

FREE SPEECH
AND
UNFREE NEWS

*The Paradox of Press Freedom
in America*

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The Rise of State Secrecy

The **Elijah Lovejoy award** was given for “fearless” journalism in the fight for a free press—it was named for America’s “first martyr for freedom of the press.” But when he received the inaugural award in 1952, James S. Pope opened his address by declaring that “freedom of the press in our country has become almost an invulnerable institution.” In fact, Pope thought that the right to press freedom was “so majestic that for much too long most of us in the newspaper field were blinded by it.” Looking for “frontal attacks” on press freedom, Americans had missed a “flanking movement”: the decline of access to government information. Classical speech rights, as Walter Lippmann had argued three decades earlier, did not guarantee the stream of news upon which opinions were based. Or, as Pope put it in 1951, “We have hammered for two centuries on the primary theme that the press must be free, that any and every citizen has the right to express his opinion of his government. But of what value are these opinions if they are based on ignorance or on part truths? Lately we have discovered that while we were expounding on freedom of the press, freedom of information was being lost on a major scale by default.”¹

This concern for freedom of information was novel. Pope was chairman of the new Freedom of Information Committee of the ASNE; offering congressional testimony in 1956, he confessed that he “was an old hand in this business of fighting for access to public information and I have been doing it exactly five years.” Pope and his colleagues were reacting to the rise of governmental secrecy in the early years of the Cold War, particularly new executive orders that classified government information, and

new arguments about the right of the executive branch to keep information from the public. Nobody knows exactly how much information was actually kept secret in America after World War II, but by any estimate it was a staggering amount. When the Pentagon created an Office of Declassification Policy, it estimated that classified material, if piled 2,000 pages to a foot, would stretch out some 3 million feet. That was in 1957; in the same year, it was estimated that over a million people were involved in classifying material. By 2001, when there were 33 million acts of new classification, philosopher of science Peter Galison estimated that there were some 7.5 billion pages being kept secret—a collection roughly the same size as the Library of Congress.²

Although it is tempting to think of secrecy as a timeless attribute of the state, the American secrecy regime has a short history, having been built in a burst of activity after World War II.³ In many ways, it was a patchwork of statutes and executive orders. There was little congressional or judicial oversight, and there was no master plan—it evolved in response to Cold War fears and partisan political clashes, and was legitimated by bureaucratic inertia. But it was unprecedented. In 1956, sociologist Edward Shils declared that “the past decade has been the decade of the secret. Never before has the existence of life-controlling secrets been given so much publicity and never before have such exertions been made for the safe-guarding of secrets.”⁴

The new secrecy produced a deep paradox in American press freedom: while there were more and more protections for the right to publish without state interference, it became ever more difficult to access information held by the state. This was no accident: the censorship of information was seen as a more palatable method of securing secrets than the antidemocratic censorship of speech or publication. In theory, the secrecy regime helped to protect freedom of the press—it preserved American security in the threatening world of Cold War geopolitics, without contradicting the First Amendment right to speech. But in practice, the rise of secrecy eroded the press’s ability to circulate political information to the public and helped to produce the nationalistic and deferential culture of Cold War journalism. Secrecy and the Cold War mutually reinforced each other, producing the McCarthyite obsession with security, the press’s participation in the militaristic consensus of Cold War Washington, and the exclusion of the public from the key facts of American foreign policy. There was a backlash to this culture, as journalists, editors, and politicians argued that a free press required access to state secrets. But they only

succeeded in passing the Freedom of Information Act (FOIA) of 1966, and that was a superficial response to the new laws of secrecy. The most important trend of the 1950s and 1960s was the decline of press access to information.

* * *

The roots of the national secrecy state could be traced to World War II. In 1958, John Steinbeck argued that “our whole miasmatic hysteria about secrecy . . . had its birth” amid the “huge and gassy thing called the War Effort.” In the late 1940s, pressure to keep national security information secret continued to mount. In 1946, the Atomic Energy Act declared that much material was “born classified” and introduced mechanisms to regulate the circulation of information about the design, manufacture, and utilization of atomic weapons and nuclear energy. In 1947, the National Security Act created the CIA and specified that the director of the new agency was responsible for protecting intelligence sources and methods from unauthorized disclosure—language that was interpreted expansively to cover any information collected by an intelligence agency, regardless of whether or not the source was open. In the same year, draft rules for a general classification order were leaked from the Security Advisory Board, which had been quietly working on them since 1945. They included provisions that allowed the classification of information that caused “serious administrative embarrassment or difficulty” and, in the face of much public criticism, were quickly retracted. The issue of classification went quiet for a time.⁵

But on September 24, 1951, Harry Truman issued Executive Order 10290, creating, for the first time, a permanent classification regime across all agencies of the government. It featured four levels of classification—Top Secret, Secret, Confidential, and Restricted—and created newly standardized security procedures: information was not to be discussed by phone; methods for destroying classified material were specified. There were even requirements about the kind of safes that could be used for each class of information.⁶

But most significantly, the order explicitly invoked the information disclosure provisions of the Espionage Act to enforce the classification regime. Finally, thirty years after equivalent provisions had been deleted by Woodrow Wilson’s Congress, the criminal sanctions of the Espionage Act were being deployed to enforce executive decisions about what informa-

tion could be released to the public. The order was justified as a necessary response to the increasing amount of information that was vital to national security in the age of total Cold War. For instance, before a company issued stock, the Securities and Exchange Commission collected vast amounts of its financial data, which might include defense contracts; the Departments of Health and Agriculture collected information that could be related to the development of bacteriological weapons. “I am not trying to suppress information,” Truman asserted; “I am trying to prevent us from being wiped out.”⁷

But the order was criticized by newspaper editors and Republicans, and in 1953, Dwight Eisenhower issued Executive Order 10501, which superseded Truman’s order. It made many changes, but two in particular were intended to roll back the classification system: the elimination of the bottom category of classification (“restricted”) and the removal of some agencies from the classification system. The reforms turned out to be largely superficial. Authority to classify was removed only from agencies that should never have had it in the first place (such as the American Battle Monuments Commission, or the Committee on Purchases of Blind-Made Products). The classification powers of the Atomic Energy Agency, the CIA and the Departments of State, Defense, Justice, Commerce, and Treasury—responsible for 90 percent of classification—were left untouched. And eliminating the category of “restricted” information had little effect because cautious government employees continued to classify information of marginal security value. They now did so with the more restrictive “confidential” stamp. (Beyond its consequences for democratic deliberation, disgruntled bureaucrats worried that this posed a quite material problem—“restricted” material could be kept in a locked desk, but “confidential” material required the purchase of special filing cabinets.)⁸

In short, Eisenhower’s order consolidated rather than reformed Truman’s. And between the two, a new regime of classification had been created. Information would now be kept secure by classification at the government source, not by censorship of the press, or even by journalists’ self-censorship as in World War II. The system had been coming into view during the 1940s, but with the classification order, the retreat of censorship from the sphere of publication was complete.

The tectonic nature of this shift was not immediately apparent in 1951. During a press conference intended to explain the classification system, Truman struggled to distinguish the new order from the old. In what Arthur Krock described as a “tongue lashing,” Truman lectured the press on

their duties to deal with national security information, gave examples of improperly published information, and called on editors and journalists "to use good judgment for the safety of the United States." When correspondents pointed out that many of Truman's examples featured information that had been released by the government, the press conference quickly degenerated. Under questioning, Truman did not seem to know whether information should be secured by the press or the state:

Q: Mr. President, recently the Defense Department gave out certain information about the Matador, also on these guided missiles, and so forth. That was published probably in every paper in the land. Was that the publishers' responsibility not to publish that?

Truman: I think so, if they want to protect the country.

Q: Wouldn't it be better to tighten up over at Defense?

Truman: That is what we are doing. I say, that is what we are doing, and that is what you are fussing about.

Throughout the conference, Press Secretary Joe Short had tried by "gestures and a couple of agonizing whispers" to keep Truman on message. But even when given explicit instructions, Truman still garbled the point: "Joe wants me to make it perfectly clear that this order only applies to the officials of the United States Government. My comments, though, apply to everybody who gives away our state secrets." Short had to issue a statement after the conference to clarify the situation: "The recent executive order on classified information does not in any way alter the right of citizens to publish anything."⁹

Truman was still speaking in the language of press responsibility from World War II. But after 1951, the state would not directly interfere with the press's right to publish, or even attempt to inculcate a culture of self-censorship among journalists. In 1948, James Forrestal had met with editors to float the idea of establishing a successor to the Office of Censorship, but nothing came of it. After crises, there would still be calls for the press to act responsibly: shortly after the Bay of Pigs fiasco, JFK asked newspaper publishers to "reexamine their own responsibilities . . . and to heed the duty of self-restraint." But such rhetoric was not institutionally enforced. In the aftermath of the Cuban Missile Crisis, Byron Price had been brought in to talk about drafting a new code of voluntary censorship, but the idea was soon dropped.¹⁰

And the state certainly did not formally censor press publication of state secrets. The McCarran Act of 1950 tightened the Espionage Act's restrictions on the disclosure of information, but only after Elisha Hanson of ANPA insisted on the inclusion of an explicit guarantee that nothing in the act could be construed "in any way to limit or infringe upon freedom of the press or of speech." Issuing a comprehensive review of the national security apparatus in 1957, Loyd Wright gave an angry address decrying "irresponsible" behavior by the press and calling for "vigorous prosecutions" for the publication of state secrets. But the Wright Commission's proposal of a new law to penalize publication of secrets by "persons outside as well as within the government" was criticized as an undemocratic threat to press freedom, and it quickly died in Congress. In the same year, a Defense Department investigation into the problem of leaks explained that prosecuting journalists made little sense: bringing espionage prosecutions against a journalist risked widening the leak as evidence was disclosed in trial; and such prosecutions risked making a martyr of the journalist. "The real culprit," explained the head of the inquiry, was the "member of our department rather than the reporter."¹¹ Securing secrets required policing the government employee, not the press. After 1951, the "right of citizens to publish anything" was increasingly sacrosanct.

