BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS

"SECRET LAW AND THE THREAT TO DEMOCRATIC AND ACCOUNTABLE GOVERNMENT"

TESTIMONY OF BRADFORD A. BERENSON

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Chairman Feingold, Senator Brownback, and Members of the Committee, I appreciate the opportunity to testify before you today. I served as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I had the opportunity to observe at close hand the way in which the executive branch functions in a time of national security crisis, including the internal and external pressures that sometimes cause the executive to feel that it needs to shield from public view certain aspects of its legal decisionmaking. I offer the following general observations regarding government secrecy in contexts as diverse as executive orders, Office of Legal Counsel opinions, FISA court orders, and executive privilege in the hope that they may be of some assistance to you in formulating your own views on where the boundaries between appropriate confidentiality and excessive secrecy should lie.

Background

Ours is and traditionally has been among the most open, transparent, self-critical and self-correcting societies in the world. Without question, this is one of our great strengths, if not our greatest. This ability to fix our mistakes depends upon the ability to recognize them and debate them, together with possible solutions. This in turn depends on broad and unrestricted access to information, especially about governmental policies and activities. Recent advances in information technology have made more information available to more people than ever before in human history, and this has greatly magnified the advantages accruing to a society such as ours that values openness, criticism, and debate.

Because openness is such a venerable American strength, we all have an understandable tendency to regard secrecy of any sort, and especially governmental secrecy, with suspicion and distrust. This conventional wisdom was well expressed recently by the United

States Court of Appeals for the Sixth Circuit when it said, "Democracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

But a reflexive and unthinking condemnation of governmental secrecy is scarcely more defensible than a reflexive and unthinking appetite for it. The Sixth Circuit's flair for the quotable judicial aphorism unfortunately was not matched by a similar passion for historical accuracy, for the empirical truth is very nearly the opposite: the world's oldest democracy – our own – was *born* behind closed doors. When the Constitutional Convention met in Philadelphia for four months in the summer of 1787, it did so under a rule of strict and absolute secrecy. No reporters or visitors were permitted at any session, and not one word of its momentous deliberations was permitted to be disclosed to anyone who was not a delegate. General George Washington, who presided over the Convention, personally enforced the rule of secrecy, at one point sternly admonishing the delegates when he found a single page of notes that a delegate had mislaid inside the Convention hall. This secrecy was scrupulously respected during the Convention and indeed lasted well beyond the debates over ratification: the details of the Founders' deliberations were not laid before the public until the publication of James Madison's notes more than fifty years later, in 1840.

The difficult question is thus not whether governmental secrecy is a good or a bad thing but rather how much of it is really necessary. At the highest level of generality, every person on this panel and every member of this Committee would probably agree with the basic proposition that we should have no more government secrecy than is truly necessary. That is to say, our government should be as open as possible and keep as few secrets as possible, consistent with the public good. However, it has always been understood that the public goods inherent in

the free flow of information are sometimes trumped by even greater public goods that result from protecting certain kinds of information from disclosure.

The difficult questions are thus: How do we identify what information it is better to safeguard than disclose? And who is to decide? I believe the same general principles inform the analysis when the subject is, as it is today, "secret law" as when we are discussing any other category of information. In my view, there is nothing unique or special about legal materials or legal analysis that entitle them to less protection than other categories of protectable information. Indeed, as the law of the common law attorney-client and work product privileges makes clear, our legal system has traditionally regarded the legitimate confidentiality interests in such materials as occupying a higher rung on the ladder than most others. The same basic considerations should apply to deciding when to protect legal materials and analysis generated inside the executive branch from disclosure as should apply to deciding when to protect other categories of information.

In making this assertion, it is essential at the outset, however, to clarify that there is no such thing as true "secret law" in the way most lay observers would understand that term. When we talk about "law," we generally are referring to rules of prospective application that govern or regulate private conduct, setting forth rights and duties whose violation might subject a person to some form of sanction. That is not what we are talking about in this hearing. Secret law of this sort would obviously be intolerable, and is quite inconsistent with the traditions of a free and democratic society. It also does not exist. Neither Congress nor executive branch agencies are permitted to regulate private citizens' behavior through rules the citizens do not or cannot know about. *See, e.g., Brinton v. Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) (noting that Freedom of Information Act does not permit keeping secret "final statements

of policy or final actions of agencies, which have the force of law or which explain actions the agency has already taken" or "communications that promulgate or implement an established policy of an agency").

