

5-1-2010

The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program

Kathleen Clark

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law and Politics Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. Rev. 357 (2010).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2010/iss2/8>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program

*Kathleen Clark**

ABSTRACT

This Article identifies mechanisms that help to hold the federal government's executive branch accountable for complying with the law, and shows how claims of national security secrecy undermine the effectiveness of these accountability mechanisms. It identifies four distinct stages in the process of accountability, sets out a typology based on the mechanisms' location inside or outside of government, and identifies some of the specific mechanisms that hold the executive branch accountable for violations of the law. These multiple overlapping mechanisms would appear to constitute a robust system of accountability.

A review of how this system of accountability operated in connection with the Bush Administration's warrantless surveillance program, however, reveals that all of these mechanisms share a common characteristic, which turns out to be a weakness: a dependence on the provision of information. Remove the information, and the entire structure of apparently robust accountability collapses. The executive branch was able to prevent these multiple accountability mechanisms from scrutinizing the warrantless surveillance program by asserting national security secrecy. This systematic weakness in the accountability

* Professor of Law, Washington University in St. Louis. kathleen@wustl.edu. I want to thank the participants in the Washington University Political Theory Workshop and law faculty workshops at the University of Pittsburgh, American University, and Washington University in St. Louis, as well as Steven Aftergood, Manuela Albuquerque, Sam Bagenstos, Cheryl Block, Mark Bovens, George Brown, Yongjin Chang, Robert Chesney, Adrienne Davis, Jill Delston, Rebecca Dresser, Steve Dycus, Mark Fenster, Louis Fisher, Amanda Frost, Tom Gallanis, Kathy Goldwasser, Leslie Griffin, Peter Joy, Dan Keating, Orin Kerr, Heidi Kitrosser, Robert Kuehn, Bruce LaPierre, Bill Lawry, Steve Legomsky, Douglas Letter, Ron Levin, Orly Lobel, Greg Magarian, Gregory Maggs, Peter Margulies, Larry May, Ian MacMullen, Gregory Maggs, Stanley Paulson, Peter Raven-Hansen, Todd Peterson, Andrew Rehfeld, Harold Relyea, Laura Rosenbury, Margo Schlanger, Ted Schneyer, Steven Schooner, Jonathan Siegel, Charles Tiefer, Steve Vladeck, and Chris Wells for their comments on earlier versions of the Article.

architecture has significant policy implications, including the need to recognize a crime-fraud exception to the state secrets privilege.

TABLE OF CONTENTS

I. INTRODUCTION.....	359
II. MEANING OF “ACCOUNTABILITY”	360
III. TYPOLOGY OF ACCOUNTABILITY MECHANISMS FOR THE EXECUTIVE BRANCH	362
A. Accountability Mechanisms that are Entirely Internal to the Executive Branch	364
1. Legal opinions	364
2. Internal investigations	366
B. Accountability Mechanisms that are Entirely External to the Executive Branch	369
1. Committee oversight	370
2. Government Accountability Office investigations ..	373
3. Intervention by a member of Congress on behalf of constituents	376
C. Accountability Mechanisms Located in Executive Branch but Based on Congressional Action	376
1. Congressionally created mechanisms within the executive branch	377
a. Inspectors General.....	377
b. Ombudspersons.	381
2. Congressionally created mechanisms within the executive branch that involve outside actors	384
a. Freedom of Information Act.....	384
b. Whistleblower protection.	385
c. Special Commissions.	387
IV. A CASE STUDY IN ACCOUNTABILITY: THE NATIONAL SECURITY AGENCY’S WARRANTLESS SURVEILLANCE PROGRAM.....	389
A. The NSA’s Warrantless Surveillance Program	390
B. Executive, Congressional, and Judicial Checks while the Surveillance Program Remained Secret	392
C. Congressional, Judicial, Executive and Public Responses to the Disclosure of the Program	396
V. IMPLICATIONS FOR CLAIMS OF NATIONAL SECURITY SECURITY.....	404
VI. CONCLUSION	406

APPENDIX: EXECUTIVE BRANCH OFFICIALS PROSECUTED FOR MISLEADING CONGRESS (1949 – PRESENT)	408
---	-----

I. INTRODUCTION

Several Democratic members of Congress and human rights organizations have called for establishing a “truth commission” to investigate the Bush Administration’s interrogation and warrantless surveillance policies.¹ Others advocate criminal investigation and even prosecution of Bush Administration officials who authorized these policies.² Republican legislators and some commentators oppose any commission or criminal investigation of Bush Administration policies, arguing that they would constitute an attempt by those currently in power to criminalize their policy differences with predecessors.³ President Obama also opposes a truth

1. *See, e.g.*, Patrick Leahy, *The Case for a Truth Commission*, TIME, Mar. 2, 2009, at 25, available at <http://www.time.com/time/magazine/article/0,9171,1880662,00.html>; JUAN E. MÉNDEZ ET AL., STATEMENT ON COMMISSION RELATING TO DETENTION, TREATMENT, AND TRANSFER OF DETAINEES, <http://www.constitutionproject.org/manage/file/317.pdf> (last visited Mar. 1, 2010) (endorsed by Amnesty International USA, Human Rights First, and sixteen other organizations). While President Bush repeatedly asserted that the harsh techniques he authorized did not amount to torture, *see, e.g.*, Michael A. Fletcher, *Bush Defends CIA’s Clandestine Prisons: ‘We Do Not Torture,’ President Says*, WASH. POST, Nov. 8, 2005, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700637.html>, at the end of the Bush Administration, a Pentagon official publicly acknowledged that the treatment of at least one prisoner at Guantanamo amounted to torture. Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A1 (“We tortured [Mohammed al-]Qahtani,” said Susan J. Crawford, in her first interview since being named convening authority of military commissions by Defense Secretary Robert M. Gates in February 2007.”).

