surveillance mechanisms actually used in his case. The district court initially ruled for the defendant, ordering disclosure of the FISA materials to a security cleared member of the defense team. The court reasoned that

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

The government appealed and the Seventh Circuit reversed. In so doing, the court expressly rejected the idea that adversariality is essential to the

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82 Id. at §§ 1086(c), 1825(d), 1881e.
83 Id. at § 1806(f).
84 United States v. Daoud, 755 F.3d 479, 481 (7th Cir. 2014).
86 The Franks hearing is named after Franks v. Delaware, 438 U.S. 154 (1978), which established the right to a hearing regarding potential misrepresentations in a warrant application upon a preliminary showing made.
87 Daoud, 2014 WL 321384 at *2.
88 Id. at *3.
89 Id. (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).
90 United States v. Daoud, 755 F.3d 479, 481 (7th Cir. 2014).
justice system, citing examples of non-adversarial, ex parte proceedings and
duties the court assumes sua sponte.\(^\text{91}\)

The court then opined that having security-cleared defense counsel view
FISA materials is insufficient protection.\(^\text{92}\) The court authorized a sort of
halo of secrecy beyond what is strictly required, reasoning that even non-
secret information that defense counsel then revealed might “provide clues
to classified material” or even a security cleared individual might make
mistakes regarding revealing secret information.\(^\text{93}\) The Seventh Circuit
concluded that its own review of the classified materials assured itself that
the government was being truthful, that disclosure would result in national
security harm, and that the underlying surveillance that took place did not
violate FISA.\(^\text{94}\)

As Daoud argued in his petition for certiorari, which was later denied by
the U.S. Supreme Court, “defendants cannot identify knowing or even
reckless falsehoods in affidavits they have not seen,” nor can they
“determine which surveillance authorities were used against them . . . [in
order to] effectively contest the legality of those authorities or the
admissibility of evidence obtained through [their] use….”\(^\text{95}\) That defendants
like Daoud who have been prosecuted using evidence obtained under FISA
and have a right to notice of that fact still cannot amass enough evidence to
effectively challenge the constitutionality of the surveillance mechanisms is
even more ironic in light of Clapper. There, the Court, in denying plaintiffs
standing to challenge FISA surveillance, assured the public that at the very
least criminal defendants would be in a position to do so.\(^\text{96}\)

That there has never been a disclosure of FISA materials is a testament
to the near absolute deference courts give to the government in determining
the necessity of the materials for the defense. And as the defense has no
access, it cannot effectively argue to the contrary. This failure of
adversarial testing affects not only the initial secrecy determination, but the
subsequent merits challenge to the legality of government activity.

2. No Notice

The failure of adversariality to sufficiently protect criminal defendants
fighting for discovery of warrants issued by the FISA court and related

\(^{91}\) Id. at 482.
\(^{92}\) Id. at 484.
\(^{93}\) Id.
\(^{94}\) Id. at 485.
\(^{96}\) Clapper, 133 S. Ct. at 1154.
FISA material pale in comparison to the adversariality problem faced by criminal defendants who don’t even know that such materials exist. In fact, in the national security context, secret government searches may easily go undetected if the government fails to provide actual notice to the defendants about how evidence was gathered. This problem has arisen in the context of FISA authorized searches as well as other types of secret searches.

In the FISA context, although the law requires notice to any defendant against whom evidence is to be used that was “obtained or derived” from FISA-authorized surveillance, the lawyers of the National Security Division of the Department Justice for years took the position that unless evidence obtained under FISA was to be directly introduced in the criminal proceedings, it need not provide notice.97 For example, if the evidence obtained under FISA was used, in turn, to obtain a traditional warrant, from which further evidence was found, only the evidence from and existence of the traditional warrant would need to be disclosed.98 In 2013, having changed its position, DOJ undertook a systematic review of criminal cases to make additional disclosures to defendants, some of whom had already been convicted and were serving prison sentences.99

Since that time, however, DOJ has still asserted it need not provide notice of secret surveillance concerning criminal defendants when the surveillance was conducted under non-FISA authority. Under a Reagan-era Executive Order, E.O. 12333, the NSA can conduct surveillance outside the United States, even when, in practice, it may incidentally catch domestic communications.100 But according to the New York Times, “officials contend that defendants have no right to know if 12333 intercepts provided a tip from which investigators derived other evidence.”101

To be sure, a criminal defendant cannot possibly bring the adversarial process to bear on the question of divulging the details, justifications, and circumstances of a search if the defendant has no idea the search even took place.102 This first-layer of nonadversariality, like in other contexts, causes