Instead, the "secret law" to which the title of this hearing refers includes such things as non-public opinions of the Justice Department's Office of Legal Counsel, orders of the FISA Court, classified Executive Orders promulgated by the President, and information protected by the presidential communication and related executive privileges. It is essential to appreciate that, although legal in nature, these materials govern or pertain to the internal functioning, operation, or deliberations of the executive branch; they do not regulate private conduct or impose primary obligations on our citizens. And the public officials whose conduct they regulate have access to them and know what they require. As such, their secrecy does not pose the same kind of due process problems as would true "secret law."

It is also very important to appreciate that, although much of this material may be secret from the public, most of it is available for review to the public's representatives in Congress in the course of properly authorized oversight activities. Thus, although there is not the full democratic accountability that attends full disclosure to the press and the public, there are still mechanisms in place for checking and balancing the policy choices of the executive.

With the issue thus in proper perspective, let us consider the circumstances and process by which such executive branch information should properly be kept confidential. My central point this morning is that the fundamental categories of "secret law" and the reasons that support their secrecy are traditional and well-established, and they are not only endorsed and validated in specific congressional enactments and judicial opinions but also they are reflected in parallel practices of the Congress itself. It is always possible to argue that there are particular

instances in which something has been kept secret which should not have been, but disagreement over the application of settled and well-supported understandings is inevitable, and it does not generally signal a systemic problem. Moreover, although one can certainly identify inherent flaws and perverse incentives in the existing system of executive control over national security classification and executive privilege, I do not believe that there is any cure that would not be far worse than the disease.

The Legitimate Interests Supporting Secrecy

There are two broad categories of information that account for virtually all of the instances of "secret law" with which the Committee is concerned: national security information, and information pertaining to internal communications and deliberations of the executive branch. Each of these categories is well-recognized, and each has a long historical pedigree. Each has also been expressly recognized and validated by Congress through statutes such as the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA), and by the courts. And ultimately each is driven by the need to protect the long-term public interest.

Moreover, each is reflected in similar practices by the Congress itself. If there is "secret law" in the executive branch, it also exists in the legislative branch. The fact that both branches, from the time of the founding until now, and regardless of political party alignment, have felt the need to safeguard the confidentiality of national security information and certain categories of internal deliberations is proof positive that the reasons for withholding this sort of information from the public are not only legitimate but compelling.

The protection of diplomatic, military, and intelligence information. The vast majority of information withheld from public view, including most of the categories of "secret law" with which the Committee is concerned, are withheld on the ground that they pertain to the

foreign relations, military, or intelligence activities of the United States. According to reports of the Office of Information Security Oversight at the National Archives, in a typical year, well more than 90% of national security classifications are made by either the CIA or the Department of Defense.

In contrast to the domestic sphere, where the values of openness are paramount, it has long been recognized that the ability to keep secrets is essential to the nation's ability to protect itself against foreign threats and conduct relations and negotiations with foreign countries. As Cardinal Richelieu observed centuries ago in this context, "Secrecy is the first essential in affairs of the State." Cardinal Richelieu served a king, but his observation, which focuses on the foreign relations sphere, is true as well for a democracy. Alexander Hamilton in the Federalist Papers famously cited the capacity to maintain "secrecy" as one of the principal comparative institutional advantages of a unitary executive in conducting the nation's external relations. *See* The Federalist No. 70 at 423-24 (Alexander Hamilton) (Clinton Rossiter ed. 1961). And President Wilson, liberal humanist that he was, observed after the experience of World War I that as "commander in chief of the armies and navy of the United States," the President had to be "ready to order it to any part of the world where the threat of war is a menace to his own people. And you can't do that under free debate. You can't do that under public counsel. Plans must be kept secret." Speech of September 5, 1919, *Papers of Woodrow Wilson* 63:46-47.

Effective military and intelligence activities by their nature require concealment of information from the nation's adversaries, which necessarily also means concealment from the public. No sensible person disputes the notion that military plans, the sources and methods of gathering intelligence, or negotiating instructions given to our diplomats cannot be made public

for fear of compromising paramount interests of the state. It would no doubt improve decisionmaking and reduce mistakes if all of our activities in these areas could be disclosed and subjected to a full public debate, but the cost to our vital interests of simultaneously revealing this information to our adversaries has always been thought to outweigh those advantages. Whatever benefits could be gained from fuller public debate and discussion, they do not outweigh the risks to the safety of our citizens that would attend revealing such things as the identity of our intelligence agents or confidential sources abroad; the means by which we gather intelligence on suspected terrorists through cooperating intelligence services, moles, or technological means; our military plans and the disposition of our forces in foreign battlefields; or our assessments of the motivations, interests, strengths and weaknesses of foreign nations with whom we may be dealing.