2. *See, e.g.*, Q&A: Jonathan Turley on Holding Bush and Cheney Accountable, posting of Tony Mauro to The BLT: The Blog of LegalTimes, <http://legaltimes.typepad.com/blt/2008/12/qa-jonathan-turley-on-holding-bush-and-cheney-accountable.html> (Dec. 23, 2008, 13:39 EST).

3. Senator Kit Bond stated that a Truth Commission is “Third World country-type stuff . . . where you go in and prosecute; if you lose an election you get prosecuted.” Margaret Talev & Marisa Taylor, *Will Obama Back ‘Truth Commission’ to Probe Bush Practices?*, MCCLATCHY NEWSPAPERS, Feb. 20, 2009, <http://www.mcclatchydc.com/homepage/v-print/story/62575.html>. Stuart Taylor argues that criminal prosecutions would hinder any search for truth because witnesses will plead the Fifth Amendment rather than provide evidence. Stuart Taylor, Jr., *The Truth About Torture*, NEWSWEEK, July 21, 2008, at 36. Kenneth Anderson argues that a “truth commission” would be “little more than political payback.” Posting of Kenneth Anderson to New York Times Room for Debate Blog,

commission, stating that he prefers to look forward rather than backward.⁴

Is it necessary or appropriate to hold Bush Administration officials accountable for their actions through a criminal or commission investigation? This Article contributes to the debate on this issue by placing it in a broader theoretical context and by examining the degree to which accountability mechanisms operated effectively during the Bush Administration. Commission and criminal investigations are just two of the many mechanisms that can hold the executive branch—and its officials—accountable for violations of the law.

Part II of this Article explains, on the level of theory, what is meant by legal accountability and it identifies four distinct stages of accountability. On a more concrete level, Part III identifies some of the most important mechanisms that hold the U.S. executive branch accountable for violations of the law and sets out a typology of those mechanisms.⁵ Part IV examines how those mechanisms operated in connection with the Bush Administration's warrantless surveillance of domestic communications. While the legal opinion function eventually held the executive branch in check, most of the other accountability mechanisms did not operate effectively in connection with the warrantless surveillance program because of claims of national security secrecy. Part V discusses the implications of this case study for evaluating executive branch claims of national security secrecy where those claims would undermine accountability.

II. MEANING OF "ACCOUNTABILITY"

This Article uses the term, "accountability," to refer to the process of accounting for one's actions to someone else.⁶ To fully describe the process of accountability, it is necessary to identify:

<http://roomfordebate.blogs.nytimes.com/2009/03/02/a-truth-commission-for-the-bush-era/?pagemode=print> (Mar. 2, 2009, 12:24 EST).

4. David Johnson & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, N.Y. TIMES, Jan. 11, 2009, at A1.

5. This Article does not address international mechanisms that attempt to hold the executive branch accountable for illegal conduct, such as the International Committee of the Red Cross or the possibility of foreign prosecution of U.S. officials who commit war crimes.

6. Rob Jenkins, *The Role of Political Institutions in Promoting Accountability*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 135, 136 (Anwar Shah ed., 2007); see also Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999) ("[A]ccountability refers to the implicit

- the party giving the account or explaining its conduct (the accountor),
- the party who receives the account (the account-recipient⁷),
- the type of information provided,
- the processes used, and
- the possible consequences available.⁸

The focus of the accounting might be compliance with legal norms, an employer's norms, social norms, or moral norms.⁹ This Article addresses legal accountability: whether the federal government's executive branch complies with the law and the mechanisms that monitor such compliance.¹⁰ For the purposes of this Article, the accountor may be the executive branch itself, a particular agency within the executive branch, or an executive branch official. Some accountability mechanisms—such as a civil lawsuit—can operate directly against the executive branch or indirectly on the executive branch through an officeholder. The account-recipient may be a governmental body, such as an Inspector General, a congressional committee, or a court; or may be an outside institution, such as the press. The information generally includes facts regarding the accountor's actions, the surrounding circumstances, and arguments about whether those actions were proper.

The process of accountability has four distinct stages. The first stage is *informing*: the accountor provides information relating to its conduct. Informing can occur through *self-reporting*, where the accountor voluntarily provides this information, or through *discovery*, where the account-recipient is in a position to require the accountor

or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others . . .").

7. Mark Bovens refers to the account-recipient as the account-forum. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 450–51 (2007). Other authors refer to it as account-holder.

8. Jerry Louis Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 120 (Michael Dowdle ed., 2006) (identifying the final component as identifying possible sanctions); Bovens, *supra* note 7, at 451–52 (referring to “consequences” rather than “sanctions.”).

9. *See, e.g.*, Mashaw, *supra* note 8, at 119 (discussing legal, market-based and social accountability regimes).

10. *Cf.* Bovens, *supra* note 7, at 456 (defining “legal accountability” as accountability rendered through court proceedings).

to provide the information.¹¹ The second stage is *justification*, where the accountant attempts to defend the legality of its conduct. The third stage is *evaluation*, where the account-recipient evaluates the accountant's conduct. And the final stage is *rectification*, an account-recipient's response (such as a penalty or other remedy) when it is dissatisfied with the proffered justification.¹² Rectification may serve any of several distinct purposes: incapacitation (preventing the officeholder from engaging in similar activity by removing him from office), deterrence (punishing the officeholder in order to deter him or other officeholders from engaging in similar activity), compensation (paying those harmed by the illegal conduct for the harm they suffered), or symbolic expression (authoritatively stating that what occurred was illegal).¹³

Some accountability mechanisms include multiple stages of accountability. Civil lawsuits, for example, involve discovery, justification, evaluation, and rectification. Other mechanisms, such as the Freedom of Information Act and mandatory reporting statutes, involve only a single stage, providing only partial accountability.¹⁴ A single mechanism that provides only partial accountability may work in concert with other mechanisms to effectuate all four stages of accountability.