By focusing on regulating the employee rather than the journalist, classification began to distinguish itself from censorship. In a 1948 debate on government censorship, Tom Wallace of the *Louisville Times* argued that government withholding of information "is not censorship and is not related to censorship." Erwin Canham thought that the best way to reconcile security and press freedom would be to simultaneously "condemn censorship" and "recognize the primary responsibility on the government itself to determine what information it feels should be withheld in the original instance." Joe Short made the same distinction starkly in 1951: "Classification . . . has no realistic relationship to censorship."¹²

In reality, of course, classification was just a different form of censorship, one that was more subtle because it was invisible to the public eye: nobody's speech rights were violated. Censorship now took place within the bureaucracy, with the act of classification. The simple decision that information should be classified triggered a host of consequences: that information was held and transported securely, only certain individuals could know it, and its disclosure became a crime.¹³ Government employees decided what to classify within an institutional framework that incentivized

the overclassification of documents: a 1956 Defense Department investigation of classification thought that 90 percent of items should not have been classified. Although presidents and government commissions have routinely decried overclassification, there have never been any sanctions against it. As one admiral told a congressional committee in the 1950s, no one had ever been court-martialed for *overclassifying* a document.¹⁴ Nor has there ever been a mechanism to encourage transparency at the point of classification. In 1951, William Benton suggested that there should be “a top-ranking advocate of the people’s right to know” within the bureaucracy to counterbalance the instinct to classify. But nothing came of it, just as nothing came of proposals that each agency have a public information advocate to argue against classification.¹⁵ At no point have classifiers been instructed to consider the public’s right to know when making classification decisions.¹⁶ And not until Clinton’s presidency was the classifier required to justify the act of classification—and even then, the classifier simply needed to cite a relevant generic category of classifiable information, hardly an onerous task.¹⁷ Despite these institutional incentives to overclassify, the courts have deferred to the initial act of classification, preferring not to review judgments that are presumably made in the interests of national security.¹⁸

* * *

The growing desire to keep national security information secret was a product of early Cold War fears about communist espionage. This was distinct from the fears about communist propaganda that justified the period’s interferences with free speech: the privately enforced Hollywood Blacklist; university loyalty codes; the criminal conviction of Communist Party leaders for advocating the overthrow of the government, upheld by the Supreme Court in the *Dennis* case of 1951. In fact, government interferences with speech rights were falling out of favor. There was far less federal prosecution of speech during the second Red Scare than there had been during the first. Between 1948 and 1957, the state successfully prosecuted only one hundred speakers under the Smith Act; between 1917 and 1919, using the Espionage Act, it had succeeded close to 1,000 times. And by 1957, the Supreme Court had begun to reverse course on its decision in *Dennis*. It soon conceded that the right to free speech did protect the right to advocate the overthrow of the government. After that, it began to protect an expansive vision of free speech.¹⁹

The desire to secure state secrets, however, was less controversial. In his ringing dissent in the *Dennis* case, in which he had rearticulated the importance of the free market of ideas, William Douglas had conceded that he “would have no doubts” about the prosecution if “those who claimed protection under the First Amendment were teaching . . . the filching of documents from public files.”²⁰ Fears that communists could steal state secrets helped to legitimize the new loyalty programs, and the theft of documents was a central theme in the signature dramas of the early Cold War: the *Amerasia* editors’ possession of hundreds of classified documents; the Rosenbergs’ transfer of documents about the bomb; and Whittaker Chambers’s sensational revelation of the Pumpkin Papers, the microfilm roll of classified documents that he claimed had come from Alger Hiss. The political impact of the Hiss case shows how broadly respected the classification regime was in postwar America. As Archibald MacLeish later recalled,

The information that was supposed to be in that bloody pumpkin was the kind of information that any postman in the State Department had. It was of no interest to anybody. Why didn’t somebody at some point read it? If you’ve ever read it, you’d know what I mean. But nobody did, not during the trial; they were so poisoned by McCarthy they thought that anything that had been marked secret must be secret for some reason, not realizing that every bureaucrat in Washington uses that little stamp to protect his own hide!²¹

* * *

Ironically, the primary critics of classification and secrecy in the early Cold War were anticommunist Republicans, who were equally committed to keeping state secrets out of the hands of communists. It was just that they didn’t believe that the Truman loyalty boards were effectively weeding out communists, and wanted to see the classified raw files for themselves. In March 1948, for instance, the House Un-American Activities Committee subpoenaed the files of the Commerce Department’s loyalty board only days after it had cleared Dr. Edward Condon of disloyalty. Secretary of Commerce Averell Harriman refused to turn them over, claiming that revealing the identity of confidential informants would undermine the efficacy of the loyalty program. Shortly thereafter, Truman issued a statement directing all agencies to decline subpoenas for records in order to

protect national security, confidential informants, and the reputations of government personnel being subject to unfounded allegations. The House voted 300 to 29 to order the immediate release of the file, but Truman refused to comply, because the vote had not been put to the Senate.²² The pattern repeated for the remainder of Truman's presidency.

The partisan dynamics of anticommunism thus produced some unlikely advocates of government transparency. In 1951, forty-four Republicans, including Richard Nixon and Joe McCarthy, signed a manifesto declaring that "any attempt to restrain the inherent right of an American to criticize his Government must be resisted by all freedom-loving persons. . . . We shall vigorously resist any attempt to conceal facts from the American people." In 1952, Red-baiting senator William Jenner proposed a sweeping open access bill to make "an initial step in breaking the censorship" of the American state. In a public statement explaining the bill, Jenner criticized the classification order, the rise of propaganda in the New Deal publicity bureaus since 1933, and the Truman administration's limp response to the threat of communist subversion. Jenner's bill was a product of his deeply conservative politics, but it was also a strikingly bold proposal for government transparency. It declared that government records were "public property" and envisioned criminal sanctions for government failure to disclose. Both suggestions were more stringent than the Freedom of Information acts that were ultimately passed in the 1960s and 1970s.²³

Truman's attorney general made sure that Jenner's bill died in Congress, and the Truman administration repeatedly opposed other efforts to enforce a right to access executive documents. In early 1948, for instance, Truman vetoed a bill that would have allowed Senate review of Atomic Energy Commission appointee files, because it was "an unwarranted encroachment of the legislative upon the executive branch."²⁴ Presidents had long refused to turn over executive documents, though the limits of the practice were unsettled and the courts had never determined if those refusals were constitutional.²⁵ But as Truman fought off anticommunist attacks, a newly capacious right to executive secrecy solidified. In 1949, a freelancing Department of Justice attorney, Herman Wolkinson, stitched together the previous incidents of executive denial to argue that there was a clear and settled precedent: the executive had an "uncontrolled discretion to withhold the information and papers in the public interest."²⁶ Wolkinson's article lacked official imprimatur, but it showed that the executive's right to secrecy was becoming more sharply defined.

The question of executive secrecy and the politics of McCarthyism came to a head at the same moment: the Army-McCarthy hearings of 1954. The army accused McCarthy and his aides of using allegations of communism to gain preferential treatment for a friend in the service; McCarthy alleged that those army accusations were made in bad faith to cover up army ineptitude in rooting out communists. As the hearings unfolded, it became increasingly difficult to evaluate the claims and counterclaims, because the most important evidence was classified. McCarthy had entered as evidence a letter that he claimed was from J. Edgar Hoover to the army, outlining a communist spy ring. It turned out to be a summary of the original, but it did contain classified material, which the attorney general refused to declassify. (He also threatened criminal prosecutions against the leaker, although McCarthy never disclosed his source.) McCarthy also claimed that the army's allegations had been cooked up at a secret meeting of Republican policy heavyweights. One of its attendees, military lawyer John Adams, was called to give testimony. But in a public letter on May 17, Eisenhower ordered that no employees of the Defense Department could offer testimony or provide evidence about conversations, communications, or documents within the executive branch. Eisenhower's letter was accompanied by a memorandum from the attorney general that borrowed liberally from Wolkinson's 1949 article on executive privilege. Eisenhower claimed that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official measures." That meant the president had a right to withhold information "whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the nation." Asked in a press conference the next day whether he might modify the order, Eisenhower announced that he had "no intention whatsoever of relaxing or rescinding the order because it is a very moderate and proper statement of the division of powers between the executive and the legislative."²⁷

Because the order essentially shut down the Army-McCarthy hearings—devoid of substance, they would continue just long enough for McCarthy to finally, fatally, discredit himself—Ike's action was met with initial praise. As journalist Clark Mollenhoff noted in 1956, "that [Eisenhower] letter won support because it came clothed as a weapon to stop Senator McCarthy." But the order ushered in an unprecedented level of executive secrecy. Executive confidentiality became the norm, not the exception; it

was the release of documents that required justification, not their concealment. In 1955, Robert Cutler, former assistant to Eisenhower for national security affairs, declared that “all papers, all considerations, all studies, all intelligence leading to the formulation of national security policy recommendations are the property of the president” and that “only he can dispose of them.” “In fact,” Cutler continued, “any other concept would lead to chaos.” In the threatening shadow of global communism, Cutler believed, those who called for a right to access documents had to prove “that the widespread, public disclosure of our secret projects will make the free world stronger, and the neutral better disposed, will rally the subject people, and will put the Communist regimes at a disadvantage.” Both JFK and LBJ took some steps to reduce the use of the privilege from these extremes, but a precedent had been established. When the Johnson administration established a ground rule that agencies were not to transmit to Congress any communication from the White House, Attorney General Ramsey Clark explained that “this is not the establishment of a new policy, but the exercise of a legal privilege in accordance with historical practice of presidents and essential to the separation of powers.” Only seven years earlier, a law review article on the privilege had called it “ambiguous and muddled” and an “unresolved constitutional question.”²⁸ The partisan clashes of the McCarthy era had helped to solidify an expansive right of executive secrecy.

