of overclassification. This point was echoed by Schlesinger, who also expressed hesitation about the wisdom of relying on a "rebellious collaboration between anonymous and disgusted officials and the press." Since the rightness or wrongness of an unauthorized disclosure could be worked out only *after* such an action had already been undertaken, there was the danger, he warned, of too little or too much disclosure, depending on the proclivities of the officials and reporters involved. "Might it not be better," he asked, "to maintain the balance between secrecy and disclosure in a less nerve-racking way?"[190] To this end, he proposed two paths along which reform could proceed. The first was to establish "some form of appellate procedure" to help ensure that "classification decisions met standards of reason."[191] The second was to compel the president to "supply Congress the information necessary to responsible debate," for instance, by establishing "as a matter of law that CIA intelligence analyses be made available to the relevant committees."[192]

Schlesinger's analysis proved prescient. Emboldened by the widespread distrust of the presidency, Congress enacted two major changes in the institutional framework regulating the employment of state secrecy. In 1974, it amended FOIA to authorize the courts to examine classified records in camera in order to determine whether they legitimately qualified to be withheld under various national security exemptions. These amendments, adopted over President Gerald Ford's veto, effectively invited the courts to oversee the classification system. The other change was the creation of an intelligence oversight system in the form of the House Permanent Select Committee on Intelligence in 1977 and the Senate Select Committee on Intelligence in 1976.[193] Congress also passed the Hughes-Ryan Act in 1974 and the Intelligence Oversight Act in 1980, making it compulsory for the president to keep select members of Congress "fully and currently informed" of "significant anticipated intelligence activity," including covert operations.[194] Congress did not, however, bolster protection for the officials, reporters, and publishers responsible for transmitting unauthorized disclosures, declining, for instance, to establish a reporter's privilege to protect the identity of confidential sources or to revise the Espionage Act, which had been used to prosecute Daniel Ellsberg in the Pentagon Papers case.

In short order, however, it became clear that the enacted reforms had failed to challenge the president's control over the flow of secret information. During President Ronald Reagan's second term, citizens and lawmakers learned—once again via unauthorized disclosures—that the administration had secretly facilitated the sale of arms to Iran, covertly provided support to the Contras in Nicaragua in violation of the law, and utilized American media outlets to undertake a disinformation campaign

targeted at Libya. Representative Norman Mineta, a member of the House intelligence committee during this period, described Congress's position in memorable terms: "we are like mushrooms. They keep us in the dark and feed us a lot of manure."[195] Meanwhile, civil society activists discovered that judicial deference to the executive's claims about the harm likely to be caused by the disclosure of classified information meant that FOIA could not help them obtain access to seemingly basic information about the executive's activities—for example, the size of the intelligence budget. As Robert Deyling glumly reported in 1992 after surveying the empirical evidence, since the enactment of FOIA the courts had "ruled on hundreds of cases involving classified information, affirming the government's decision to withhold the requested information in nearly every case."[196]

These setbacks prompted further calls for reform. For instance, Harold Koh argued that Congress ought to delegate the oversight of national security matters to a "core group of members" comprising a handful of its highest-ranked officials: limiting the number of overseers would, he felt, make it harder for the president to refuse to share information on the grounds that Congress was prone to indiscretion.[197] Sissela Bok, meanwhile, argued that the level of concealment in American government had become "pathological" owing to a deficiency at the heart of FOIA, whose proponents had failed to see that allowing information to be withheld on national security grounds would enable conniving officials to defeat the realization of publicity. Citing Weber, Bok warned that laws such as FOIA "can serve the public well only if the exceptions to them are kept to a minimum and are prevented from expanding."[198] This point was reiterated by the Commission on Protecting and Reducing Government Secrecy (the Moynihan Commission), which concluded in 1997 that there was a pressing need for "some check on the unrestrained discretion to create secrets" and for an "effective mode of declassification." To this end, the commission recommended the establishment of an independent National Declassification Center to oversee "systematic declassification."[199] What the commission explicitly rejected, though, was the idea that unauthorized disclosures might serve as a means of countering overclassification. "There must be," Senator Daniel Moynihan declared, "zero tolerance for permitting such information to be released through unauthorized means."[200]