III. TYPOLOGY OF ACCOUNTABILITY MECHANISMS FOR THE EXECUTIVE BRANCH

Accountability mechanisms can build on each other, such as when the leak of a controversial Justice Department memo and investigative journalists' news stories led to more intensive

11. Cf. Mashaw, *supra* note 8, at 118–19 (referring to self-reporting and discovery as two distinct stages of accountability). Mark Bovens has adopted a narrower definition of accountability, including only those mechanisms in which the accountant is obligated to disclose information. Bovens, *supra* note 7, at 450.

12. Other writers have divided the accountability process differently. Rob Jenkins refers to both discovery and justification as “answerability.” Jenkins, *supra* note 6, at 138–39. Richard Mulgan includes justification in the self-reporting stage. Richard Mulgan, *The Processes of Public Accountability*, 56 AUSTL. J. PUB. ADMIN. 25, 27 (1997) (“reporting . . . may . . . involve explanation and justification of actions that have been taken”).

13. Cf. Jon Elster, *Accountability in Athenian Politics*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 253, 276 (Adam Przeworski et al. eds., 1999) (“I have distinguished between two purposes of accountability: incapacitation and deterrence.”).

14. See Mulgan, *supra* note 12, at 26.

congressional scrutiny of executive branch treatment of prisoners;¹⁵ or can interfere with each other, such as when an investigating congressional committee grants use immunity to a witness invoking the Fifth Amendment, and that immunity undermines the ability to prosecute that witness.¹⁶ In evaluating the effectiveness of the various accountability mechanisms, we need to be cognizant of the fact that a mechanism may be effective even if it operates at only one of the four stages of accountability. A Freedom of Information Act disclosure will not by itself remedy illegal activity by the executive branch. But such a disclosure may nonetheless be an integral part of the entire accountability process if there are other mechanisms that evaluate the government's justification for its action and can seek a remedy for any wrongdoing.¹⁷

To get a handle on the range of accountability mechanisms that can hold the executive branch accountable for complying with the law, this section sets out a typology of them, based on their location, ranging from those that are:

- (A) entirely internal to the executive branch (such as legal opinions from the Office of Legal Counsel);
- (B) entirely external to the executive branch (such as investigations by congressional committees); and
- (C) located (at least partially) within the executive branch, but acting pursuant to a congressional mandate.

Thus, this Article distinguishes mechanisms that are purely internal executive branch mechanisms from those that are located in the

15. See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1013 (2008).

16. See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991) (reversing John Poindexter's convictions because prosecution witnesses had reviewed his immunized testimony before the congressional Iran-Contra Committee); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *modified on reh'g*, 920 F.2d 940 (D.C. Cir. 1990) (vacating Oliver North's conviction on the same grounds); LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1993) (noting that the Court of Appeals decisions "makes a subsequent trial of any congressionally immunized witness virtually impossible" (quoting *United States v. North*, 910 F.2d at 924 (Wald, C.J., dissenting))).

17. Mulgan, *supra* note 12, at 31, 35 (recommending a "multi-channelled approach to public accountability," and noting that "there is no reason to expect any one institution to fulfil [sic] all the functions of accountability").

executive branch but have been created by Congress through statutory enactments.¹⁸

*A. Accountability Mechanisms that are Entirely
Internal to the Executive Branch*

The prototypical accountability mechanism may well be the congressional investigation of the executive branch, with that branch having to explain and justify to someone outside of itself its conduct.¹⁹ But certain accountability mechanisms are entirely internal to the executive branch. This section describes two of those mechanisms: legal opinions and internal investigations.

1. Legal opinions

One example of a purely executive branch accountability mechanism is the practice of obtaining a legal opinion about questionable conduct prior to engaging in that conduct. Under the Constitution, the President can require a written opinion from the head of each department,²⁰ and by statute, Congress requires the

18. Others who have examined accountability mechanisms have missed this important distinction. For example, in a 2006 essay, Neal Katyal indicated that he would outline “a set of mechanisms that create checks and balances within the executive branch,” and he identified four such mechanisms:

- overlapping jurisdiction among departments (e.g., State and Defense Department) which may cause them to have competing conceptions of proper policy;
- requirements that the executive branch report particular information to Congress;
- civil service protection for most employees, insulating them from partisan political control; and
- a dissent channel for State Department employees who disagree with current policy.

Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006). But the first three of these mechanisms have their origin in Congress, not in the executive branch. Congress sets out in statute the jurisdiction of each of the cabinet departments, so jurisdictional overlap is the result of congressional action. Congress also created civil service protection and the reporting requirements, which usually require that the information be delivered straight to Congress. So while these three mechanisms are located in the executive branch, they are by no means purely internal to the executive branch. Only the State Department's dissent channel is purely internal to the executive branch, established by Department regulations rather than by statute and with reports staying within the Department. See 2 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 070 (1998). The dissent channel is limited to dissent on substantive foreign policy issues, and is not for concerns about alleged violations of law. *Id.* at 071.2.

19. See MORTON ROSENBERG, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995), available at <http://www.fas.org/sgp/crs/misc/95-464.pdf>.