* * *

The rise of classification and the rise of executive privilege helped to legitimate a broad culture of secrecy. By 1957, DC reporter Jack Wilson, writing a series on secrecy for the *Des Moines Register*, observed that the laws were important, “but they aren’t as significant as the general climate of secrecy in which the agencies operate.” Throughout DC, Wilson reported, there was a general sense “that if an item wasn’t marked secret, there must have been a mistake.” A 1955 questionnaire sent to all agencies found that they had created some thirty categories to keep nonsecurity information from the public, such as “need to know,” “for official distribution,” “administratively confidential,” and “for official use only.” In the mid-1950s, a former public relations executive briefly instituted rules in the Commerce and Defense Departments that limited the release of all unclassified information that *might* be inimical to the defense interests of the United States—as one commentator noted, “every telephone book and

road map in the country” was in that category. At times, the culture of secrecy took on the air of self-parody. Twelve years after World War II, Harvard continued to store 7,000 feet of military records that its employees lacked clearance to look at. The Department of Labor classified statistics on the army’s purchase of peanut butter because enemies might use them to deduce the size of the force—even though the army published monthly reports of its total personnel.²⁹

But important information was veiled from the public. A 1953 Atomic Energy Commission report that could have limited the accidental fallout from the 1954 Bikini tests was classified and removed from public knowledge. Congressional efforts to oversee foreign aid expenditures were met with assertions of executive privilege, which obscured aid activities, corruption, and inefficiency in such countries as Laos, Vietnam, Pakistan, Brazil, and Guatemala. In 1959, the General Accounting Office complained that it was being denied information about defense spending and thus denied the opportunity to check for waste, mismanagement, and poor procurement practices. The navy, army, and air force asserted that if internal reports on spending and procurement were to be released, internal inspectors might soften their criticism. The material was therefore not released to protect the “public interest” in “efficient” government.³⁰

* * *

The press, too, found it increasingly difficult to gain access to information about government activities. The post-World War II administrations could keep things hidden, or they could strategically disclose them, spinning as they went, or they could provide select journalists with exclusive background information. By the mid-1950s, journalists were criticizing this new set of practices with a new term: “news management.”³¹ In the broadest sense, of course, there was nothing new about politicians seeking favorable publicity. But there had been two major changes. First, the rise of the administrative state meant that large areas of policy were determined by appointed figures, who did not need publicity for reelection. Second, issues of national security and foreign policy predominated over all others, which encouraged greater secrecy and more strategic communication on behalf of administrators, as well as greater deference on behalf of the press. Thanks to these developments, the rules of the game between journalists and politicians shifted.

The post-World War II administrations, for instance, were far more parsimonious about the information they released through their publicity bureaus. The Presidential Press Conference, continuing its decline after World War II, symbolized the broader trend. Whereas Coolidge, Hoover, and FDR had held around seventy conferences per year, Truman averaged only forty-two, and Ike, JFK, and LBJ held roughly twenty-four per year.³² This decline in quantity was married to a shift in quality: the press conferences revealed less information and became almost ritualistic. FDR had met the correspondents informally around his desk, but Truman made press conferences more formal, moving them to a newly devoted press room in the old State Department building. JFK chose a cavernous auditorium for his conferences. And with the introduction of television cameras in 1955, the conferences were no longer off the record. Direct quotation of the president became the norm, and newspapers started printing transcripts. Presidents therefore became more cautious and disclosed far less. Eisenhower was infamous for circuitous, rambling answers that consumed time while revealing little. (One journalist quipped that if you asked Ike the time, he would give you a history of clock making.) Adding to the emptiness, large portions of the press conference were used for presidential announcements and set statements, which limited the amount of questions that could be asked in the allotted time.³³

Handouts, public statements, and press briefings also became increasingly strategic in the early Cold War. Publicity officers within the executive agencies had remained the most important source for political reporting. In 1951, Philip W. Porter of the *Cleveland Plain Dealer* grumbled that press agents "are in the same category as women—they are often puzzling and amazing, but we couldn't get along without them." By the early 1960s, the PR staff of State and Defense alone had grown to some 773 persons. But releases were increasingly crafted simply to maintain the official line. During the Korean War, Truman issued a "gagging order" preventing officials from speaking on foreign policy issues without clearing them through the Department of Defense. Such orders could appear commonsensical—they were a way to handle the strategic imperatives of a Cold War that never bubbled over into total war, and thus never led to the establishment of an heir to the OWI. In the wake of the Cuban Missile Crisis, for instance, JFK explained that there had been an obvious need to speak with one voice and to manage the release of information because all administrative disclosures were simultaneously messages to Moscow. The

problem was that times of crisis never ended, and so many areas of the nation's life could be used to make statements to Moscow. In April 1961, for instance, Robert McNamara told the Senate that investigations of the expensive and controversial Zeus missile were publicizing weakness to the Russians: "What we ought to be saying is that we have the most perfect anti-ICBM system the human mind can devise."³⁴

Although journalists continued to rely on such official channels as their primary source for news, they increasingly sought out unofficial channels to get a clearer sense of political life than the handouts and briefings could provide. Leaks and background briefings became the order of the day. It is difficult to measure the rise of leaks, but one commentator in the 1940s dated the first "background briefings" to two meetings in November 1942. That date is suspiciously precise, but the statement shows that these briefings were significant new developments, which became more common as secrecy expanded. In 1948, Bruce Catton, who had been a PR officer during World War II, declared that "our particular form of government wouldn't work" without such off-the-record disclosures.³⁵ The difference between a "leak" and a "background briefing" was entirely political. Both involved the off-the-record disclosure of theoretically confidential information; a leak was simply what one called a background briefing when one disapproved of it.

So although politicians regularly complained about "leaks," and treated them as anarchic and exceptional breaches in security, they were quickly "institutionalized," as Douglass Cater observed in 1959: "Cloaked news has become an institutional practice in the conduct of modern government . . . part of the regular intercourse between government and press." Cater understood that leaks were used by politicians and government officials for a host of reasons: to defuse hostile stories, to float trial balloons, to wage interagency rivalry, to bring pressure to bear on allies in diplomatic negotiation, to manipulate public opinion. And officials in the Cold War were particularly skilled at using leaks to further their own purposes. During the Berlin crisis, plans for a massive defense buildup were leaked, both to create the impression of government activism and to soften the reception for the smaller, but still substantial, increase that was coming. In 1965, Murray Marder of the *Washington Post* was shown a selection of classified diplomatic cables that seemed to support the LBJ administration's assertion that intervention in the Dominican Republic was intended to save American lives. In all, as William S. White put it,

“the leak or exclusive story is rarely an example of a reporter’s persistence and skill”; leaks occurred because a government official wanted to put the story out.³⁶

Beyond their impact on any particular news item, the use of leaks transformed the practice and culture of journalism. Journalists could not do their work unless they cultivated official sources that would speak to them informally. In the 1950s, journalists wined and dined officials, cultivating interpersonal networks to facilitate access to news. The leading journalists were networked with the most powerful and extensive sources—as with the Alsop brothers’ lavish Georgetown dinner parties, or their “Sunday Night Suppers” with Chip Bohlen and Frank Wisner, or Drew Pearson’s carefully collected files of rumor and gossip. Journalists and officials developed a mutually beneficial system of trust and reciprocity. Only journalists who shared the politician’s assumptions would receive the leaks, which reinforced the assumptions, which reinforced the trust, which produced more leaks. The logic of the system was captured in the most superficial of contexts—both correspondents and politicians agreed that sexual indiscretions were not matters of public interest, and the public remained ignorant of them.³⁷

But for all the clubby camaraderie, the partnership between the press corps and the politicians was not an equal one. As David Broder of the *Washington Post* later recalled, trust was a form of policing: “One of Kennedy’s techniques for dealing with the press was to say things that were so damn candid—to some about sexual things but even his political comments—so that you knew if you printed it, you would be ending your intimate relationship. . . . It was a way of coopting us.” The journalist always needed the politician more than the politician needed the journalist. As early as 1951, editor Oxie Reichler complained that journalists were no longer selling “fresh brand new merchandise” but were “accepting more and more of the second hand stuff.” Reichler feared that dependence on background briefings was “more serious than the closed door form of censorship.” By 1963, Alan Barth believed that the press’s greatest failure was “that out of respectable and patriotic motives” it had become “an instrument and partner of the government. . . . Along with newspaper compliance with official secrecy has gone a dangerous tendency to let editorial criticism of the government stop, like politics, at the water’s edge.”³⁸

As a result, without formal censorship or any apparent violation of the First Amendment, the flow of information in the polity was adjusted

to state imperatives. Journalists sat on stories to aid the government, as when the *New York Times* kept the Argus atmospheric nuclear tests quiet for six months at the request of the government, or when the Alsops kept quiet what they knew about CIA interventions in Guatemala and Iran. *New York Times* journalists were among those who knew about the secret U2 flights for three years before Gary Powers was shot down over Soviet airspace in 1960, but the paper kept the matter quiet. “We exercised a judgment,” Scotty Reston later explained, “that it was not in the national interest for us to print that fact. I still think that is a defensible position.” The secrecy of the flights distorted foreign relations and domestic politics. Republicans could not dispel Kennedy’s claims that there was a missile gap, because the proof of American military superiority was classified.³⁹

The press also sculpted stories to match government policy. Preparations for the Bay of Pigs were well known—JFK’s press secretary called it “the least covert military operation in history,” and Reston observed that there were “literally hundreds, maybe thousands” of people in Miami who knew about the plans. But key details were kept out of the papers in the lead-up—*New York Times* editors deleted a reference to CIA involvement days before the invasion, and the *Miami Herald* and the *New Republic* had earlier killed stories about preparations in Guatemalan training camps. Far more important than such suppression was the casual approval the papers gave to the invasion. Even after the invasion had come to its dismal conclusion, the press criticized the implementation of the plan, not the underlying questions of ethics or morality. Reflecting the topsy-turvy priorities of midcentury journalism, one reporter even put the blame for the fiasco on the administration’s failure to brief the press on the proper way to spin the story: “I believe that if the US had displayed greater trust towards the press and had frankly announced in a background briefing session that the Cuban operation was to be a commando-type mission (which it was) and not a massive invasion, the defeat would not have been interpreted as a humiliating fiasco for Washington.”⁴⁰