Barely had the ink dried on the Moynihan Commission's report than the onset of the so-called war on terror prompted the administrations of Presidents George Bush and Barack Obama to employ an array of covert capabilities. As events unfolded, it quickly became clear that the executive continued to maintain a stranglehold over the flow of information relating to the use of these capabilities. For instance, in 2002 Congress authorized the use of military force in the wake of assertions by officials that secret

intelligence revealed Iraq to be developing weapons of mass destruction and aiding terrorist organizations hostile to the United States. When these assertions eventually proved to be unfounded, members of Congress drew the conclusion that there had been "an exaggeration" of the threat.[201] According to Senator Dianne Feinstein, the episode underscored how vital it is for Congress to have "fairly presented, timely and accurate intelligence when they consider whether to invest in the President the authority as Commander-in-Chief to put American lives, as well as those of innocent civilians, at risk."[202] However, in spite of promises of closer oversight in the future, in 2006 a majority of the Senate intelligence committee found out about the NSA's warrantless wiretapping program only after the *New York Times* published a story on the program. Peeved, Senator Ron Wyden, a committee member, complained that he and his fellow senators had been forced to hire a news-clipping service to bring such reports to their notice. "My line," he is reported to have said, is "What do I know? I'm only on the Intelligence Committee."[203]

Congress is not the only branch to have struggled to oversee the president's secret activities during the war on terror. Over the past decade, the courts too have been hard-pressed to help citizens and lawmakers lift the veil on covert operations that have apparently violated the dignity and rights of individuals targeted in counterterrorism operations. For instance, FOIA has proven ineffective as a means of compelling the disclosure of documents detailing the treatment of suspected terrorists because judges continue to defer to the executive's assessment of the harm likely to be caused by disclosure of such information. This record has led critics such as Pallitto and Weaver to declare that judges have "abdicated" the role that FOIA intended for them to play—namely, to serve as independent assessors of classification decisions.[204] The courts have also proven unwilling to closely scrutinize the government's invocations of the state secrets privilege. As a result, complainants who have been subjected to extraordinary rendition and warrantless wiretapping have found themselves denied a forum in which to establish their claims and seek judicial remedy—a "harsh result" that has also attracted criticism from legal scholars.[205]

Not every regulatory mechanism has proven ineffective, though. To the extent that citizens and lawmakers have become aware of potential wrongdoing in the past decade—the establishment of secret prisons, the practice of extraordinary rendition, and the existence of warrantless surveillance programs—this has been due to unauthorized disclosures. The executive's response to this development has been unambiguous: the Bush and Obama administrations have together prosecuted more officials than all their predecessors combined.[206] Notably, neither Congress nor the courts have intervened strongly on behalf of either officials or

the press. On the contrary, lawmakers have routinely condemned such disclosures, while the courts have permitted legal action against officials and reporters to proceed. Not surprisingly, these developments have drawn strong criticism from First Amendment scholars such as Stone and Kitrosser, who have called for enhanced protection for officials and reporters on the grounds that the law currently "gives inordinate weight to secrecy at the expense of informed public opinion."[207] However, proposals of this variety have been fiercely opposed, most recently by Lillian BeVier and Schoenfeld, who argue that unauthorized disclosures are unacceptable because of the "injury to democratic rule when unelected individuals act to override the public will" as expressed by elected representatives.[208]

The Dilemma

To recapitulate: I began by asking why state secrecy is approved in principle and censured in practice. The prevailing explanation, as we have seen, blames the presidency for having exploited "popular fear" and "popular faith" during the Cold War to establish a secrecy system that it has since used to its advantage. The problem with this explanation, I have argued, is that the Framers clearly expected the executive to employ state secrecy. Hence the executive's real and imagined transgressions cannot simply be a product of war hysteria; they must derive from something more deep-seated than that. The real cause, we have seen, is a silence in the Framers' theory. The Framers authorized the president to employ secrecy in the public interest, but did not fully explain how citizens and lawmakers could know whether the president is in fact exercising this power responsibly. This silence did not produce lasting crises of confidence in the nineteenth century because the dearth of foreign entanglements afforded presidents little reason or opportunity to employ state secrecy extensively. However, once the United States immersed itself in international politics at the turn of the twentieth century, the concomitant increase in the scope and scale of secrecy magnified the impact of the Framers' silence.

This conclusion raises an obvious question. For more than half a century now, scholars have addressed the Framers' silence by pushing for reforms intended to loosen the president's stranglehold over the flow of secret information. Why, then, does American public life continue to be roiled by controversies over the employment of state secrecy? The problem, as we have seen, is that it is not easy to fill the Framers' silence. Contemporary efforts have arrived at an impasse. The regulatory mechanisms that have been championed in recent decades—the Freedom of

Information Act and the establishment of congressional oversight committees in particular—have proven ineffective at exposing wrongdoing. Meanwhile, the regulatory mechanisms that have proven effective at exposing wrongdoing—the practices of whistleblowing and leaking—are condemned as unlawful and therefore illegitimate. It turns out, in other words, that the available safeguards are either ineffective or undesirable.

Can this dilemma be solved? That is, is it possible to transform legislative oversight and judicial review into more *effective* checks on the employment of state secrecy? And if not, are there conditions under which the making of unauthorized disclosures by officials, reporters, and publishers can be defended as *legitimate*? These are the questions we shall examine going forward. What we shall find is that this dilemma is far harder to solve than commentators have hitherto recognized.