20. U.S. CONST. art. II, § 2.

Attorney General to provide legal advice to the President and other department heads.²¹ By regulation, the Attorney General has delegated this responsibility to the Office of Legal Counsel (OLC).²²

The practice of obtaining legal advice can help ensure that an actor stays within the limits of the law. If an agency wishes to engage in particular action and requests a legal opinion from OLC, it may learn that the proposed action would be illegal. Looking at this situation through the lens of accountability, the agency involved is the accountor and OLC is the account-recipient. This opinion-writing function partakes of several different stages of accountability: self-reporting (when an agency provides OLC with information about its proposed conduct), discovery (if the Justice Department seeks additional information about the proposed conduct), justification (if the agency provides an argument for the legality of its proposed action), and evaluation (when OLC evaluates that proposed justification and decides whether the proposed action is legal).

While courts and commentators generally assume that allowing a client to keep legal advice secret helps to ensure that clients comply with the law,²³ recent history shows that such secrecy can be perverted to facilitate wrongdoing and undermine legal accountability. In 2002, OLC issued a legal opinion concluding that despite Congress's enactment of a criminal law prohibiting torture, executive branch officials could nonetheless legally torture prisoners as long as the President authorized it.²⁴ Both during its drafting and after it was issued, this opinion was closely held within the executive branch. By limiting internal circulation of the opinion, the Bush Administration was able to delay the leaking of its improper conduct and limit internal criticism.²⁵ A 2009 Justice Department report

21. 28 U.S.C. §§ 511–12 (2006).

22. 28 C.F.R. § 0.25(a) (2010).

23. *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (asserting that the attorney-client privilege “promote[s] the broader public interest[] in the observance of law”); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (“Courts frequently have asserted the argument that the privilege furthers societal interests in law compliance”). *But see* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 29 (1998) (criticizing *Upjohn's* analysis).

24. Memorandum from Jay S. Bybee, Asst. Atty. General, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

25. *See infra* Part III.C.2.b. (internal whistleblowing).

noted that internal circulation and review of the opinion were “deficient,” that the limitations on circulating the opinion “were, in part, based on the limited number of security clearances granted to review the materials,” and that “[t]his denial of clearances to individuals who routinely handle highly classified materials has never been explained satisfactorily.”²⁶ Until the opinion was leaked, the Bush Administration was able to rely on the opinion as the basis for its policy of torturing prisoners allegedly connected to al Qaeda, and effectively immunize government officials from later prosecution for their actions.²⁷ Eventually, the Washington Post obtained the opinion and, on June 14, 2004, published it on its website.²⁸ There was an immediate public uproar because of the opinion’s dubious legal justification of torture and extreme claims about executive power.²⁹ Nine days after the Washington Post published the opinion, the Justice Department officially withdrew it,³⁰ eventually replacing it with a more narrowly drawn opinion.³¹ But until it was leaked, the secrecy of the 2002 opinion enabled the Bush Administration to subvert this accountability mechanism, transforming it from a mechanism preventing illegality to one enabling it.³²

2. *Internal investigations*

Another accountability-related practice involves conducting an internal investigation to determine whether there has been wrongdoing. Internal investigations generally partake of several

26. U.S. Dep’t of Justice Office of Prof’l Responsibility, Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 259–60 (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

27. David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 55–57 (Karen J. Greenberg ed., 2006).

28. See David Ignatius, *Small Comfort*, WASH. POST, June 15, 2004, at A23.

29. See, e.g., Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B03. For a more detailed critique of the opinion, see Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J.L. & NAT’L SEC. L. & POL’Y. 455 (2005).

30. Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed: Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A01.

31. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Asst. Attorney General, *Legal Standards Applicable Under 18 U.S.C. 2340-2340A* (Dec. 30, 2004).

32. See Sudha Setty, *No More Secrets Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 593 (2009).

stages of accountability: discovery (when an agency investigates allegations of wrongdoing by interviewing witnesses and gathering evidence), justification (when agency officials provide an argument for the legality of their past action), and evaluation (when the investigator analyzes the legality of the conduct, advises another executive branch official about factual and legal conclusions, and recommends a response).³³ In many executive branch agencies, Congress has created a specific office—the Inspector General—to conduct such investigations of alleged wrongdoing.³⁴ However, even executive branch agencies that lack an Inspector General can conduct their own internal investigations. For example, after the Clinton Administration fired seven White House travel office employees, there were allegations that the firings had been motivated by a desire to outsource travel services to an Arkansas company with ties to the Clintons. The White House responded by conducting an internal investigation, resulting in an 80-page public report and reprimands against four White House officials.³⁵

An example of a national security-related internal investigation was the CIA's 1973 investigation of its own illegal conduct. Prompted by press reports that the CIA had provided assistance to Watergate burglars, CIA Director James Schlesinger sent a memorandum to all CIA employees, directing them to report on all CIA activities that “might be construed to be outside the legislative charter of this Agency.”³⁶ This investigation resulted in a nearly 700-page report (known as the “Family Jewels”) detailing illegal activities.³⁷

33. Internal investigations occur in the private sector as well, and federal law has given private sector organizations an incentive to engage in and set up an institutional structure for such internal investigations in order to ferret out wrongdoing. *See, e.g.*, U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8B2.1 (2009) (requiring organizations to establish effective compliance and ethics programs); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of the U.S. Code).

34. *See* discussion of Inspectors General, *infra* Part III.C.1.

35. Thomas L. Friedman, *White House Rebukes 4 In Travel Office Shake-Up*, N.Y. TIMES, July 3, 1993, at 11.

36. James R. Schlesinger, Memorandum for All CIA Employees (May 9, 1973), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/schlesinger_jewels.pdf.