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97 Sari Horwitz, Justice is reviewing criminal cases that used surveillance evidence gathered under FISA, WASH. POST (Nov. 15, 2013).
98 Id.
99 Id.
102 That is not to say that even if a criminal defendant successfully challenged the legality of a EO 12,333 search, that it would necessarily lead to exclusion of the evidence, given the many exceptions to the so-called “fruit of the poisonous tree” doctrine. See, e.g., Murray v. United States, 487 U.S. 533 (1988) (describing the independent source exception
a second catch-22 for the judicial system: the surveillance programs and methods used themselves will never be able to be tested on their merits. In fact, criminal defendants may well lose the ability to mount constitutional arguments that would prevail.\footnote{103}

This treatment of national security secrecy claims as not even subject to the requirement of notice such that adversarial testing can follow is in considerable tension with well-established rights of criminal defendants to notice of a search.\footnote{104} The right to notice is rooted in constitutional concerns, both in due process doctrine\footnote{105} and in Fourth Amendment requirements.\footnote{106} Notice is also a right protected in the Federal Rules of Criminal Procedure, which requires notice with the execution of a warrant, and delays of that notice only in certain circumstances.\footnote{107} The departure from the notice requirements undermines—almost completely—the adversarial testing of the search itself.

3. CIPA

In addition to secret surveillance and Fourth Amendment concerns, national security secrecy issues may arise in criminal trials in a variety of ways. In fact, sometimes, the very subject matter of the criminal liability involves national security secrets. To handle these sorts of matters, in 1980 Congress passed the Classified Information Procedures Act, which does not alter criminal defendants’ substantive discovery rights,\footnote{108} but does create a process to balance national security interests in the way classified material is handled. In particular, it allows the government to make certain deletions, alterations, or summaries of classified material to balance the national security harm against the defendant’s need for the information.\footnote{109}
It also allows classified information to be disclosed subject to a protective order limiting disclosure to defense counsel with an appropriate security clearance.\textsuperscript{110} In the event the defendant needs classified information that cannot, according to the government, be disclosed despite a court order that it should be, the court must, under the statute, presumptively dismiss the indictment or complaint.\textsuperscript{111} That is, the government can weigh the risk to national security and the importance of the prosecution against each other, and if it believes the information truly cannot be disclosed, the government suffers the consequence of not being able to proceed with the criminal case.

There is complete judicial deference on the need for national security secrecy in these cases. As the Fourth Circuit recently said, “we have no authority [] to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security.”\textsuperscript{112} As a result, CIPA does not truly allow for any testing of claims for national security secrecy needs, and it still allows a default of secrecy. It also exemplifies a claim of national security secrecy need that may not allow the litigation to go forward.

To be sure, the fact that the government ultimately internalizes the cost of a secrecy claim by having to drop the criminal charges acts as internal pressure not to press secrecy claims without merit. But as one scholar said, “because dismissal is always an available option for the government, CIPA cannot invariably force disclosure, and it therefore does not offer any accountability at all when the executive is determined to avoid it.”\textsuperscript{113}

\textbf{C. Immigration Proceedings}

National security secrecy claims may also arise in the course of immigration proceedings either concerning an individual is seeking a visa for admission to the United States or the United States’s attempt to remove a person already present from the country. In fact, in the popular discourse, immigration enforcement is intimately linked to national security and counterterrorism efforts. This belief was made particularly salient when immigration enforcement agencies were moved under the umbrella of the newly-created Department of Homeland Security after 9/11.

Individuals have long been excluded from or removed from the United

\textsuperscript{110}18 U.S.C. app. 3 § 3.
\textsuperscript{111}18 U.S.C. app. 3 § 6(e).
\textsuperscript{112}United States v. Abu Ali 528 F.3d 210, 253 (4th Cir. 2008).
States on the grounds that they constitute threats to national security. For example, in the present day version of the Immigration and Nationality Act (INA), grounds of inadmissibility include planning to enter the country to engage in espionage or sabotage, and engaging in, planning endorsing, or affiliating with terrorist activity.\textsuperscript{114} As to deportation of individuals already present in the U.S., most of the same national security grounds justify deportation.\textsuperscript{115}

Importantly, however, non-adversariality is actually written into the statute vis-à-vis the information likely to be most important to adjudicating the propriety of denying admission or deporting an individual on national security grounds. The INA provides certain hearing rights to the noncitizen facing removal\textsuperscript{116} that include examining the evidence against him and cross-examining witnesses, but specifies that “these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief....”\textsuperscript{117}

And the courts have nearly universally upheld the right of the government to use secret evidence in immigration proceedings based on a national security claim.\textsuperscript{118} As a dissent in one such case decried, invoking the adversarial ideal, “The Attorney General may act on confidential information and Congress has left him to square it with his conscience. But he cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system.”\textsuperscript{119}