The state’s ability to manipulate the flow of information to the public without relying on formal censorship came to a head in the Vietnam War. The American press had paid little attention to Vietnam throughout the 1950s. When it sent correspondents in the early 1960s, they were responsible for crafting American public opinion about the country for the first time. As American involvement in the conflict escalated under JFK and LBJ, this news was carefully managed. In Vietnam, military briefings to

reporters downplayed casualties, while trusted journalists were taken on helicopter tours to the most favorable fronts—one such program was called Operation Maximum Candor. At home, careful releases of information justified increasing involvement. *Time* and *Life* magazine were given selectively leaked Pentagon cables to allow them to write up lurid accounts of the Gulf of Tonkin incident; broader questions about U.S. policy went unasked. The escalation of U.S. troops was deliberately released in a “piecemeal” fashion to mitigate the “crisis atmosphere” that would result from a direct announcement. When U.S. troops began offensive combat operations, General Taylor explained to Dean Rusk that no public announcement should be made, but routine announcements of such activity could be confirmed as they happened: “This low-key treatment will not obviate [all] political and psychological problems . . . but will allow us to handle them undramatically.” In a 1963 congressional inquiry into access to government information, James Reston observed that “we are engaged in quite a war in Vietnam and this country hasn’t the vaguest idea that it is in a war.” In May 1964, almost two-thirds of the public still said they had given little to no thought to Vietnam. In the same month, intensive bombing of Laos began under the cover of secrecy—it would take five years to come to light.⁴¹

Eventually the public would become far more interested in the war, and as the antiwar movement mobilized, it began to fixate on the secrecy and deceptions of the Johnson administration—what was soon dubbed the “credibility gap.” Later, many would attribute the rise of this antiwar movement to the press itself. In reality, press opposition to the war trailed public opposition, and mapped much more closely onto the attitude of official circles. The earliest journalists to criticize the war were a small group of Saigon correspondents, such as David Halberstam and Neil Sheehan. JFK was sufficiently frustrated by them that he tried, in vain, to have the *New York Times* reassign Halberstam. But the Saigon correspondents were mainly critical of the decision to rely on Diem and the South Vietnamese army, not of the broader morality of U.S. involvement. As Neil Sheehan put it, “We were just as interventionist-minded as Joe Alsop; we didn’t share any basic differences with Robert McNamara. It was a question of how do you win the war.” The Saigon correspondents believed the war would be won with more direct U.S. involvement; they believed that because their sources were military advisors who were dissatisfied with the existing strategy. More broadly, too, the press reflected the range of

opinions of those in power—when officials began to question the war, so too did the press. Such a reliance on official sources was natural, explained Peter Lisagor, Washington bureau chief of the *Chicago Daily News*, “because they were supposed to have the facts and you didn’t.” After leaving the administration, Ted Sorenson reflected on the chasm separating the information available to officials and the public. “In the White House,” he recalled, “I felt sorry for those who had to make judgments on the basis of daily newspapers. There’s a large difference between reading diplomatic cables and intelligence reports and sitting in your living room reading the papers. Now I’m one of those guys sitting in his living room reading the papers and I’m even more acutely aware of the difference.”⁴² The press and the public had been cut off from meaningful access to political information.

* * *

Even before the controversy of Vietnam, this secrecy system was criticized. In the 1950s and 1960s, the primary forum for antisecrecy politicking was a Special Subcommittee on Government Information, known by the name of its chairman, John Moss.⁴³ The Moss Committee was founded in 1955 to explore “the trend in the availability of government information.” Over its eleven-year life, it conducted some twenty-four hearings and published fifty-four volumes of reports and transcripts. The vast majority of these hearings were intended to expose secrecy in the government to the light of publicity—a strategy that encouraged government departments to modify or clarify individual information policies. But the committee also helped to promote legislation intended to deal with the problems of secrecy more holistically—particularly the 1966 FOIA.⁴⁴

A particularly powerful lobby of scientists and industrialists used the hearings of the Moss Committee to criticize the way secrecy had compartmentalized knowledge and thus hindered progress in national defense research—these utilitarian arguments did much to undermine the legitimacy of widespread secrecy.⁴⁵ The Moss Committee also worked closely with the small group of editors and lawyers who served on a number of committees devoted to accessing federal records, a group that became known as the Freedom of Information (FOI) movement. In innumerable speeches, articles, books, and letters to officials, men such as James Russell Wiggins of the *Washington Post*, Clark Mollenhoff of the *Des Moines*

Register, James Pope of the *Louisville Kentucky Journal*, and Virgil M. Newton of the *Tampa Tribune* both criticized the rise of secrecy and developed strategies to overcome it.⁴⁶

The most important of the FOI movement's many publications was Harold Cross's *The People's Right to Know*, published in 1953. The ASNE's FOI committee commissioned Cross, former counsel for the *New York Herald Tribune*, to undertake a broad survey of access to public information in 1950. He began by noting the simple absence of legal rights to access information held by the federal government. "The dismaying, bewildering fact," Cross announced gloomily, "is that in the absence of a general or a specific act of Congress—and such acts are not numerous—there is no enforceable legal right in public or press to inspect any federal non-judicial record." Others in the FOI movement agreed that access to information depended more "upon official grace than upon legal authority." "Every employee of the government can build his own little dam," James S. Pope complained, "but nobody is empowered to destroy them."⁴⁷

Cross and his allies believed that the obvious solution to the problem was to recognize a legal right to access information. "It is not enough merely to recognize philosophically nor to pay lip service to the important political justification for freedom of information," Cross argued, because "citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs." Without that right, Cross concluded, "we have but changed our kings."⁴⁸

The problem was how to ground such a right of access to information. It was unmentioned in the Constitution, little explored in political philosophy, and far from recognized in jurisprudence. Indeed, the whole idea of a "right to know" was a neologism that had emerged from the effort to create global press freedom in the aftermath of World War II. On January 23, 1945, the *New York Times* credited AP head Kent Cooper with coming up with a "good new phrase for an old freedom" when he spoke of the global right to know. Even Pope was forced to concede that "freedom of information is a will-o'-the-wisp among basic liberties."⁴⁹

So FOI advocates became inventive in their efforts to identify a long-standing right to know. Some drew on slim threads of textual evidence to suggest a First Amendment right to information, such as dicta in the 1936 *Grosjean* decision that stated that "it goes to the heart of the natural right of the members of an organized society . . . to impart and *acquire* information about their common interests." Others referred to hints in classical political philosophy, such as Madison's oft-cited claim that a

"popular government without popular information or the means to acquire it is but a prologue to a farce, or a tragedy" and John Milton's cry for the "right to know, to utter and to argue freely." "It was not by chance," Pope suggested, "that John Milton had put first the liberty to know."⁵⁰

But most claimed simply that the First Amendment itself implied the right to know, and that the founders had taken this for granted. Lawyer Wallace Parks argued that the founders were "focused on the then current English struggle for a free press which was concerned principally with licensing, taxing, and direct censorship"—and so "could not reasonably have been expected" to discuss access to information explicitly. Pope agreed, arguing that the drafters of the Bill of Rights were thinking of a smaller government than that of the 1950s, and "had spelled out freedom of the press while its twin, freedom of information, they had taken for granted." That was the only explanation, Pope believed, for neither the right to speak nor the right to access information was "self-sufficient"—"if government by and for the people requires the right to speak out and to publish, it requires implicitly the right to know."⁵¹

In many ways, these intellectual moves were identical to earlier efforts to modernize the First Amendment. But despite the formal similarity between their efforts and the arguments of John Dewey, Archibald MacLeish, the Newspaper Guild, or Felix Frankfurter, the FOI advocates generally believed that they were reestablishing the *laissez-faire* liberty of the First Amendment, not transcending it. Although they spoke of a positive right to information, they really wanted to roll back what they saw as the state's excessive interference in the marketplace of ideas. Classifying information, after all, required state action. So while it was possible to construct the right to information as a positive right, it was also possible to defend it as a negative right that needed to be protected from state interference.⁵² The leading advocates of the right to know certainly saw matters this way, and they were generally critical of *any* government action in the field of the press. J. R. Wiggins, for instance, was opposed both to the NRA effort to regulate the press and the Eastland Commission's investigations of radical journalists. Harold Cross, too, was critical of New Deal efforts to reform the press.⁵³ And FOI advocates made little use of the language of the AP antitrust decision, in which the case for a First Amendment right to information was stated most explicitly—for that decision encouraged state intervention in newspaper economics.

So although Cross and his allies wanted recognition for a constitutional right to know, their broader political commitments to a *laissez-faire*

vision of press freedom left them isolated. They did not identify the right to know with the other midcentury efforts to articulate a positive vision of press freedom; instead, they thought of themselves as resuscitating a long-dormant aspect of classical press freedom. As Cross put it in 1953, "The issue of the right of the people to know, by means of access to official information, as an essential part of those freedoms [of speech and press] has emerged from its Rip Van Winkle era." Thinking about the problem in those terms, however, forced them to acknowledge that there was little Supreme Court precedent on the issue. And there was little historical evidence to support their gloss on the founders' intent—the Constitutional Convention had met in secret, as did the Senate in its first years. So the case for a right to know had to be stated abstractly: a lack of current jurisprudence "constitutes no bar to recognition" in the future; "the language of the First Amendment was broad enough to embrace" such a right.⁵⁴ Those arguments had some rhetorical power, but ultimately the FOI advocates could not embed a right of access within First Amendment jurisprudence.