37. National Security Archive, *The CIA's Family Jewels*, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm>. This report became known as the “Family Jewels.” CIA Releases Two Collections of Historical Documents, June 26, 2007, <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/cia-releases-two-collections-of-historical-documents.html> (indicating that this collection of

An internal executive branch institution that has the potential to serve as an accountability mechanism is the Justice Department's Office of Professional Responsibility (OPR). OPR was created in 1975 in response to the "ethical abuses and misconduct by Department of Justice officials in the Watergate scandal," and investigates allegations relating to the professional ethics, competence, and integrity of Justice Department attorneys.³⁸ If OPR finds misconduct, it recommends a range of punishments for the attorney's supervisor to impose and "ordinarily" informs state bar disciplinary authorities of its finding.³⁹ In the past, OPR disclosed summaries of the cases where it found professional misconduct and issued annual reports with statistical data. But under the Bush Administration, OPR stopped providing such summaries, and its last annual report was for the fiscal year ending in September of 2007.⁴⁰ OPR investigations can entail long delays, and the head of OPR, who is appointed by the Attorney General, lacks the independence and stature of an arguably more effective account-holder, the Justice Department's Inspector General, who is appointed by the President and confirmed by the Senate. It is difficult to assess the effectiveness of OPR because it usually keeps the results of its investigations secret. Recently, however, OPR teamed up with the Justice Department's Inspector General (IG) to investigate politicized hiring and firing at the Justice Department, producing four public reports.⁴¹ The investigation found that Justice Department officials

documents is referred to as the "Family Jewels"). Another momentous national security-related internal investigation, the multi-volume history of the Vietnam War (the "Pentagon Papers"), focused not on illegality, as such, but on policy missteps. DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 19-21* (1996) (discussing Secretary of Defense Robert McNamara's motivations for commissioning the study).

38. U.S. DEPARTMENT OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY POLICIES AND PROCEDURES (July 25, 2008), *available at* <http://www.usdoj.gov/opr/polandproc.htm> [hereinafter OPR POLICIES & PROCEDURES]; Office of Professional Responsibility Organizational Chart, <http://www.usdoj.gov/jmd/mps/manual/opr.htm#orgchart>.

39. OPR POLICIES AND PROCEDURES, *supra* note 38.

40. See Richard B. Schmitt, *More Scrutiny, Secrecy at Justice*, L.A. TIMES, July 6, 2008, at A14 (noting that in 2001, the Justice Department reversed its policy of publicly disclosing summaries of cases where OPR found professional misconduct); OPR Annual Reports Home Page, <http://www.justice.gov/opr/reports.htm> (last visited Aug. 19, 2009).

41. U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), *available at* <http://www.justice.gov/opr/oig-opr-iaph-crd.pdf>; U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), *available at* <http://www.justice.gov/opr/us-att-firings-rpt092308.pdf>; U.S. DEP'T OF

had violated federal law by improperly considering job candidates' political and ideological affiliation when hiring for career positions. They identified specific officials who had engaged in wrongdoing, and recommended changing certain Department policies to make recurrence less likely.⁴²

This kind of purely internal executive branch investigation has a significant advantage. Claims of national security secrecy will not prevent the investigator from gathering the relevant information if a high-level executive branch official commissions the investigation.⁴³ A downside, however, is that the results may be closely held within the executive branch. Most of the "Family Jewels" were kept secret for more than three decades, and some of the information is still secret.⁴⁴ Also, if the person directing the internal investigation has a vested interest in finding no illegality, the investigation may turn out to be—or be perceived as—a "whitewash."⁴⁵

B. Accountability Mechanisms that are Entirely External to the Executive Branch

Some accountability mechanisms are entirely external to the executive branch. These include some entirely extra-governmental

JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) (hereinafter *POLITICIZED HIRING BY MONICA GOODLING*), available at <http://www.justice.gov/opr/goodling072408.pdf>; U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (2008), available at <http://www.justice.gov/opr/oig-opr-investigation-hire-slip.pdf>.

42. See, e.g., *POLITICIZED HIRING BY MONICA GOODLING*, *supra* note 41, at 135–39.

43. Cf. *infra* Part III.C (discussing a security clearance issue which stymied the Justice Department Inspector General's investigation of NSA's domestic spying operation).

44. See David Corn, *Where's the CIA's Missing Jewel?*, *THE NATION*, CAPITAL GAMES BLOG, <http://www.thenation.com/blogs/capitalgames/208296> (June 26, 2007, 17:25 EST).

45. After the Justice Department's disastrous 1993 raid on the Branch Davidian compound in Waco, Texas, the Department conducted an internal investigation, EDWARD S.G. DENNIS, JR., *EVALUATION OF THE HANDLING OF THE BRANCH DAVIDIAN STAND-OFF IN WACO, TEXAS: FEBRUARY 28 TO APRIL 19, 1993* (1993), but it was perceived by some to be a whitewash of departmental wrongdoing. See *The Waco Whitewash*, *N.Y. TIMES*, Oct. 12, 1993, at A22, available at <http://www.nytimes.com/1993/10/12/opinion/the-waco-whitewash.html?pagewanted=1>. Eventually, after revelations that the earlier investigation failed to uncover all relevant information, the Department brought in an outsider to conduct another investigation. See JOHN C. DANFORTH, *INTERIM REPORT TO THE DEPUTY ATTORNEY GENERAL CONCERNING THE 1993 CONFRONTATION AT THE MT. CARMEL COMPLEX WACO, TEXAS*, at ii (2000), available at <http://www.cesnur.org/testi/DanforthRpt.pdf>.

bodies, such as the press and nongovernmental organizations, but many are located in the legislative branch.⁴⁶ This section discusses some of those mechanisms.