To be sure, there is the possibility that some disclosure of national security information is required if it goes to the question of the removability of a noncitizen who has a constitutional right to a hearing,\textsuperscript{120} but the fact

\textsuperscript{114} 8 U.S.C. § 1182(a)(3).
\textsuperscript{116} While noncitizens facing deportation have a right to a hearing, only some noncitizens seeking admission do. For example, an LPR who has left the country and is returning, while still seeking admission, is entitled to a hearing. See Landon v. Plasencia, 459 U.S. 21 (1982) (holding as such as a constitutional due process matter). In addition, certain asylum claimants have a right to a hearing. Moreover, the government in certain circumstances routinely provides a hearing even when none is required, for example, a noncitizen with a valid visa who seeks admission but is being denied.
\textsuperscript{117} 8 U.S.C. § 1229a(b)(4)(B).
\textsuperscript{118} See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (upholding a regulation that denied a hearing in exclusion cases based on confidential information); Jay v. Boyd, 351 U.S. 345 (1956) (upholding a regulation that denied access to secret evidence with respect to a claim for discretionary relief from deportation).
\textsuperscript{119} Jay, 351 U.S. at 934.
\textsuperscript{120} See, e.g., American-Arab Anti-Discrimination Committee v. Reno, 883 F.Supp. 1365, 1377-78 (C.D. Cal. 1995) (holding that the use of undisclosed classified information
that the statute itself contemplates a per se, unquestionable exclusion of national security information in most circumstances itself renders the treatment of national security secrets in immigration cases as a nonadversarial matter. It also prevents adversarial testing of the underlying claim, such as claims to entitlement to relief or to entry into the United States.

D. FOIA

The Freedom of Information Act (FOIA) is, of course, a statute that gives rise to litigation over secrecy itself. It allows “any person” to request any records from the federal government for any reason, and requires the government to provide them, subject to nine statutorily enumerated exemptions. In the context of national security information, two exemptions in particular are typically in play. Exemption 1 covers records that are properly classified pursuant to an executive order for reasons related to the national defense or foreign policy. Exemption 3 covers records exempt by another statute, in this case § 102(d)(3) of the National Security Act of 1947, which states that “the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.” Unlike the other contexts in which a national security secrecy claim subject to no adversarial testing prevents a court from reaching the merits of the action, claims of exemption under FOIA on either of these bases is expressly reviewable, de novo, in federal court.

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122 5 U.S.C. § 552(b)(1)-(9) (listing the exempt records as (1) properly classified records, (2) records relating only to internal personnel rules and practices, (3) exempt from disclosure by another statute, (4) trade secret and confidential commercial or financial information, (5) records that would be privileged in litigation, (6) records for which disclosure would constitute a clearly unwarranted invasion of personal privacy, (7) certain law enforcement records, (8) certain records relating to regulatory oversight of financial institutions, and (9) certain records concerning wells.
123 5 U.S.C. § 552(b)(1) (reading, in its entirety: “This section does not apply to matters that are— (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”).
125 5 U.S.C. § 552 (a)(4)(B) (“In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.”)
However, threshold secrecy questions do arise and, like in other contexts, may prevent the court from reaching the merits of the FOIA claim.

This phenomenon arises in the context of the so-called Glomar response. The Glomar response refers to agency responses to FOIA requests that not only refuse to release the requested records, claiming an exemption, but in fact refuse to confirm or deny of the very existence of the requested records on the ground that the fact of their existence itself would cause national security harm.\textsuperscript{126} It was first used in response to requests for CIA records concerning a ship, the Hughes Glomar Explorer, for which the Glomar response is named.\textsuperscript{127} The ship had, in fact, been secretly commissioned for the CIA, under the cover story that recluse billionaire Howard Hughes was investing in harvesting manganese from the bottom of the ocean.\textsuperscript{128} The CIA’s real purpose, however, was to—improbably—attempt to lift from the ocean floor a sunken Soviet nuclear submarine, in the hopes of learning valuable intelligence amidst the cold war.\textsuperscript{129}

The mission failed, but after a mysterious break-in to the Hughes headquarters and theft of related documents,\textsuperscript{130} leaks made their way to the press,\textsuperscript{131} and the CIA sought to suppress publicity, convincing a number of major news outlets to hold the story.\textsuperscript{132} Eventually, however, it broke.\textsuperscript{133} The Military Audit Project then filed a FOIA request for documents related to planning, design, construction, and use of the Glomar ship,\textsuperscript{134} and journalist Ann Phillippi filed a FOIA request for records related the CIA’s attempts to persuade the news media not to publish the story.\textsuperscript{135}