In today's legal environment, the conduct of military, intelligence, and diplomatic affairs are shot through with difficult legal questions, and someone has to decide them. They cannot be decided by the courts, which have no institutional role in these affairs as such. And usually they cannot be decided by the Congress, because Congress can only act through legislation, which is a slow, cumbersome, and blunt instrument for addressing the infinitely variable and nuanced circumstances that daily confront the nation in its intercourse with the rest of the world. Thus, the responsibility falls to lawyers in the executive branch to interpret whatever law may apply and to attempt to ensure that our military, diplomatic, and intelligence operations conform to constitutional and statutory law. In some of these areas, Congress may lay down certain rules, but it is the executive that has to apply them.

In doing so, it is impossible in many instances to publicly disclose the way in which they are being applied, for the simple reason that doing so will disclose precisely what the

nation is in fact doing – information that would do our security interests great harm if disclosed. For example, if the President issues an intelligence finding authorizing a particular covert operation to be carried out by our clandestine services, the legality of that finding must necessarily be passed upon by lawyers in the intelligence community, the Department of Justice's Office of Legal Council, and/or the National Security Council. But their opinions and analysis obviously cannot be disclosed because they must discuss the activity itself in the course of rendering legal judgments. I suppose this is "secret law" in some sense, but it is part and parcel of the underlying intelligence activity. The opinions will typically be classified at the same level as the underlying activities.

For the same reason, FISA orders are classified. A FISA order authorizes specific foreign intelligence surveillance activities. Revealing these orders would reveal both intelligence methods and capabilities, and intelligence targets – including to the targets themselves. Whatever public benefit would accrue from a robust debate over the propriety of the workings of the FISA Court is, in my opinion, far outweighed by the harm the country would suffer from losing its ability to eavesdrop on foreign terrorists and agents of foreign powers.

These are not, at bottom, controversial observations. Indeed, Congress itself has already endorsed them in various statutory pronouncements. Whether in FISA's requirement that FISA Court proceedings generally occur pursuant to stringent security requirements, *see* 50 U.S.C. §§ 1803(c), 1805(a), FOIA's categorical exemption from disclosure for information properly classified by the executive, 5 U.S.C. § 552(b)(1), or the APA's exemption for matters involving "a military or foreign affairs function of the United States," 5 U.S.C. § 553(a)(1), statutes passed by Congress already broadly support the notion that materials of this sort must be kept secret, and that the national executive is responsible for seeing to it that this occurs. *See*

also, e.g., 50 U.S.C. § 403-1(i)(1) (obligating the Director of National Intelligence to protect sources and methods of intelligence-gathering from unauthorized disclosure).

The courts also have made clear that they, too, recognize that secrecy is essential to the effective conduct of foreign, military, and intelligence affairs. Echoing Hamilton, for example, the Supreme Court has noted that the President "has his agents in the form of diplomatic, consular, and other officials," and that "[s]ecrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

The need for maintaining the secrecy of national security information is abundantly reflected in the way the Congress conducts its own business. The funding of the intelligence community occurs through a "black budget," which is not publicly disclosed except as to it aggregate amount. What is this if not "secret law" of the most literal sort? The public does not get to weigh in on the decisions their elected officials are making with regard to costly and vital national initiatives; there is no press coverage, and no public debate, and we undoubtedly lose something as a result. Yet few question that Congress is perfectly right to consider and pass the intelligence budget in this manner. Likewise, under the National Security Act of 1947, the intelligence committees of both houses were established to oversee intelligence matters. *See* 50 U.S.C. §§ 1413a(a), 1413b(b). These committees do much of their work in secret. Closed-door hearings are often held, and sometimes even the fact of a hearing is not publicly known, in order to protect the nation's intelligence assets.

Moreover, entire sessions of Congress are held in secret. Article I, Section 5 of the Constitution specifically provides that "Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require

secrecy." Congress has not hesitated to use this authority where the larger public interest has required it. Until 1929, all executive sessions of the Senate were held in secret. Even after that date, the Senate has held more than 50 secret sessions. With the exception of President Clinton's impeachment trial (which itself occasioned six secret sessions) the overwhelming majority of those sessions have been convened to consider foreign affairs and national security-related matters such as defense procurements, presidential reports on Soviet compliance with arms control agreements, nuclear treaties, sales of military hardware to nations in the Middle East, Chinese trade status, and chemical weapons conventions. *See* Congressional Research Service, *Secret Sessions of Congress: A Brief Historical Overview* (Oct. 21, 2004).