Members of Congress have several tools to bring the executive branch to account. For instance, Congress has the ability to gather information about the executive branch, both informally—through, for example, written requests to an executive branch official for answers to particular questions—and formally through Committee investigation with subpoenas for public testimony and the disclosure of documents. Other Congress-based accountability mechanisms include impeachment, investigation and reporting by the Government Accountability Office, and statutory causes of action against the executive branch or executive branch officials.⁴⁷

1. *Committee oversight*

Congressional committee oversight has been a key accountability mechanism since 1946, when Congress passed legislation directing committees to engage in oversight activities.⁴⁸ Committee oversight

46. In theory, elections could serve as a legal accountability mechanism for a first-term president, or even for a second term president who wishes to see his party continue to control the executive branch. See RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 45 (2003) (“Elections set the outer limits of acceptable government behavior . . .”). But their primary focus is political accountability rather than legal accountability. *Id.* at 41–44. In addition, “voters think of elections much more as opportunities to try to select good types” rather than as a method of holding elected officials accountable. James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 82 (Adam Przeworski et al. eds., 1999); see also Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079 (2005) (“[I]ntermittent, highly contested elections are simply very poor devices for holding a person accountable. Most electoral democracies present the voters with only two or three realistic choices, which means that a multitude of issues must map into a small decision set.”).

47. Congressional oversight can be divided into direct oversight, which refers to the review of executive branch activities by congressional appropriations and authorizing committees, and indirect oversight, which refers to the many mechanisms by which Congress enables *other actors* to review executive branch activities, including establishment of the Government Accountability Office and Inspectors General, requirements that the executive branch disclose information about its activities, and the authorization of private causes of action against the executive branch. For a description of “fire-alarm oversight,” see Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

48. See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, L. & CONTEMP. PROBS., Autumn 1991, at 205, 207 (citing the Legislative Reorganization Act of 1946, 60 Stat. 832 (1946) (codified at 2 U.S.C. § 190(d) (1982))).

can partake of all stages of accountability: informing (through hearings, subpoenas, and informal information requests), justification (when agency officials argue for the legality of past action), evaluation (when the committee issues a report assessing whether the executive branch has violated the law), and rectification (when Congress enacts legislation in response). The primary function of committee oversight processes is to gather information about executive branch activities, which Congress can then use to administer course corrections if necessary.

Committee oversight is often a powerful tool for gathering information from the executive branch, but it comes with special challenges. While Congress may use its contempt power and court processes to obtain information from those outside the executive branch, its ability to compel disclosure from the executive branch is more circumscribed.⁴⁹ Every year, the executive branch issues thousands of reports to Congress as mandated by statute and provides additional information in response to specific congressional requests.⁵⁰ But at times, the executive branch successfully resists congressional attempts to obtain sensitive information, such as that relating to intelligence or protected by a privilege. Where there is conflict regarding congressional information requests, Congress and the executive branch usually come to an accommodation.⁵¹ Sometimes Congress gets the information it seeks, but not always. In addition, executive branch officials sometimes provide misleading responses to congressional requests for information, which can frustrate Congress's oversight efforts, particularly if the deception goes unpunished.⁵²

49. See generally MORTON ROSENBERG & TODD B. TATELMAN, CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE (2008), available at <http://www.fas.org/sgp/crs/misc/RL34097.pdf>.

50. See CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, REPORTS TO BE MADE TO CONGRESS, H.R. Doc. No. 110-4 (2007) (indicating that the Congress required the President and cabinet agencies to issue 3,066 reports to Congress); Memorandum from Adam Hilkemann, Research Assistant, Wash. U. in St. Louis Sch. of Law, to author, *Re: Number of Mandatory Reports to Congress from the Executive Branch* (June 10, 2008) (on file with author) (indicating that in 2007, Congress required the executive branch to provide over 3000 reports to Congress).

51. See generally Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992).

52. A related issue is whether executive branch officials are held accountable for misleading Congress. Several criminal statutes prohibit misleading Congress, but only the executive branch can bring criminal prosecutions against those who violate those statutes. In the last sixty years, nineteen executive branch officials have been prosecuted for misleading

Executive branch officials can justify their actions by testifying at congressional hearings or writing letters to Congress, and Congress can evaluate the proposed justification. If Congress concludes that the executive branch has engaged in wrongdoing, it may be able to “generate overwhelming political pressure” for the executive branch to take corrective action,⁵³ or it can require executive action by enacting a statutory mandate. For example, in the wake of a congressional investigation of the Bush Administration’s firing of nine U.S. Attorneys, Congress enacted a new statute limiting the President’s ability to replace U.S. Attorneys without consulting Congress.⁵⁴ At the extreme, if presidential wrongdoing is so serious that it would constitute “high crimes or misdemeanors,” Congress has the option of impeaching and removing the President.⁵⁵

In general, congressional committee oversight may be more robust or intensive when the political party that opposes the President controls Congress.⁵⁶ Recent history seems to be consistent

Congress. *See infra* APPENDIX. Most of those cases were brought by prosecutors who were not under the political control of the President: Watergate Special Prosecutor Leon Jaworski prosecuted three of them and Independent Counsels prosecuted nine others. *Id.* A politically independent prosecutor was available during only about a third of that time period. The Office of Watergate Special Prosecutor existed from 1973 until 1976, and the Independent Counsel statute was authorized for a five-year term on four occasions, for a total of 20 years. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. § 591 (2006)); Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 2, 96 Stat. 2039 (1982); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987); Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994). The disproportionate share of prosecutions by politically independent prosecutors suggests that the Justice Department is ordinarily disinclined to prosecute executive branch officials for misleading Congress.