While both requesters received the same response refusing to confirm or deny the existence of responsive records, Phillippi’s request was the first to reach the D.C. Circuit, which issued an opinion approving the Glomar response. Justifying the agency’s failure to confirm or deny the existence of

\begin{thebibliography}{9}
\bibitem{127} Phillippi v. CIA, 546 F.2d 1009, 1010 (D.C. Cir. 1976).
\bibitem{129} RadioLab, Neither Confirm Nor Deny at 5:26 (Feb. 12, 2014).
\bibitem{132} Phillippi v. CIA, 655 F.2d 1325, 1327 (D.C. Cir 1981).
\bibitem{133} See William Farr & Jerry Cohen, \emph{CIA Reportedly Contracted with Hughes in Effort To Raise Sunken Soviet A-Sub}, L.A. TIMES, Feb. 8, 1975, at 18.
\bibitem{134} Military Audit Project v. Casey, 656 F.2d 724, 729 (D.C. Cir. 1981).
\bibitem{135} Phillippi, 546 F.2d at 1011.
\end{thebibliography}
the records, the D.C. Circuit explained that “[i]n effect the situation is as if appellant had requested and been refused permission to see a document which says either ‘Yes, we have records related to contacts with the media concerning the Glomar Explorer’ or ‘No, we do not have any such records.’” Interestingly, in the Phillippi case the government eventually abandoned its position that it could neither confirm nor deny the existence of records, but the Glomar response lived on.

In fact, the use of Glomar is now expressly approved in the current version of the Executive Order concerning classification, which declares that, “[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” And while never approved by Congress, most commentators agree that there may be limited circumstances in which a Glomar response is appropriate. The central problem with Glomar, however, is that courts refuse to subject Glomar claims to rigorous review, thereby breaking down the adversarial process in the litigation as a whole.

To begin, as to the merits of FOIA exemption claims, courts have developed detailed (if, as I have documented elsewhere, flawed) procedures to allow cases to proceed in an adversarial manner. As early as 1973, the D.C. Circuit recognized the inherent information imbalance in FOIA cases:

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

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136 Id. at 1012.
137 Phillippi, 655 F.2d at 1328.
138 Exec. Order No. 1352675, Classified National Security Information, 75 FR 707
140 Margaret B. Kwoka, Deferring to Secrecy, 54 B.C. L. REV. 185, 221-235 (2013) (arguing that the procedures used in FOIA litigation have the end effect of deferring to secrecy, rather than allowing true de novo review).
impossible.\textsuperscript{141}

Thus was born a central feature of FOIA litigation: what has become known as a \textit{Vaughn} index, a specialized affidavit the court declared the Government must produce to support claims of exemption in FOIA litigation.\textsuperscript{142} The court specified that the government was required to give a detailed explanation to justify each claim of exemption, and that for voluminous records, each portion of a withheld document should be indexed and an itemized explanation given.\textsuperscript{143} In essence, the \textit{Vaughn} index requirements mirror the requirements in civil litigation for privilege logs of documents withheld in discovery.\textsuperscript{144}

The D.C. Circuit has described three primary purposes for the \textit{Vaughn} index procedure, all of which touch on promoting true adversarialism.\textsuperscript{145} First, it forces the government to carefully consider its position as to each record or portion thereof and defend its decisions.\textsuperscript{146} Second, it gives the court enough information to make a decision about the merits of the claim.\textsuperscript{147} And finally, it gives the requester enough information to present arguments to the court.\textsuperscript{148} These goals go to the heart of the adversarial process by promoting the best argumentation on both sides so that the court is fully informed to come to the right result, and allowing full participation and advocacy on the part of each party.

Moreover, when even these carefully constructed requirements fail to provide enough information to allow for full adversarial testing, as in other contexts when adversarialism fails, an inquisitorial approach is available as a fallback. Congress in fact expressly provided authority for the courts to review requested records in camera to decide whether an exemption applies.\textsuperscript{149} In fact, it adopted this provision as an amendment to FOIA

\textsuperscript{141} Vaughan v. Rosen, 484 F.2d 820, 824-25 (D.C. Cir. 1973).
\textsuperscript{142} Id. at 826-27.
\textsuperscript{143} Id.
\textsuperscript{144} See Fed. R. Civ. P. 26(b)(5)(A)(ii) (requiring a responding party withholding requested records under a claim of privilege to "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.").
\textsuperscript{145} See Lykins v. U.S. Dep’t of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984).
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} 5 U.S.C. § 552 (a)(4)(B). For these reasons, one scholar recently argued that FOIA offers more promise in fighting national security secrecy than other routes. Stephen J. Schulhofer, \textit{Access to National Security Information under the U.S. Freedom of Information Act}, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610901 By contrast, however, other scholars have noted the strong deference afforded in practice to agency
precisely to strengthen courts’ ability to review national security based exemption claims. However well or poorly these various methods work to determine the merits of FOIA exemption claims, Glomar eviscerates their efficacy. In fact, courts expressly acknowledge that regular procedures don’t apply: “Glomar responses are an exception to the general rule [under Vaughn v. Rosen] that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information.”