* * *

Instead, their most significant efforts to counteract the rise of secrecy were legislative. "The time is ripe," Cross declared in 1953, "for an end to ineffectual sputtering about executive refusals of access to official records and for Congress to begin exercising effectually its function to legislate freedom of information for itself, the public, and the press." In what would prove to be the most influential sections of his book, Cross identified two pieces of legislation in need of amendment: the hitherto obscure Housekeeping Statute of 1789, and the Administrative Procedure Act (APA) of 1946. After considerable effort, the FOI movement, working with the Moss Committee, revised both pieces of law—the Housekeeping law in 1958, the APA by the first FOIA in 1966.⁵⁵

The trajectory of the Housekeeping amendment foreshadowed, in miniature, the fate of the FOI bill. The original 1789 statute gave the heads of executive departments the authority to regulate the "custody, use and preservation of the records, papers and property appertaining to it." Cross discovered that the statute, apparently intended to allow for the storage and safekeeping of public records, was increasingly cited as statutory authority to deny access to government records. FOI advocates believed it

was the "root" and "fountainhead" of secrecy. "Our feelings about it," James Pope announced giddily in 1951, "are not unlike those of a doctor who has been observing the ravages of some disease, and finally identifies the germ." Despite the opposition of executive agencies, congressional allies of the FOI movement successfully passed a simple one-sentence amendment to clarify that the statute did "not authorize withholding information from the public or limiting the availability of records to the public." But in August 1958, Eisenhower issued a signing statement reiterating that the bill did not alter the constitutional right of executive privilege. FOI advocates soon admitted that the "bill has accomplished precious little, if anything." Government agencies made no changes to their information policies. They simply stopped citing the housekeeping statute as authority to withhold information and, following the logic of Eisenhower's signing statement, fell back on general claims of executive privilege.⁵⁶

Efforts to amend the APA took longer, and had more lasting consequences. The APA, intended to tame and standardize the proliferation of executive agencies in the late New Deal, had a number of provisions intended to improve transparency. But it had become clear that these provisions were so riddled with exemptions that they facilitated secrecy instead. The APA exempted agencies from publishing any information related "solely to the internal management of an agency" or any information concerning "any function of the U.S. requiring secrecy in the public interest." Although the APA required every matter of official record to be made available, it exempted information "held confidential for good cause" and guaranteed a right of access only to "persons properly and directly concerned" with the matter at hand. It was easy to find "good cause" to keep a record secret and the exemption for records relating to "internal management" appeared almost open-ended. In 1961, for instance, the secretary of the navy ruled that telephone directories fell into this category, and could thus be withheld from the public. And the APA provided no remedy for the wrongful withholding of information from citizens—no review process, no appeals process, and no sanctions for official misconduct. Cross was not alone when he declared the public information provisions of the APA to be an "abject failure."⁵⁷

The FOI bill amended the APA in three important ways. First, it allowed all citizens to request access to information, without a need to show "standing." Second, it allowed citizens to appeal to the courts if access to

information was withheld, which provided an enforcement mechanism for the public for the first time. And third, whereas the APA's exemptions had been broad, the FOIA created a general presumption of access with specific, and theoretically narrow, exemptions. Cross had originally argued that the act should include only one exemption: material specifically exempted by statute. The 1958 draft bill added to that exemptions for material that was "required to be kept secret in the protection of the national security" and any information that would invade personal privacy. By the time the act was passed, there were nine exemptions to disclosure, including exemptions for trade secrets, intra-agency or interagency memoranda, personnel files, investigatory files, information related to operating and condition reports of financial institutions, and information about oil findings.⁵⁸ With each additional exemption, the bill deferred further to the autonomy of government administrators.

Executive opposition to the bill made it easy to water down the language of the exemptions. LBJ's press secretary Bill Moyers later recalled that LBJ "hated the very idea of the Freedom of Information Act." In 1965, it was reported that the president had told House leaders to "scrap" it. Legislative advisors within the administration believed the proposed bill to be an unconstitutional interference with executive branch discretion, a violation of the separation of powers, and an imposition of severe administrative burdens on the heads of the departments and agencies. Agency heads complained that it substituted a "simple, self-executing word formula" for their subtle judgments about what information it was proper to disclose. In March 1964, when a version of the FOI bill passed unanimously through his Senate subcommittee, Edward Long declared, "We should not kid ourselves about the legislation's prospects. There is intense opposition to the bill from virtually every government agency in Washington."⁵⁹

For years, that opposition was enough to ensure that the bill floundered in Congress. But as the public mood began to fixate on the credibility gap and turn against LBJ's secretive administration, pressure began to mount for passage of the act. By February 1965, more than twenty-five members of Congress, from both parties, were sponsoring FOI legislation. Opposition to the bill was becoming politically problematic—Republicans, including a thirty-three-year-old Donald Rumsfeld, began to criticize the administration for its lack of transparency. At the end of 1965, Bill Moyers advised the White House that opposing the bill was a "potential time bomb."⁶⁰

Members of the administration became increasingly inventive as they sought to blunt the bill without putting themselves in what White House counsel Lee C. White called "the awkward position of opposing freedom of information." The Justice Department tried to work with John Moss to redraft the bill. But he would not concede to their changes, for they were so antithetical to transparency that he thought it better to have no bill at all. So the Justice Department made a different offer: Moss could keep the bill as it was, and LBJ would not veto it, but Justice would write the House Report that explained the legislative intent behind the bill. Moss agreed, and on June 21, the bill was quickly passed through Congress, under rules that allowed no more than forty minutes of debate. Compared with the earlier Senate report, the House report weakened the philosophy of the bill and expanded the scope of its exemptions, making it more palatable to the agencies—the National Labor Relations Board (NLRB), for instance, declared that their opposition to the bill "subsided to some extent with the issuance of the House Report." But relying on the report was something of a long shot—as the Department of Defense pointed out, "some of the interpretations by the House Committee find little support in the plain language of the act." So the Department of Defense suggested attaching a signing statement to clarify the limits of the act, as did a number of other agencies. On July 1, LBJ was informed that although the agencies "have been concerned about this bill for years," they "have come around to the view that they can live with it. The agencies are hoping that your signing statement, together with the House Report, will guide the interpretation of the statutory language."⁶¹

As the bill sat awaiting the president's signature, FOI advocates also hoped for a politically significant signing statement, and urged LBJ to hold a public signing ceremony. Moss argued that if LBJ made an "affirmative" speech on freedom of information, it would help to counter the credibility gap. But such entreaties fell on deaf ears.⁶² LBJ signed the bill without ceremony on July 4, the last day before a pocket veto would have kicked in, and his short signing statement, as the agencies had hoped, focused less on access to information than on the exemptions in the bill. Although the opening and closing paragraphs of the statement included some pabulum about "the people's right to know," the bulk of the statement reiterated the instances in which information could not be disclosed: "as long as threats to peace exist, there must be military secrets"; citizens need to be able to confide in their government without fear of being identified; personnel files must be "protected from disclosure"; "officials within

government must be able to communicate with one another fully and frankly without publicity." Crucially, LBJ also affirmed his constitutional right to exercise executive privilege: "This bill in no way impairs the president's power under our constitution to provide for confidentiality when the national interest so requires." In fact, LBJ seems to have rewritten the statement himself to further emphasize the need for secrecy. Whereas an early Department of Justice draft of the speech declared that "democracy works best when the people know what their government is doing," LBJ's final version declared only that "democracy works best when the people have all the information that the security of the nation permits."⁶³

The final act was, at best, a dubious achievement. The meaning and scope of the nine exemptions was unclear. Frank Wozencraft, head of the Office of Legal Counsel, thought their language so "inartistic" that "it is very difficult to tell what some of them mean." Given the long-standing hostility of the agencies to the bill, it was inevitable that enforcing the act would require further political struggle, and multiple trips to the courtroom.⁶⁴ When it came to the foundational question of access to national security information, the act already conceded the central issue by exempting information "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." Such an exemption had been uncontroversial. "None of us," Pope had declared in 1957, "wants security information—genuine security information—revealed." But the exemption opened a potentially large loophole that extended well beyond "genuine security information" and could cover anything that an administration believed to be in the interests of its foreign policy. On only one previous occasion, in 1950's McCarran Act amendment to the Espionage Act, had Congress acknowledged the authority of the president to issue classification orders.⁶⁵ But that had come before the creation of the modern classification regime. In 1966, in its *Freedom of Information Act*, Congress did not challenge the legitimacy of the classification system, but acknowledged it.

And on a more foundational level, the act established no general right of access to information. It was a specific piece of legislation, one that created a new mechanism to release prescribed sorts of information from executive agencies. It didn't cover Congress. And it was subject to the whims of future administrations. During JFK's presidency, Assistant Secretary of Defense Arthur Sylvester had told Pierre Salinger that "the citizen's desire to know and be informed is legitimate, but not a constitutional

right superior to the security of the United States."⁶⁶ After FOIA, there was still no constitutional right to know that could be pitted against the executive right to protect national security.

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Seen in isolation, the passage of the nation's first FOI law seems like an unprecedented breakthrough for transparency. In reality, it was a weak ameliorative to unprecedented levels of secrecy. What is truly significant about FOIA is the fact that American citizens felt they needed such a law for the first time. For the rise of secrecy had been a defining feature of America's Cold War order. Cold War fears of subversion heightened the demand for information security; anticommunist demands for access to executive documents helped legitimize the growth of executive privilege; the desire to secure the nation's secrets produced the excesses of McCarthyism; and the press corps became incorporated in the militaristic consensus of Cold War Washington. It was no accident that the Cold War and the culture of secrecy bloomed together.

But the relatively late development of America's secrecy regime should also be seen as a crucial moment in a broader historical transformation. As First Amendment rights grew in stature, government censorship shifted its logic, and began to focus on the regulation of information, not publication; on the regulation of secrets, not speech. By the late 1960s, American press freedom was marked by deep paradox. A formally free press faced new challenges in accessing basic political information. The drying up of official channels of information had heightened press dependency on unofficial networks of leaks, gossip, and rumor. And a press denied guaranteed access to political news had drawn ever closer to power. "One sometimes has the despairing feeling," journalist Karl Meyer confessed, "that no country has more freedom of the press and uses it less."⁶⁷ And then, in 1968, Richard Nixon ascended to the White House.

In the Pentagon Papers case, Ellsberg had gone free, but only because the entire matter had been thrown out of court. And in the Watergate affair, the Supreme Court had explicitly recognized the rights of the executive to keep information secret. The press's much-hallowed role in publicizing the excesses of the Nixon administration rested on the existence of government employees willing to supply the press with otherwise secret information. And while the press emerged from the scandals of the early 1970s with a clearly protected right to publish state secrets, there was no such constitutional protection for the sources that provided those secrets to the press.