53. MULGAN, *supra* note 46, at 62; *see also id.* at 54-55 (“Legislative committees . . . lack the final power of *rectification*, except indirectly through the force of publicity and political pressure.”).

54. *See* HOUSE COMMITTEE ON THE JUDICIARY MAJORITY STAFF REPORT TO CHAIRMAN JOHN CONYERS, JR., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 13 (Jan. 13, 2009), *available at* <http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf>.

55. U.S. CONST. art. II, § 4.

56. *See generally* David C.W. Parker & Matthew M. Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947-2004*, 34 LEGIS. STUD. Q. 319 (2009) (explaining that divided government is associated with an increase in the number of congressional investigations). *But see* DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002*, at 31 (2005) (explaining that divided government does not increase the number of high profile congressional investigations). Brendan Nyhan has conducted a particularly rigorous analysis of this empirical question, and noted that the Independent Counsel statute likely had a confounding effect on the question. Brendan Nyhan, *Does Divided Government Increase Presidential Scandal?* (unpublished paper

with that conclusion. The level of congressional oversight jumped significantly when the opposition Democrats took control of Congress after the 2006 mid-term elections.⁵⁷

Ordinarily, both appropriations and authorizing committees within the House and Senate review executive branch activities and receive information about major initiatives through the budget process. The proposed budget is available not just to all members of Congress, but also to the public generally, and can be an important source of information about the workings of the executive branch. An important exception, however, is the budget for intelligence operations. The intelligence budget is hidden within the Defense Department budget, and only the House and Senate Intelligence committees—not the appropriations committees—receive information about the intelligence budget.⁵⁸ Only the members and staff of the Intelligence Committees get to see the actual numbers for the intelligence budget.

2. *Government Accountability Office investigations*

A key congressional institution, the Government Accountability Office (GAO) engages in two distinct activities that help to hold the executive branch accountable for complying with the law.⁵⁹ First, it issues decisions in bid protests by government contractors claiming that the executive branch violated the law in awarding a contract to a competitor. Second, GAO conducts investigations of and issues reports about executive branch programs at the request of

delivered at the 2007 Annual Meeting of the American Political Science Association) (on file with author).

57. Thomas E. Mann, Molly Reynolds, & Peter Hoey, *Op-Chart: A New, Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK, available at <http://www.nytimes.com/2007/08/26/opinion/26mann.html> (providing a chart showing approximately 50% increase in oversight hearings during first six months of 110th Congress (controlled by opposition Democratic party) in comparison with the first six months of 109th Congress (controlled by the President's Republican party)).

58. See generally Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008).

59. The GAO changed its name from General Accounting Office to Government Accountability Office in 2004. See David M. Walker, *GAO Answers the Question: What's in a Name?*, ROLL CALL, July 19, 2004, available at <http://www.gao.gov/about/rollcall07192004.pdf>. While the President nominates the head of the GAO, the Comptroller General, the Supreme Court considers the Comptroller General to be outside the executive branch because he can be removed not just by impeachment but also through a congressional joint resolution. See generally *Bowsher v. Synar*, 478 U.S. 714 (1986).

congressional committee and subcommittee chairs and ranking members.⁶⁰

Like internal executive branch investigations, GAO investigations partake of the first three stages of accountability: informing, justification, and evaluation. GAO cannot directly rectify any wrongdoing it detects, but its reports can form part of a chain of accountability, enabling Congress to put pressure on agencies for rectification.⁶¹ By statute, if the Executive Branch decides not to follow a GAO bid protest recommendation, it must promptly report this decision to the Comptroller General, who then must inform the relevant congressional committees and recommend further action.⁶²

While most of GAO's investigative reports focus on issues of financial efficiency, some of them address the executive branch's compliance with the law.⁶³ For example, one GAO report examined whether agencies were complying with FOIA's requirement that agencies disclose in the federal register basic information about their organization and operations. The report found twenty instances of failure to make such disclosures, fourteen of which were being remedied by the agencies themselves after discussions with GAO by the time GAO published its report.⁶⁴ Another example includes a GAO report examining whether Curt Hebert, Jr., the Chairman of the Federal Energy Regulatory Commission (FERC), violated federal statutes or regulations in his communications with Kenneth Lay, the chairman of Enron, whose company was regulated by FERC.⁶⁵ A *New York Times* article had detailed a phone conversation between Hebert and Lay in which Hebert requested Lay's political support and Lay asked that Hebert change his view on a FERC policy, raising

60. In the 2008 fiscal year, GAO produced over 1200 reports or written testimony, mostly at the request of congressional committees or subcommittee chairs and ranking members. See Homeland Security Digital Library, New GAO Performance & Accountability Report for FY 2008, <http://www.hsdl.org/hslog/?=node/4489> (last visited Apr. 2, 2010).

61. See MULGAN, *supra* note 46, at 87.

62. 31 U.S.C. §§ 3554(b)(3), (e)(1) (2006).

63. Telephone Interview with James Lager, Deputy Ethics Counselor, GAO (Feb. 6, 2009).

64. See generally U.S. GEN. ACCOUNTING OFFICE, FREEDOM OF INFORMATION: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS (1986). This example illustrates the discovery, evaluation, and rectification stages of accountability.