In place of the Vaughn procedure, in Glomar cases the government files a public affidavit explaining the justification for refusing to confirm or deny the existence of responsive records. But boilerplate affidavits are routinely accepted, and give essentially no information to the requester with which the requester might formulate responsive arguments.

Take, for example, Freedom Watch, Inc. v. National Security Agency. Following revelations by NSA leaker Edward Snowden that were published in the New York Times describing the existence of a U.S. government program to launch covert cyberattacks on Iran’s nuclear program, Freedom Watch submitted a FOIA request to various agencies for six categories of claims of secrecy under these exemptions, making the review less meaningful. See, e.g., Kowka, Deferring to Secrecy, supra note ___, at 212-216 (describing the strong deference to national security based claims of exemption under FOIA); Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1208 (2004) (“Most observers agree that courts are generally deferential to claims of harm to national security, rarely overriding the government’s classification decisions.”); Meredith Fuchs, Judging Secrets: The Role That Courts Should Play in Preventing Unnecessary Secrecy, 58 ADMIN. L. REV. 131, 163 (2006) (“Even when purporting to conduct a de novo review as mandated by FOIA, courts have adopted a doctrine of deference to executive claims that secrecy is needed to protect national security interests.”). For present purposes, the important point is that whatever the merits of the review process for the exemption claims, no review can be had at all if the agency wins on the right to give a Glomar response.

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

Roth v. U.S. Dep’t of justice, 642 F.3d 1161, 1179 (D.C. Cir. 2011).

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

Becker, supra note ___, at 688.
information concerning the Times article, including the information that was leaked to the reporter, communications about the leaked information, and records related to investigations of who leaked the information.\textsuperscript{154} The Department of Defense’s invocation of the Glomar response was upheld by the D.C. District Court on the basis of an affidavit that said, in relevant part, that “[a]cknowledging the existence or non-existence of records responsive to plaintiff’s request could reveal whether the United States, and specifically DoD, conducts or has conducted cyber-attacks against Iran” and that release would “cause damage to national security by providing insight into DoD's military and intelligence capabilities and interests.”\textsuperscript{155}

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

The government has even used the Glomar response to attempt to defeat in camera review.\textsuperscript{156} The Second Circuit concluded that so long as the government’s affidavit supporting the use of Glomar is sufficient on its face, “the court should not conduct a more detailed inquiry to test the agency’s judgment and expertise or to evaluate whether the court agrees with the agency’s opinions.”\textsuperscript{157}

The use of Glomar is on the rise,\textsuperscript{158} and courts are highly deferential to agency assertions of the need for Glomar.\textsuperscript{159} The most common formulation of courts’ scope of review of a Glomar response, despite the formal de novo standard for FOIA withholdings enumerated in the statute,\textsuperscript{160} is that a court should uphold the response so long as the agency’s justification seems “logical” or “plausible.”\textsuperscript{161} Courts refusal to allow full adversarial testing of Glomar claims contributes to agencies’ success in invoking the response.\textsuperscript{162}

\textsuperscript{155} Id. at 1345. The Glomar response given by CIA and NSA was upheld on the grounds that plaintiff failed to exhaust administrative remedies before challenging those determinations in court. See id.
\textsuperscript{156} Roth v. U.S. Dep’t of Justice, 642 F.3d 1161, 1173 (D.C. Cir. 2011)
\textsuperscript{157} Wilner v. Nat. Sec. Agency, 592 F.3d 60, 77 (2d Cir. 2009).
\textsuperscript{158} Wessler, supra note ___, at 1395.
\textsuperscript{159} Wessler, supra note ___, at 1393.
\textsuperscript{160} 5 U.S.C. § 552 (a)(4)(B).
\textsuperscript{161} ACLU v. CIA, 710 F.3d 422, 427 (D.C. Cir. 2013) (quoting Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).
\textsuperscript{162} See Wessler, supra note ___, at 1393.
Moreover, like in other contexts where the failure of adversariality to test national security secrets precludes courts consideration of the merits of an action, the failure of adversariality in Glomar litigation prevents litigants from getting to the merits of the FOIA dispute. The failure to acknowledge the existence of records means that no Vaughn index will describe the withheld records or give an individualized justification for the claimed exemption, and the adversarial process will never be brought to bear on the propriety of the underlying exemption, either.