In the aftermath of the Nixon administration, this uneasy situation would be embraced as a positive contribution to press freedom. Constitutional scholar Alexander Bickel, who had represented the *New York Times* in the Pentagon Papers case, made the most explicit case for the desirability of this state of affairs. Bickel argued that democracies had competing interests in both secrecy and transparency. A democracy could not simply prioritize either the state's right to police secrecy or the press's right to publish government information: "If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress." So Bickel proposed a balancing act: the state had a right to withhold secrets and the press had a right to publish whatever information it could get hold of. It was a procedural resolution to a normative problem—Bickel called it the "game theory of the First Amendment." In hoping that the rough-and-tumble of democratic politics would produce positive outcomes that abstract theorizing could not, Bickel legitimized the theory of classification that had emerged after World War II. And he bid final farewell to the theory of press responsibility that had been midwife to the new order of national security censorship: "The presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources." "Those responsibilities," he concluded, "rest chiefly elsewhere"; the "chief responsibility of the press . . . is to play its role in the contest."⁴⁵

In the 1970s and 1980s, this distinction found repeated expression in law. Courts upheld the constitutionality of nondisclosure agreements that prevented present and former state employees from releasing information that they learned through their employment. In 1980, for instance, the Supreme Court found that a former CIA operative had no right to publish

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If the Pentagon Papers and Watergate affairs were victories for the rights of the press over the state, then, they were delimited and ambivalent victories. In both cases, the press had exercised its right to publish information that was hostile to the interests of the Nixon administration. In both cases, that meant that the public's right to know about the secret affairs of the state had been protected in practice. But the publication of the Pentagon Papers and the details of the Watergate scandal depended on leaks of information from government employees, and in neither affair were there any guarantees that such leaks were legal, let alone legally protected.

information about his former activities; he first had to submit even unclassified material to the CIA for clearance. In 1985, Samuel Loring Morison, a naval intelligence analyst, leaked information about Soviet naval power to *Jane's Fighting Ships*, and became the first leaker to serve jail time under the Espionage Act. The Fourth Circuit Court of Appeals explicitly dismissed the claim that Morison had a First Amendment right to leak the material, and the Supreme Court declined to hear an appeal of the matter.⁴⁶

If leakers had few First Amendment rights, newspapers continued to have a well-protected right to publish information however it was obtained. In a unanimous decision in 1978, the Supreme Court upheld the rights of a Virginia paper to publish confidential information from a hearing into judicial misconduct. Although the court conceded that there was a public interest in such confidential hearings, it argued that one could not protect such an interest by interfering with First Amendment rights. Rather, the harm from disclosure could "be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings." The same distinction found expression in the 1982 Intelligence Identities Protection Act, which prohibited government employees from revealing the names of covert intelligence agents but was drafted to ensure that reporters would be protected from prosecution.⁴⁷

In the abstract, this balancing test made some sense. The law sees an interest in secrecy and security and an interest in disclosure and debate, and it appears to balance them. But in reality, the balancing act is weighted in favor of the government right to secrecy. Although the rights of the press and the rights of the state are treated as autonomous rights, the press cannot publish information it has not been able to pry from the state. The rights of the state to secure information are prior to the rights of the press to publish, so the press's right to publish secret information is entirely dependent on an action that the state is regulating. Given the sprawl of the classification regime and the illegality of disclosing classified information, the press is often dependent on individual employees to break the law to provide the public with information. The threat of jail time plus the rupturing of professional and cultural norms and the loss of security clearances and employment are powerful disincentives militating against any decision to blow the whistle on state misconduct.⁴⁸

Because all leaks were issued in the shadow of such retribution, the majority of leaks were made with at least the tacit blessing of the administration. Leaks certainly blossomed in the 1970s and 1980s—by the

mid-1980s, according to one study, 42 percent of federal policy-making officials had leaked information to reporters. But they tended to come from the top of the administration, and the leaks primarily served as a tool for the conduct of administrative politics by other means. Even if institutional and partisan politicking therefore meant that some otherwise secret information was reaching the public, relying on leaks underprotected the public right to information in several ways. To protect the leaker, the use of anonymous sources became common. One 1974 study found that 54 percent of stories in the *Washington Post* and *New York Times* used at least one anonymous source. That made it very difficult for the reader to parse the accuracy of the information, let alone to assess the motives of the leaker (and it was still possible to selectively leak for self-interested reasons). As journalists continued to rely on anonymous leaks to conduct their trade—Max Frankel called leaked secrets the "coin" of the journalistic realm—they continued to depend on their sources for information, undermining the likelihood of aggressive watchdog journalism. And in some bureaucracies, and on some issues, consensus was sufficiently strong to preclude any leaks of information. The FBI's COINTELPRO program, which illegally monitored and intimidated the civil rights and antiwar movements over a period of decades, came to light only when a group of antiwar activists broke into an FBI office in Media, Pennsylvania, and stole internal FBI documents (even this extreme action was only sufficient to uncover the name of the operation; it took several years in court before FOIA requests unearthed the details and scope of the FBI's activity). In the context of ongoing overclassification, in short, it seemed inadequate to rely on leaks to inform the public.⁴⁹

But after Nixon, there was little effort to create a more secure public right to access information. There was no foundational reform of the classification system, even though the Pentagon Papers affair had revealed that too much information was being classified: Nixon's secretary of defense believed that 98 percent of the papers did not need to be classified, and all could see that the nation did not collapse when the papers were released. Between 1972 and 1975, there were seventeen congressional hearings on a number of bills that bore titles such as the "Free Flow of Information Act." But these were limited laws that would have done nothing to reform the foundations of the secrecy regime. They simply sought to exempt reporters from being forced to name their sources in criminal trials. Their advocates, including Alexander Bickel, argued that by protecting the anonymity of leakers such a "reporter's privilege" would

encourage a greater flow of information to the public. But it created no new rights of access and did nothing to lessen the sanctions on leaking; it just impeded the government's ability to prosecute leakers. In any case, the law was never passed, and in 1974 a divided Supreme Court ruled that the First Amendment implied no such privilege. Over the coming decades, the Justice Department's internal guidelines tightly restricted the actual issuing of subpoenas to journalists, while lawyers for the newspaper industry were able to massage the ambiguities of the Supreme Court decision to convince a number of lower courts that a privilege did exist. But they were building on shaky precedent.⁵⁰ And when whistle-blowing protections were passed in the 1970s and 1980s to help encourage employee disclosure of government illegality or impropriety, they exempted the national security and intelligence agencies, and provided little protection to those disclosing classified information.⁵¹

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The only area of meaningful post-Watergate reform was the revision of the FOIA in 1974. Implementation of the 1966 act had revealed a number of problems. Ralph Nader thought FOIA was being "undercut by a riptide of agency ingenuity"; a congressional committee agreed that it had "been hindered by five years of foot-dragging by the federal bureaucracy." Agencies had considerable discretion to delay their response to requests, particularly when denials were challenged in court—it took, on average, 167 days for a FOIA case to come to resolution. The agencies could charge prohibitive finding fees and dismiss requests they considered to be imprecise. They relied heavily on the statutory exemptions to disclosure, and the courts were deferential to such claims if the material was classified. In 1974, the Supreme Court ruled that such deference was required.⁵²

The process frustrated researchers. When one requestor, Harrison Wellford, tried to access reports on pesticides filed with the Department of Agriculture, he was at first denied because he had not identified them clearly enough. Upon asking for indexes to help him identify the reports, he was denied this request because the indexes were interagency memoranda and thus exempt from disclosure. Wellford took the case to court, where, two years later, he won access to the reports. But then the department announced that it would cost \$91,840 to remove confidential information from the reports and prepare them for public release. "At that point," Wellford recalled, "we decided to try to find other means to get the infor-

mation." Such problems made the law next to useless for reporters working to deadline. A 1971 survey of 123 AP managing editors found that only 16 had used the law or even threatened to do so. FOIA was more valuable to corporations and private law firms, who could afford the costs and time delays if it allowed them to access commercially valuable information such as investigatory processes, or the details of successful contract bids.⁵³

In early 1973, bills to reform FOIA were introduced in both the Senate and the House. Despite unanimous agency opposition to the bills during hearings, both were reported favorably out of committee and went to conference for final drafting. The bills, in slightly different ways, made a number of changes to remedy the problems with FOIA: they established hard time limits within which agencies had to respond to FOIA requests, they allowed federal courts to award court and attorney costs to prevailing plaintiffs, they tightened the exemption on investigatory files, and they prevented agencies from withholding whole documents if they contained one piece of exempt information under a new principle that "reasonably segregable portions" of documents had to be disclosed once the exempt sections were deleted. Both bills also explicitly authorized judicial review of classification decisions to overturn the Supreme Court interpretation of the law. The Senate bill even tried to put teeth into FOIA by allowing the court to order the suspension of any federal official who had improperly withheld information.⁵⁴

As the conference committee hammered out a compromise bill, President Ford sent it a letter expressing his concern that the new bill imposed unreasonable requirements on the agencies, that the proposed penalty for employees was too harsh, and that the law undermined the classification system. To calm the president, and ward off a potential veto, some changes were made to the final bill. Most significantly, the potential sanction of suspension was abandoned, replaced with a watered-down provision that if the court believed the employee had acted "arbitrarily or capriciously" in withholding documents, it could order the Civil Service Commission to determine whether disciplinary action was warranted. And although the final language of the new national security exemption did make clear that courts had authority to review the act of classification, the conference report instructed future courts to "accord substantial weight" to agency representations about the need to keep classified information secret. Ford tried to veto even this watered-down bill. But it was not a propitious moment for a president to oppose a freedom of

information law. Nixon had stepped down as the conference committee was in session, and Ford's veto came a little over a month after his controversial pardon of the former president. In November, both the House and the Senate voted to override the veto, and the FOIA was amended.⁵⁵

The new FOIA was an improvement over its predecessor. After it went into effect in early 1975, FOIA requests quadrupled, and individuals began to have greater success accessing information. The ACLU, the AP, and the National Security Archive have been dogged in their use of the law. And whereas administrators had once been generally opposed to disclosure, a new generation of government employees came up in a climate more hospitable to transparency. In 1980, a number of FOIA personnel formed the American Society of Access Professionals (going by the clever acronym of ASAP) that worked to forge a culture of disclosure across agencies and between the government and FOIA requestors.⁵⁶