With respect to government secrecy relating to national security information, Congress generally has the ability to obtain access to that information for oversight purposes. Thus, there is some interbranch accountability and a check built into the system, even if it is a more limited and imperfect one than exists in other spheres. However, the second major category of information generally protected from disclosure by the executive, to which I will now turn, is protected, almost by definition, from disclosure to the Congress as well, because it is direct function of the separation of powers.

Preserving the separation of powers. Information that remains secret as an outgrowth of the separation of powers relates primarily to the deliberative process inside the executive branch and is generally thought of under the rubric of "executive privilege." As a technical matter, executive privilege has a number of different and distinct aspects (e.g., deliberative process, presidential communications, attorney-client, military and diplomatic secrets, law enforcement, etc.), but in general, significant controversies in this area have tended

to focus on the privilege attaching to communications between and among the President and his advisers.

Because this aspect of executive branch secrecy shields information even from the Congress, it has not received the same explicit congressional endorsement as the secrecy associated with national security activities. However, it is no less well-rooted in the history and traditions of our country. Indeed, the rule of secrecy adopted by the Constitutional Convention was justified on precisely the same grounds that continue to support executive privilege more than two hundred years later. As James Madison noted at the time, the secrecy rule was adopted "to effectually secure the requisite freedom of discussion." Letter from James Madison to James Monroe (Sept. 10, 1787).

After adoption of the Constitution, President George Washington, in consultation with his cabinet, was the first to invoke a presidential prerogative to maintain the confidentiality of certain intra-executive communications, even from the Congress. He did so when the House of Representatives sought to compel the production of information pertaining to the negotiating instructions in relation to Jay's Treaty, which was then quite controversial. President Washington refused to produce the requested information on the ground that doing so would be contrary to the public interest, in that it would harm the President's ability to function and to direct the nation's foreign affairs.

The courts have clearly recognized the legal legitimacy of President Washington's reasoning. Although executive privilege is sometimes qualified, depending upon circumstances and the nature of the information in question, the courts have accepted the basic rationale for its existence. In *United States v. Nixon*, 418 U.S. 683, 705 (1974), the Supreme Court explained that "[h]uman experience teaches that those who expect public dissemination of their remarks

may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." In order to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.* at 705, the Court therefore concluded that executive privilege was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

Even though the Congress is more skeptical of claims of executive privilege, its own practice clearly evinces an implicit recognition that the theoretical justification for it is sound. As noted above, Congress has from time to time held secret sessions. Some of these – notably the recent secret sessions associated with the Clinton impeachment – were designed to further the exact same interest in candor and frank internal deliberation that underlie the executive's invocation of its privilege. The same justification also shields many proceedings and reports of the House and Senate Ethics Committees from public view. Clearly, Ethics Committee proceedings are matters of considerable public interest and importance, concerning as they do the conduct of public officials, yet the rules allow for secrecy in order to serve the larger public interest in fair process for those accused of impropriety and full and frank debate within the committees.

The same parallelism between the executive and legislative branches is evident even in the narrow realm of legal opinions. Just as the Department of Justice has traditionally guarded its ability to give candid legal advice to the President by shielding certain OLC opinions from disclosure, so has the Congress shielded much of the legal advice it has received. Although it is less common now than it once was for the Senate Legal Counsel or House Legal Counsel to render formal opinions, most such opinions are not made public at the time they are issued.

And those are just the more formal aspects of congressional practice that are marked by the same secrecy that characterizes similar executive branch activities. When we consider the less formal aspects of lawmaking, it is clear that Capitol Hill is the scene of a considerable amount of private or "secret" lawmaking that occurs outside the view of the press and the public. Members' communications with their staffs, whether in person or through written memoranda, are extremely important to the legislative process, yet I know of no member who believes the hometown paper, the public, or the White House has a right to examine such material to understand how individual congressmen or Senators arrive at their positions. Meetings at which Members receive input, advice, or assistance from constituents, lobbyists, or other outside groups are likewise cloaked in secrecy. Some of the most critical meetings of all for deciding what ultimately happens in a legislative process – meetings among Members themselves, whether in small groups or in party caucuses – also occur behind closed doors. The process by which earmarks are added to appropriations bills or conference reports are generated are also marked by a notable lack of transparency. Indeed, an observer of the workings of the Congress could be forgiven for believing that the public portions of the process are but surface ripples caused by the currents running beneath.