Sometimes worst of all, in the national security context, FOIA is often used to try to uncover government actions with an eye toward potential challenges to their legality. But the requester’s inability to meaningfully challenge the denial of information when a Glomar decision is rendered often results in the subsequent frustration of any testing of the legality of the government’s actions. While bad faith on the part of the government in using Glomar to conceal illegal governmental activity is a reason to deny the use of the response, courts are nearly uniform that they will not pass judgment on the legality of questionable underlying activity.\(^{163}\) In Wilner v. National Security Agency, the Second Circuit refused to address the “legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action.”\(^{164}\) Others have labeled this a form of “deep secrecy,” or instances where the public doesn’t know what it doesn’t know.\(^{165}\)

Alternatives do exist. While the court in Phillippi suggested that without confirmation of the existence of records,\(^ {166}\) there is nothing to review in camera, that assumes that the only information that can be disclosed to the court is the same as the information that can be disclosed to the public. In fact, the court could easily declare that it will review the records, “if any exist” in camera to help in its determination about the propriety of the Glomar response. Short of reviewing the actual records, as facially odd as it may sound, it is not at all unprecedented for the government to create a Vaughn index, classify it, and submit it for in

\(^{163}\) See Wessler, supra note ___, at 1395 (“Even where the subject of a FOIA request is a program that is arguably operating in violation of the law, such as the NSA’s warrantless wiretapping program, courts will not presume that the agency used the Glomar response in order to conceal such violations of the law and thus let the agency’s response stand.”).

\(^{164}\) Wilner v. Nat. Sec. Agency, 592 F.3d 60, 77 (2d Cir. 2009).

\(^{165}\) David E. Pozen, Deep Secrecy, 62 Stan. L. Rev. 257, 313 n. 203 (2010). See also Austin Sarat, et al (eds.), Transparency and Opacity in the Law in THE SECRETS OF LAW (2012) (“[I]nvoking the so-called Glomar doctrine . . . the courts turned a shallow secret into a deep secret and produced ruling that denied the very possibility of litigation concerning [the Terrorist Surveillance Program]”).

\(^{166}\) Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1979).
At the very least, a court could review a classified Vaughn index (which would be premised on the ground that it would either contain a list of records, if they exist, or declare that none exist, if they do not. That Vaughn index would be for the court’s eyes only, which would protect the national security interests. One commentator has suggested that courts have the power to compel live testimony in Glomar cases, so as to allow the court to fully question the government’s assertions regarding the need for secrecy.  

Because not all government claims are well-founded, inquisitorial judicial review may in fact demonstrate that some portion of the index can be released publicly if it does not contain sensitive information, and thus may be used to facilitate adversariality in the process. This practice facilitates the goal of compiling “as complete a public record as is possible” and that public records “enhance the adversary process.” Finding a second-best alternative, as courts do in other contexts where adversariality is an imperfect mechanism for dispute resolution, is a far cry better than puntng. Endorsing the status quo, as the current rulings do, systematically favors government secrecy.

III. DISTRUST AND MISUSE

Adversarialism may not be a perfect dispute resolution system, but jettisoning its strictures without any replacement creates a far worse predicament. Instead of testing litigants’ claims, the failure of adversariality in the national security secrecy context leaves a void in which secrecy is unquestioningly sanctioned. This, perhaps most obviously, creates significant risks of incorrect judicial decisionmaking and bad outcomes, sanctioning secrecy where it is unjustified. Moreover, this first failure of adversariality often leads to a second one: because national security secrecy is not tested as a threshold matter, litigants cannot access information they need to get to the merits of their claims. This snowball effect, in turn, has the consequence of insulating potentially illegal government conduct from judicial review and undermining the confidence the public has in the legitimacy of the judiciary as a result. This section will

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168 Aitchison, supra note ___, at 249.
169 New York Times Co. v. U.S. Dep’t of Justice, 758 F.3d 436, 440 (2d Cir. 2014) (“Where, as here, the Government has elected to classify a Vaughn index, it becomes especially important to disclose the titles and descriptions of listed documents to facilitate the adjudication of claimed exemptions, unless those materials themselves reveal sensitive information.”).
discuss each consequence in turn.

A. Incorrect Outcomes

At base, the adversarial system should result in a reasonably high rate of accuracy with respect to outcomes. That is, judicially sanctioned decisions should be correct on the facts and the law’s applicability to those facts. For claims of national security secrecy, that translates into judicial decisions that sanction secrecy when that secrecy is in fact necessary to protect legitimate security interests, and should require release of information when the claim is ill founded and there is little evidence of a real risk of harm from release. As demonstrated above, however, the adversarial testing of these types of secrecy claims is all but nonexistent.