But problems remained. Delays were common, rendering FOIA less than helpful for reporters on deadline. While FOIA became an important tool for patient researchers, historians, and investigative journalists, it remained unwieldy. It was difficult to pry information loose from many agencies, and many a long-awaited document arrived heavily redacted, having fallen under one of the exemptions. By the early 2000s, only 6 percent of FOIA requests came from the media; 61 percent came from commercial interests. More fundamentally, FOIA remained a specific and delimited statute, subject to the expansion and contraction of classification with changing administrations. In 1994, the Clinton administration unilaterally declared that the National Security Council was not an agency, but a part of the presidency, and therefore immune from FOIA requests. One of FOIA's exemptions, moreover, applied to all material that was declared secret in another statute—in essence, the exemption could expand, accordion like, to cover more and more material. In 1984, the CIA Information Act exempted CIA operational files from FOIA; by 2003, the Department of Justice was citing 140 statutes as specific authority to withhold records under the exemption.⁵⁷ And courts remained deferential to state secrecy when asked to adjudicate on FOIA requests. By 1985, the Supreme Court had ruled in favor of disclosure in only two of the nineteen FOIA cases that had come before it. Agencies had developed two powerful new arguments to justify withholding information: they claimed that some material was so secret that even acknowledging its existence would harm national security, and they argued that even harmless pieces of information could be pieced together to form a mo-

saic picture that would aid enemies of the nation. As judges were asked to engage in speculation about potentially unknowable dangers, they deferred to claims of secrecy.⁵⁸

More broadly, the response to the excesses of the Nixon administration did not produce new rights to access information. The mid-1970s did see a brief flurry of jurisprudential and intellectual activity centered on the meaning of the press clause. In November 1974, Supreme Court justice Potter Stewart gave a famous address at the Yale Law School in which he argued that the existence of the press clause had to imply that the institutional press possessed greater First Amendment rights than the speech rights that were held by the general public. Superficially, Stewart's arguments seemed to suggest that he was the intellectual heir to Lippmann and Dewey, and that he was attempting to outline a positive notion of press freedom to complement the negative right to free speech. But in reality, Stewart was arguing that the press clause guaranteed the institutional press even greater autonomy from the state than the speech clause. He argued that the press could not be regulated like any other industry, that it could not be censored, that it should be protected from warrants and subpoenas. In 1973, Stewart had gone so far as to argue that an antidiscrimination statute that banned gender-specific job ads violated the First Amendment. (Stewart was part of a four-judge minority that nearly carried the day on this issue.) Stewart, in other words, continued to conceptualize press freedom in classical terms. He thought that guaranteeing a positive right to information would involve the state in the news-gathering process, and he joined majority decisions in the mid-1970s that found that the First Amendment did not grant the press a special right of access to prisons. In the 1970s, press freedom meant protection from government interference. Such protection was unprecedented, and the Supreme Court increasingly meant that the First Amendment guaranteed absolute autonomy, and nothing less than that, to all speakers, including the press. But the Supreme Court was also increasingly adamant that press freedom meant nothing more than the right to free speech.⁵⁹

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The era did produce real gains for freedom of expression. In 1964, a unanimous Supreme Court radically expanded First Amendment protections against libel claims. The particulars of the case emerged from the civil rights struggle—Alabama had brought libel claims against the *New York*

59. Alden Whitman to Irving Dilliard, May 24, 1956, box 5, folder 71, Alden Whitman Papers, New York Public Library (hereafter, Whitman Papers); Charles A. Perlik to Alden Whitman, February 28, 1957, box 4, folder 61, Whitman Papers; Minutes of Representative Assembly Meeting, January 30, 1957, box 154, folder 9: RA Minutes, 1956–1957, NGNY; Alden Whitman to George Rundquist, NYCLU, May 24, 1962, George Rundquist to Alden Whitman, June 12, 1962, both in box 4, folder 50, Whitman Papers; Brief for New York Civil Liberties Union, Amicus Curiae, Gerhard P. Van Arkel and George Kauffmann, Brief for the Petitioner, Alden Whitman v. USA, box 5, folder 83, Whitman Papers; Russell v. U.S., 369 U.S. 749, at 779 (1962); Alwood, *Dark Days in the Newsroom*, 100, 121–127; Ralph B. Novak to James O. Eastland, July 20, 1955, William J. Farson to IEB, July 25, 1955, both in box 94, folder 5: Executive Board 1955, NGNY; James Aronson, *The Press and the Cold War* (New York: Monthly Review Press, 1990), 134–135; “Red Stand Cleared, News Guild Feels,” *NYT*, July 28, 1955, 7; I. F. Stone letter, February 20, 1957, box 4, folder 61, Whitman Papers.

60. Jack Anderson and Ronald W. May, *McCarthy: The Man, the Senator, the “Ism”* (Boston: Beacon Press, 1952), 267; Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998), 67, 243, 263; Richard H. Rovere, *Senator Joe McCarthy* (New York: Harcourt, Brace, 1959), 166.

61. David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: Free Press, 1983), 108, 182, 186; Edwin R. Bayley, *Joe McCarthy and the Press* (Madison: University of Wisconsin Press, 1981), 15–19, 24–25, 67; Aronson, *Press and the Cold War*, 65–86.

62. Marquis Childs, “What Signs Threaten a Free Press?” *NR*, July 1951, 8; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton, 2004), 379; Alwood, *Dark Days in the Newsroom*, 69–73; Full Text of ASNE Report on Wechsler-McCarthy Case, *NR*, October 1953, 27–35; Bayley, *Joe McCarthy and the Press*, 142–145.

63. Stone, *Perilous Times*, 313; Cater, *Fourth Branch of Government*, 71, 73; Dozier C. Cade, “Witch-Hunting, 1952: The Role of the Press,” *JQ* 29 (1952): 396–407.

64. Truman, “Special Message to the Congress on Greece and Turkey”; “Press Called Key to Reds’ Tyranny,” *NYT*, August 15, 1953, 3; William Hachten, “The Press as Reporter and Critic of Government,” *JQ* 40 (1963): 17.

65. Davies, *Postwar Decline of American Newspapers*, 34–35; Harold L. Cross, *The People’s Right to Know: Legal Access to Public Records and Proceedings* (New York: Columbia University Press, 1953), xiv; George Penn Kennedy, “Advocates of Openness: The Freedom of Information Movement” (Ph.D. diss., University of Missouri–Columbia, 1978), 23, 29.

7. The Rise of State Secrecy

1. James S. Pope, “The Cult of Secrecy,” *NR*, October 1951, 8; James S. Pope, “Freedom Is Indivisible,” *NR*, January 1953, 30–31; “Award Honors Abolitionist

Editor Lovejoy,” *Chicago Defender*, September 6, 1952, 3; “JS Pope Gets Lovejoy Award,” *NYT*, October 5, 1952, 39.

2. *Availability of Information from Federal Departments and Agencies, Part 1: Panel Discussion with Editors, Hearings before a Subcommittee of the Committee on Government Relations*, 84th Cong. 4 (1955) (Statement of James S. Pope); “Defense Department Lifts Secrecy Curtain Slightly,” *EP*, July 27, 1957, 9; Wallace Parks, “Secrecy and the Public Interest in Military Affairs,” *George Washington Law Review* 26 (1957): 60; Peter Galison, “Removing Knowledge,” *Critical Inquiry* 31 (2004): 229–231.

3. Weber, for instance, famously noted that “every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of ‘secret sessions.’” See H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946), 233–235.

4. Edward Shils, *The Torment of Secrecy: The Background and Consequences of American Security Policies* (Glencoe, IL: Free Press, 1956), 36.

5. John Steinbeck, *Once There Was a War* (New York: Viking, 1958), xi–xii; Timothy L. Ericson, “Building Our Own ‘Iron Curtain’: The Emergence of Secrecy in American Government,” *The American Archivist* 68 (2005): 41; Arvin S. Quist, *Security Classification of Information*, vol. 1, 2002, 44, www.fas.org/sgp/library/quist; “A Recurrent Effort to Control the News,” *NYT*, October 24, 1947, 22; “Secrecy Modified on U.S. Material,” *NYT*, October 29, 1947, 56.

6. “New Order Due Soon on Federal Secrets,” *NYT*, September 9, 1951, 70; “Editors Object to Order,” *NYT*, September 26, 1951, 17; Harry S. Truman, “Executive Order 10290,” September 24, 1951, APP.

7. United States Commission on Government Security, *Report of the Commission on Government Security*, S.doc.64, at 155 (1957); Executive Order 10290; Anthony Leviero, “Yale Men ‘Acting Like Spies,’ Bared Grave Security Leaks,” *NYT*, October 14, 1951, 1; President’s News Conference, October 4, 1951, APP. The invocation of the Espionage Act in Executive Order 10290 and Executive Order 10501 was somewhat circuitous, adding to the general imprecision of secrecy law. See Harold Edgar and Benno C. Schmidt Jr., “The Espionage Statutes and Publication of Defense Information,” *Columbia Law Review* 73 (1973): 1052–1054.

8. “Editors Denounce Truman News Ban,” *NYT*, September 30, 1951, 39; “New Policy Is Due on Agencies Data,” *NYT*, June 14, 1953, 60; David Greenberg, “The Tale of the Upside-Down Recipe Cake: Harry Truman, the Press, and Executive Confidentiality in the Cold War Years,” in *Civil Liberties and the Legacy of Harry S. Truman*, ed. Richard S. Kirkendall (Kirksville, MO: Truman State University Press, 2013), 101–112; Dwight D. Eisenhower, “Executive Order 10501,” November 5, 1953, APP; Anthony Leviero, “Security Revision Raises Problems,” *NYT*, June 20, 1953, 5; “Eisenhower Issues New Security Code,” *NYT*, November 7, 1953, 1; *Report of the Commission on Government Security*, 162; David H. Morrissey, “Disclosure and Secrecy: Security Classification Executive Orders,” *Journalism and Mass Communication Monographs* (February 1997): 14–17.