To complete the parallelism, the Constitution itself, through the Speech or Debate Clause, U.S. Const. Art. I, sec. 6, cl. 1 – provides Members of Congress a constitutional shield against being forced to describe any of these meetings and processes – a legislative privilege to match the executive one.

I intend none of this to be critical of the way the Congress does business. Quite the contrary: the point is not that these activities are illegitimate or dangerous but rather that they demonstrate a remarkable, fundamental consensus regarding the need for secrecy and

confidentiality in certain types of governmental activities. If Congress has essentially the same forms of secret law as the executive, and for same reasons, then there is no disagreement between the branches at the level of principle. The only real disputes arise from particular applications of those principles, a subject to which I will now briefly turn.

The Responsibility For Deciding What Must Remain Secret

If the general principles informing most "secret law" are accepted and applied by all three branches of government, it is still possible to argue about how they are applied. Individual instances may be identified in which one branch makes a mistake in the eyes of the other and conceals something that should be revealed. These are discussions worth having, because they will tend to help prevent further errors in the future, but they are not indicative of a systemic problem that needs to be addressed through new ground rules or processes. They are simply examples of the truism that no process of government will ever work perfectly and that reasonable minds can and often do disagree about how best to apply even agreed principles in particular cases.

Apart from individual mistakes, it is also possible to level a more general criticism that the executive branch keeps too many secrets and does not reveal enough of what it knows. Often this criticism is articulated as a criticism of "overclassification," the tendency of the bureaucracy to err on the side of classifying information when in doubt.

There is almost certainly some truth to the overclassification criticism. Natural caution, combined with observed organizational behavior in bureaucracies, create a set of incentives for individuals with classification authority that will often lead them to classify something as a secret if there is any conceivable reason for doing so, without subjecting the issue to too much careful analysis.

However, the argument that the executive keeps too much information secret is very hard to prove, and, even if proven, still leaves an important question to which there is no satisfactory answer: what is the alternative? To illustrate the first problem, consider Governor Tom Kean's oft-cited observation that in his work with the 9/11 Commission, the vast majority of the classified information he saw would not have hurt our country's security if disclosed and should not have been classified in the first place. This is a common exhibit put forward by adherents of the overclassification critique. I respect Governor Kean's integrity and judgment, but why should we necessarily assume that his judgment on this matter is superior to that of our intelligence professionals? After all, Governor Kean is not responsible for overseeing intelligence operations or protecting the public from foreign threats on a day-to-day basis. He does not have a detailed understanding of our ongoing intelligence relationships with cooperating intelligence services, or the complex web of our global intelligence assets. He is not in a position to assess what our adversaries know or don't know, and what tile added to the mosaic of known information about our capabilities would prompt those adversaries to change the way they do business in a manner that would impair our intelligence-gathering capabilities. In his role on the 9/11 Commission, his background, his expertise, and his objectives and mission were all quite different from those of the individuals in the intelligence community who bear primary responsibility for protecting the country's secrets and maximizing the effectiveness of our intelligence operations. He is not the person whom anyone would blame if his opinion on this subject turned out to be wrong and innocent Americans died as a result.

This highlights a fundamental problem. Anyone who claims that the executive keeps too much information secret has to answer the question, too much compared to what? In whose judgment? This criticism assumes that there is some objective standard by which to

measure the aggregate amount of information withheld, or that there is some readily accessible ideal that we would all agree on. There isn't. And even accepting that there is probably some degree of natural overclassification, assessing the magnitude of that problem and how deleterious an impact it has on policymaking and public debate requires an omniscience regarding the full universe of secret information that simply isn't possible. Without that omniscience, how can one truly assess how much is overclassified, and whether the harm flowing from that overclassification exceeds the harm that would flow from erring in the other direction?

Classification decisions will never be made perfectly to everyone's satisfaction. There inevitably will be errors. The question is really which sort of errors we should prefer: errors that conceal too much or reveal too much. One of the principal reasons for overclassification is the working assumption that the consequences of underclassification would be far worse than the consequences of overclassification. My own instinct is that this is probably right, but even for those whose instincts are different, it's just a matter of instinct: marshaling any sort of reliable evidence by which to evaluate the competing assumptions is a daunting if not impossible task. There simply are too many unknowns and unknowables, both about what information is classified and what the impacts of release would be.