The result can be bad outcomes both for the interest in transparency and in the underlying litigation. As one district judge said in an immigration case, “there is a high risk that the plaintiffs will be erroneously deprived of temporary resident or other legalized status because they cannot confront the evidence to be used against them. One would be hard pressed to design a procedure more likely to result in erroneous deprivations.” And in fact, many notable cases across the various legal contexts described above have been proven, after the fact, to have gotten it wrong.

Take, for example, Reynolds, the Supreme Court case that endorsed the state secrets privilege. There, the Court endorsed the Air Force’s refusal to release the accident report concerning an airplane crash that has killed plaintiffs’ civilian relatives. It also refused to examine the records in camera. Supporting its conclusion, the Court noted that “[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident.” Absent being able to discover the most relevant evidence, the plaintiffs subsequently settled.

But as it turns out, the report was eventually released in 1996, and “it contained no secrets at all but did show appalling negligence.”

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173 Id.
174 Id.
175 Id. at 11.
176 https://fas.org/sgp/othergov/reynoldsapp.pdf
177 Adam Liptak, The Case That Led to an Uneasy Shift in the Balance of Government Powers, N.Y. TIMES (July 2, 2008). See also, Origin Story, This American Life 383 (June 19, 2009), available at http://www.thisamericanlife.org/radio-archives/episode/383/origin-story (quoting the daughter of one of the victims describing the accident report: “nothing in there about the secret equipment or the secret mission of the plane”).
In the immigration context, the leading case allowing the government to deny a noncitizen entry into the United States based on secret, undisclosed evidence similarly demonstrates the error of sanctioning the secrecy. In Knauff v. Shaughnessy, Ellen Knauff, who was born in Germany but had fled Hitler’s regime and worked as a civilian for the U.S. Army during World War II, sought entry into the United States after having married a United States citizen during the war.\textsuperscript{178} She was, however, detained at Ellis Island and, two months later, ordered excluded without a hearing based on the Attorney General’s assertion that her admission was prejudicial to national interests.\textsuperscript{179} Famously declaring that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied interest is concerned,” the Supreme Court affirmed in a 4-3 decision the AG’s refusal to disclose the basis of the opinion on the grounds of public security.\textsuperscript{180}

But after public campaigns mounted on Knauff’s behalf, her case was reopened and a hearing was granted, at which the government asserted that Knauff engaged in espionage while working for the Army.\textsuperscript{181} But Knauff was able to discredit the government’s three witnesses, demonstrating that her visits to the Czech embassy were for passport purposes and that she had no access to secret information during the relevant time period, and she later won her right to stay in the U.S.\textsuperscript{182} That the government’s evidence was flimsy at best and that the petitioner was able to set the record straight demonstrate the value of disclosing the government’s evidence.

Of course, these examples are old, in part because in many instances only the passage of time (if anything) will lead to declassification and public release of the underlying secret information. But recent national security leaks have provided another context in which the public has had the opportunity to evaluate the validity of the government’s claims of secrecy, and preliminary observations suggest that these disclosures, too, question the propriety of national security secrecy decisions by the court. For example, the Second Circuit recently ruled that an NSA collection of bulk telephone data violated the statutory authorization under the relevant FISA provision known as Section 215.\textsuperscript{183} As the court said in its opinion, “Americans first learned about the telephone metadata program that appellants now challenge on June 5, 2013, when the British newspaper

\begin{thebibliography}{9}
\bibitem{179} Id.
\bibitem{181} Weisselberg, \textit{supra} note ___, at 962-63.
\bibitem{182} Id.
\bibitem{183} American Civil Liberties Union v. Clapper, -- F.3d --, 2015 WL 2097814, at *1 (2d Cir. May 7, 2015).
\end{thebibliography}
The Guardian published a FISC order leaked by former government contractor Edward Snowden."184 Only by this and subsequent revelations, both by Snowden and by the government in response to his disclosures, did the plaintiffs, “despite [] substantial hurdles [imposed by Clapper],” establish standing to sue because the court found that as a result of the disclosed government orders, the plaintiffs “need not speculate that the government has collected, or may in the future collect, their call records.”185 That is to say, only because of the the likely unlawful steps taken by a former NSA contractor to unilaterally leak classified material to the press did the bulk data collection end up successfully challenged.