9. Arthur Krock, "Truman's Press Views Mystify the Capital," *NYT*, October 7, 1951, 157; "Text of Truman Security Statement and Transcript of Discussion," *NYT*, October 5, 1951, 12; President's News Conference, October 4, 1951, APP.

10. James Russell Wiggins, *Freedom or Secrecy* (New York: Oxford University Press, 1956), 100; John F. Kennedy, "The President and the Press: Address before ANPA," April 27, 1961, www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/American-Newspaper-Publishers-Association_19610427.aspx; Creed C. Black to Pierre Salinger, July 31, 1963, folder: Freedom of Information 3b, box 143, Pierre Salinger Papers, John F. Kennedy Library, Boston; *Government Information Plans and Policies, Part 1: Hearings before a Subcommittee of the Committee on Government Operations*, 88th Cong. 9 (1963).

11. Edgar and Schmidt, "Espionage Statutes," 1026–1027; *Report of the Commission on Government Security*, 1, xxiii, 687–688; "Wright, Moss Expound Views on 'Leak' Law," *EP*, July 13, 1957, 10; "Text of Wright's Statement on Journalists and U.S. Security," *NYT*, July 1, 1957, 14; 85 Cong. Rec. A5155 (June 27, 1957); "2 in House Score Leak Proposals," *NYT*, June 24, 1957, 12; "Editorial," *EP*, June 29, 1957, 6; William A. Korn, "Secrecy and Security," *Editorial Research Reports*, August 7, 1957, 571; *Availability of Information from Federal Departments and Agencies, Part 8: Hearings before a Subcommittee of the Committee on Government Operations*, 85th Cong., 2044–2045 (1957); Committee on Classified Information, U.S. Department of Defense, *Report to the Secretary of Defense* (Washington, DC: Government Printing Office, 1957).

12. *Problems of Journalism: Proceedings of the 1948 Convention American Society of Newspaper Editors*, April 15–18, 1948, 241–242; Joseph Short to Maclean Patterson, November 5, 1951, folder: Executive Order Re Classified Information, 285-M, misc., box 928, Truman OF.

13. *Report of the Commission on Protecting and Reducing Government Secrecy*, S.Doc 105–2, at xxvi, 4, 35 (1997); Quist, *Security Classification of Information*, 6; Galison, "Removing Knowledge," 237.

14. *Government Information Plans and Policies, Part 1: Hearings before a Subcommittee of the Committee on Government Operations*, 88th Cong. 64 (1963); Arthur M. Schlesinger Jr., *The Imperial Presidency* (Boston: Mariner Books, 2004), 343; "Defense Department Lifts Secrecy Curtain Slightly," *EP*, July 27, 1957, 9; "Adm. Hoskins Given Job of Declassifying Secrets," *WP*, May 22, 1957, B11; Jason Ross Arnold, *Secrecy in the Sunshine Era: The Promise and Failure of US Open Government Laws* (Lawrence: University Press of Kansas, 2014), 21–22.

15. 82 Cong. Rec. S12508 (October 3, 1951); "Press Groups Ask Congress to Stem the Tide of Secrecy," *EP*, February 8, 1958, 9; James S. Pope to Joseph Short, copied to Benton, n.d., folder: Executive Order Re Classified Information, 285-M, misc., box 928, Truman OF; Arthur Krock, "The New Checks on Government Information," *NYT*, September 28, 1951, 28; "Security and News," *NYT*, October 6, 1951, 13.

16. According to the executive orders issued by Jimmy Carter, Bill Clinton, George W. Bush, and Barack Obama, the public interest in disclosure was to be considered when making declassification decisions, but not in the initial classification

decision. While Carter, Clinton, and Obama all encouraged classifiers to err on the side of openness when in doubt about whether to classify, they did not require positive weighing of a public interest in disclosure. See Executive Order 12065, Executive Order 12958, Executive Order 13292, and Executive Order 13526, all at APP.

17. *Report of the Commission on Protecting and Reducing Government Secrecy* (1997), 30.

18. Robert P. Deyling, "Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act," *Villanova Law Review* 37 (1992): 67–112.

19. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton, 2004), 312–426; Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Cambridge, MA: Schenkman, 1978), 285–369; John W. Caughey, "McCarthyism Rampant," in *The Pulse of Freedom: American Liberties: 1920–1970s*, ed. Alan Reitman (New York: W. W. Norton, 1975), 154–210.

20. *Dennis v. U.S.*, 341 U.S. 494, at 581 (1951).

21. Bernard A. Drabek, ed., *Archibald MacLeish: Reflections* (Amherst: University of Massachusetts Press, 1986), 165.

22. William S. White, "Files of Condon Loyalty Test Demanded by House Inquiry," *NYT*, March 3, 1948, 1; "Subpoena Seeks Data on Dr Condon," *NYT*, March 4, 1948, 8; "Harriman Holds up Report on Condon," *NYT*, March 5, 1948, 1; "President Orders Agencies to Bar Data on Loyalty," *NYT*, March 16, 1948, 1; Samuel A. Tower, "Atomic Committee Takes Up Charges against Dr Condon," *NYT*, March 7, 1948, 1; "House Bids Truman Yield Condon File; He Defies Demand," *NYT*, April 23, 1948, 1; "Memorandum Reviewing Inquiries by the Legislative Branch during the Period 1948–1953 Concerning the Decision Making Process and Documents of the Executive Branch," n.d., pp. 10–17, box 88, file: Executive Privilege 2, RC; James Reston, "Loyalty File Request Puts Hard Decision up to Truman," *NYT*, March 14, 1950, 4; "McCarthy Asserts Truman Is 'Afraid' to Release Files," *NYT*, April 10, 1950, 1; "President Opens 81 Loyalty Files to Senate Inquiry," *NYT*, May 5, 1950, 1.

23. 82 Cong. Rec. S12853 (October 9, 1951); "Legislator Scores Truman Gag Order," *NYT*, October 7, 1951, 82; "Bricker Deplores Order on Security," *NYT*, October 3, 1951, 4; *Individual Views of Mr. Jenner in Respect to the Report of the Committee on Rules and Administration Relative to the Maryland Senatorial Election of 1950*, S.Doc. 81 (1951); 82 Cong. Rec. S12933 (October 11, 1951); "Memorandum Reviewing Inquiries by the Legislative Branch during the Period 1948–1953," 102–108.

24. Samuel A. Tower, "President Upheld by Senate on Veto of Atom Inquiry Bill," *NYT*, May 22, 1948, 1.

25. While there were instances of withholding before the 1940s, they were different in scope, frequency, and character to what became codified as "executive privilege" after World War II. For an introduction to the historical debate about them, see Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy and Accountability*, 3rd ed. (Lawrence: University Press of Kansas, 2010); Raoul Berger, *Executive Privilege: A Constitutional Myth* (New York: Bantam, 1974).

26. Schlesinger, *Imperial Presidency*, 40–47, 155; Herman Wolkinson, “Demands of Congressional Committees for Executive Papers,” *Federal Bar Journal* 10 (1948–1949): 103–150, 223–259, 319–350.

27. “Senator Isirate: President Orders Aides Not to Disclose Details at Top-Level Meeting,” *NYT*, May 18, 1954, 1; “Texts of Eisenhower Letter and Brownell Memorandum,” *NYT*, May 18, 1954, 24; “Transcript of Presidential Press Conference,” *NYT*, May 20, 1954, 18; Robert Kramer and Herman Marcuse, “Executive Privilege: A Study of the Period 1953–1960,” *George Washington Law Review* 29 (1961): 669–687.

28. Clark Mollenhoff, “A Precedent the Press Should Examine,” *NR*, January 1956, 31; “Unnecessary Suspense,” *NYT*, May 18, 1954, 28; “Presidential Discretion,” *WP*, May 18, 1954, 14; Kramer and Marcuse, “Executive Privilege,” 827–916; JFK to John Moss, March 7, 1962, folder: Executive Privilege, box 22, Office Files of Harry McPherson, Lyndon B. Johnson Library, Austin, TX; Theodore C. Sorensen to Attorney General, March 30, 1962, folder: Executive Privilege 2, box 88, RC; Joseph W. Bishop Jr., “The Executive’s Right of Privacy: An Unresolved Constitutional Question,” *Yale Law Journal* 66 (1957): 477–491; Ramsey Clark, “Memorandum for the President,” December 9, 1964, file FE 14–1, box 25, WHCF.

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31. “Reston Sees No Conspiracy to Seal News,” *EP*, January 3, 1959, 45; “PR Releases Called Worse than Secrecy,” *EP*, April 9, 1960, 70; Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978), 170.

32. Gerhard Peters, “Presidential News Conferences,” APP, www.presidency.ucsb.edu/data/newsconferences.php.

33. Douglass Cater, *The Fourth Branch of Government* (Cambridge, MA: Houghton Mifflin, 1959), 39–41; William S. White, “Analyzing the ‘Adversary’ Relationship,” in *The Presidency and the Press*, ed. Hoyt Purvis (Austin: University of Texas, 1976), 10–12; “Presidential Press Parley Changes Advocated in Memo,” *EP*, December 3, 1960, 9; “Shop Talk at Thirty,” *EP*, February 25, 1961, 68.

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51. Wallace Parks, “The Open Government Principle: Applying the Right to Know under the Constitution,” *George Washington Law Review* 26 (1957): 10; Pope, “Freedom Is Indivisible,” 31.

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53. Wiggins, *Freedom or Secrecy*, 132; Wiggins, “Safeguarding the People’s Right to Know,” 80–81; Harold L. Cross, “Where Stands the Battle Line on Press Freedom?” *NR*, October 1954, 44–45.

54. Cross, *People’s Right to Know*, 128–129; *Availability of Information from Federal Departments and Agencies, Part 1: Panel Discussion with Editors, Hearings before a Subcommittee of the Committee on Government Relations*, 84th Cong. 36 (1955). On early American secrecy, see Sagar, *Secrets and Leaks*, 20–21; Rozell, *Executive Privilege*, 24; Gerald L. Grotta, “Philip Freneau’s Crusade for Open Sessions of the U.S. Senate,” *JQ* 49 (1971): 667–671.

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