The question thus devolves to one of process: who will decide what to withhold, and how? That, and not any objective debate about the substantive correctness of the withholding and disclosure decisions, will really determine what secrets are kept. Here, the current answer is clear: executive branch officials decide what to withhold based upon standards set forth in executive orders promulgated by the President. I suspect that to the extent Members of Congress are uncomfortable with executive branch "secret law," that discomfort stems from this basic fact, which inevitably means that the Executive enjoys a very broad degree of

unilateral discretion in managing these matters. But any challenge to this system bears the burden of identifying a better one – and not just one that *might* be better but that clearly *will* be better given the stakes and the costs of error. It is here that, in my judgment, the critiques break down most clearly. To paraphrase Churchill, we currently have the worst of all possible systems for regulating the creation and maintenance of official secrets – except all the others.

At bottom, the case for the current system comes down to relative institutional competence. The system has evolved as it has because the information in question is acquired or created as part of the operation of the executive. It is generated by intelligence agents and analysts, the military chain of command, the communications of senior policymakers and presidential advisors, and the daily functioning of executive branch officers and agencies. It is inherently operational in nature. And it is essential to the executive's ability to carry out core executive functions, such as gathering intelligence, developing military weapons, and conducting relations with foreign countries. It is, in short, quintessential executive branch information, and its maintenance and management has traditionally been regarded as an inherent aspect of the President's Article II power.

The legislative and judicial branches of government do not have nearly the same need for or control over this information. These kinds of communications and data do not form the basis for resolving lawsuits, nor do they generally bear on legislative questions (and when they do, the Congress has means to obtain them under appropriate security procedures). Nor are the courts or Congress as well positioned as the executive to make sound, fully informed, contextual judgments in real time about whether the release of such information would jeopardize the national interest. This simply has to be a matter of judgment for individual officials in the moment. The relevant executive branch officials are daily immersed in the flow

of information and the operational realities of the matters and issues to which this information pertains. They have far superior access to the full mix of information and other considerations that must inform a judgment regarding protection or disclosure of such information. Their training, professional experience, and expertise are all directly germane to the task at hand. Neither of the other two branches has anything like the same practical ability to make these judgments in a comprehensive and intelligent manner, however flawed they may be in gross.

Both Congress and the courts have recognized this. FOIA (and numerous other statutes) expressly acknowledges that the executive runs the security classification system. *See* 5 U.S.C. § 552(b)(1). And the courts have disclaimed the authority or ability to meaningfully second-guess executive branch judgments about the harm that would likely flow from releasing national security-related information. The Supreme Court has noted that "[i]t is the responsibility of [the intelligence community], not that of the judiciary to weigh the variety of complex and subtle factors in determining whether the disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). In the Pentagon Papers case, five Justices in two separate opinions, one concurring and one dissenting, strongly endorsed the notion that the executive, not the judiciary, must superintend matters of national security. Justice Harlan's dissent, speaking on behalf of three Justices, describes the strongly held and traditional view of the courts regarding their relative institutional competence in this area:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible for the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor

> responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

New York Times v. United States, 403 U.S. 713, 757-58 (1971) (Harlan, J., dissenting). These three Justices' views were echoed by Justice Potter Stewart, writing for himself and a fifth Justice, constituting an overall majority of the Court:

> [I]t is clear to me that it is the constitutional duty of the Executive – as a matter of sovereign prerogative and not as a matter of law as the courts know law – through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

Id. at 729-30 (Stewart, J., concurring).

Note that Justice Stewart makes the same distinction regarding "secret law" that I made at the outset, distinguishing between "executive regulations" that govern the bureaucracy and "law as the courts know law." We have much less to fear from "secret law" in the former category than in the latter. Indeed, its existence is inevitable and vital to the protection of the public interest. Some things in government are properly kept secret. As described above, there is general consensus, validated by pronouncements and practice in all three branches of government, on what kinds of things those are. And somebody has to apply those categories to the millions of documents and communications that are created within the executive branch each year. However imperfect its judgments may be, as a practical matter, that can only be the executive. Just as Congress must control the confidentiality of the information and communications it generates, so to must the executive branch control those things in its own domain.

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In closing, I wish to thank the Committee for the opportunity to address this interesting and important issue. The Committee's concern with openness and accountability in

our government is laudable. It is a concern that I share. But I would hesitate to allow concerns about classified information or executive privilege in individual disputes or contexts to provoke a reaction that could result in an even less satisfactory state of affairs. I believe we have little choice but to continue to work with the system that we have, and to try to improve it patiently and slowly through case-by-case discussions of circumstances in which we believe it has malfunctioned. I would be glad to answer any questions the Committee may have.