Tellingly, the concurrence in that case focuses on the lack of adversariality in the FISC as bearing a key component of the blame for the situation:

It may be worth considering that the participation of an adversary to the government at some point in the FISC’s proceedings could similarly provide a significant benefit to that court. The FISC otherwise may be subject to the understandable suspicion that, hearing only from the government, it is likely to be strongly inclined to rule for the government. And at least in some cases it may be that its decision-making would be improved by the presence of counsel opposing the government's assertions before the court. Members of each branch of government have encouraged some such development.186

And in fact, Snowden’s disclosures have led to policy-level debates about the propriety of NSA surveillance activities and curbing NSA’s statutory authority.187

B. Illegitimate Law

Beyond getting the cases wrong, judicial abdication of responsibility to police national security secrecy threatens to undermine the judiciary and the rule of law in two important ways. First, evidence suggests that the judiciary may suffer from a perceived lack of legitimacy as a result of its failure to submit to adversarial or other rigorous testing claims of national security secrecy. Second, threshold national security secrecy creates proven

184 Id. at *4.
185 Id. at *9.
186 Id. at *36 (Sack, J. concurring).
187 See Jennifer Steinhauer, House Votes to End N.S.A.’s Bulk Phone Data Collection, N.Y. TIMES (May 13, 2015).
risks of endorsing a body of so-called secret law, an anathema to our collective visions of our constitutional democracy.

As to the first point, the judiciary’s own legitimacy as a forum for dispute resolution, a neutral arbiter, and a co-equal branch that performs a checking function is threatened in the public view. In fact, the social science literature on procedural justice demonstrates that a belief in the legitimacy of the legal system is a significant factor in individual decisions to comply with the law. Views on legitimacy, in turn, are heavily influenced by views on whether the processes used by legal actors are fair, as demonstrated by factors such as decision maker neutrality and the ability of the interested person to participate in the process.

The failure of the courts to engage adversarial testing of national security secrecy directly implicates the second of those concerns—the ability of the stakeholders to participate in the process—and indirectly affects the first—the apparent neutrality of the decision makers. Without disclosing enough information for a challenger to make arguments about the propriety of a national security secrecy claim, the challenger, as courts have noted and as described above, is handcuffed in her ability to argue the other side. And the courts’ failure to subject those claims to any kind of alternative procedure, even an inquisitorial one such as in camera review, leaves litigants on strong footing to feel the court has taken the government’s side.

The implications go far beyond public annoyance or even outrage. As I have argued elsewhere, a lack of legitimacy as characterized by procedural justice in judicial decision making over secrecy claims will increase the likelihood that individuals will resort to self-help. Indeed, recent national security leaks of unprecedented proportions—what I have labeled “deluge leaks,” are, at least in part, just that: rough justice for those who feel the formal system of challenging government secrecy has failed.

Another legitimacy consequence of the failure of adversariality in this realm is the development of “secret law.” Secret law, a phrase coined by Professor Kenneth Culp Davis, is “shorthand for agency use of precedents, policies, or controlling interpretive principles without prior publication or public availability of those uses.” Indeed, secret law is, as a formal

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188 Tom Tyler, Why People Obey the Law 61 (2007).

189 See Kwoka, Leaking and Legitimacy, supra note ___, at 1422-23 (summarizing the agreement in the literature about the importance of these factors).

190 See generally id.

191 These leaks would include those of Edward Snowden, the former NSA contractor currently living on temporary asylum in Russia, as well as those made by Chelsea Manning, a former Army soldier, and facilitated by Julian Assange and his leak-facilitating website, WikiLeaks. See id. at 1396-1402 (describing recent deluge leaks in detail).

matter, strongly disfavored by the court.\textsuperscript{193} Secret law has even made its way into the popular discourse; it was recently decried by the Atlantic as “Un-American,” on the ground that “[w]hat good are frequent elections if the people are ignorant as to the actual policies their representatives have put into place?”\textsuperscript{194}

Threshold determinations of national security secrecy that prevent the litigation from reaching the merits of the underlying claims in whole categories of cases, however, endorse such secret law. As a Mother Jones article entitled “You Can’t Challenge Secret Law Because It’s Secret” described the Supreme Court’s standing decision in \textit{Clapper}, “Just because you’re paranoid doesn't mean that they're not after you. But you'll never be able to prove it.”\textsuperscript{195} An ACLU lawyer describes the impact of the government’s failure to provide notice of searches under EO 12,333,”notice to defendants is one of the few mechanisms by which dragnet surveillance programs—which affect millions—will ever be reviewed in court.”\textsuperscript{196}

The threat of the development of a body of secret law—e.g., secret authorizations for surveillance that go untested, or secret justifications for interrogation methods that go undiscovered—is very real given the unquestioning allowance of national security secrecy claims. Without adversarial testing, these claims may be hiding government overreach or wrongdoing, and we may never know.

\section*{IV. RESTORING NATIONAL SECURITY TRANSPARENCY}

TBD.

\section*{CONCLUSION}

TBD.