65. See Letter from Robert H. Hast, Managing Director, Office of Special Investigations, to Senator Joseph I. Lieberman, Chairman, Committee on Governmental Affairs (Aug. 16, 2001) (on file with author) [hereinafter Hast Letter], available at <http://www.gao.gov/new.items/d011020r.pdf>.

the specter of possible solicitation to bribery.⁶⁶ GAO interviewed Hebert, Lay, and two FERC employees who overheard Hebert's part of the conversation, and concluded that there was no violation of either criminal law or ethics regulations.⁶⁷

By statute, the GAO has the ability to extract information from the executive branch agencies, but that statute excepts from such mandatory disclosure any records related to intelligence activities.⁶⁸ Since the early 1960s, the CIA has effectively shut the GAO out from conducting any oversight functions regarding its activities.⁶⁹ In fact, from the creation of the Senate and House Intelligence Committees in the 1970s, the executive branch has argued that those committees are the exclusive vehicles for congressional oversight.⁷⁰ More recently, the Director of National Intelligence has taken a similar approach, arguing that oversight of intelligence functions is beyond the purview of the GAO.⁷¹ In addition, the Executive Branch has argued that while GAO has authority to evaluate executive branch work that is done pursuant to statutes, it lacks authority to evaluate executive branch work done pursuant to the President's constitutional authority, thus exempting wide swaths of foreign policy and intelligence-related activities from GAO scrutiny.⁷²

66. Lowell Bergman & Jeff Gerth, *Power Trader Tied to Bush Finds Washington All Ears*, N.Y. TIMES, May 25, 2001, at A1, available at <http://www.nytimes.com/2001/05/25/politics/25POWE.html?pagewanted=1>.

67. See Hast Letter, *supra* note 65.

68. 31 U.S.C. § 716(d)(1)(A) (2006).

69. See generally U.S. GEN. ACCOUNTING OFFICE, CENTRAL INTELLIGENCE AGENCY: OBSERVATIONS ON GAO ACCESS TO INFORMATION AND CIA PROGRAMS AND ACTIVITIES (2001), available at http://www.fas.org/irp/congress/2001_hr/071801_hinton.pdf.

70. *Id.* at 3 ("The CIA has maintained that the Congress intended the intelligence committees to be the exclusive means of oversight of the CIA, effectively precluding oversight by [the GAO]."); see also Investigative Authority of the General Accounting Office, 12 Op. Off. Legal Counsel 171 (1988).

71. See U.S. GEN. ACCOUNTABILITY OFFICE, INFORMATION SHARING: THE FEDERAL GOVERNMENT NEEDS TO ESTABLISH POLICIES AND PROCESSES FOR SHARING TERRORISM-RELATED AND SENSITIVE BUT UNCLASSIFIED INFORMATION 29 (2006), available at <http://www.gao.gov/new.items/d06385.pdf>. The Office of the Director of National Intelligence refused to comment on GAO's draft report, stating that "the review of intelligence activities is beyond GAO's purview." *Id.*

72. See generally Investigative Authority of the General Accounting Office, 12 Op. Off. Legal Counsel 171 (1988).

3. *Intervention by a member of Congress on behalf of constituents*

Members of Congress sometimes take action on behalf of individual constituents who have been aggrieved by executive branch agencies. This is accountability at the retail level rather than at the wholesale level. The concern is not whether an entire policy is legal, but whether the executive branch's treatment of one particular constituent is legal. In some ways similar to a civil lawsuit, this type of activity partakes of all four stages of accountability. The member (or her staffer) may initially seek more information from the agency (roughly analogous to the discovery process), and may eventually address legal arguments to the agency on behalf of the constituent (roughly analogous to legal argument addressed to a judge). Unlike litigation, however, the persuasiveness of the argument may be enhanced by the stature of the member of Congress and the degree to which the agency is beholden to that member. Thus, intervention on behalf of a constituent may not only reflect an effort to rectify a legal wrong by the executive branch, but may instead reflect a political effort to convince an executive branch official to reverse a decision that disfavored the constituent.

C. *Accountability Mechanisms Located in Executive Branch but Based on Congressional Action*

This section examines accountability mechanisms that are located in the executive branch, but that were created by congressional action. It divides these statutorily-created mechanisms into two categories: those that involve only executive branch actors, and those that also involve actors outside the executive branch. Accountability mechanisms within the executive branch include Inspectors General (IGs) who conduct regular audits and investigate alleged wrongdoing in 60 executive branch agencies, and Ombudspersons, who mediate disputes.⁷³ Mechanisms that involve nonexecutive actors include the Freedom of Information Act, protections for whistleblowers, and specially created investigative commissions.

73. Some federal ombudspersons have been created by the executive branch itself through regulation rather than by Congress through statute.

1. Congressionally created mechanisms within the executive branch

a. Inspectors General. Over the objection of the executive branch,⁷⁴ Congress created Inspectors General and gave them the authority to receive confidential tips about waste, fraud, and abuse, and to directly access all of an agency's records to investigate those tips and other allegations.⁷⁵ Every six months IGs issue detailed reports to the agency head and Congress.⁷⁶ When IGs discover "particularly serious or flagrant problems" within the agency, they must report immediately to the agency head, who must forward that report to Congress.⁷⁷ IG reports have become a particularly important source of information for congressional committees investigating the executive branch.⁷⁸ IGs can recommend sanctions against particular employees and changes in administrative processes, but cannot impose either.⁷⁹ So IG investigations partake in the discovery, justification, and evaluation stages of accountability, but not rectification. On the other hand, the publicity that accompanies issuance of an IG report can result in rectification through legislative change.⁸⁰ For example, after concerns were raised about the FBI's extensive use of National Security Letters (NSLs) to collect information, Congress required the Justice Department IG to audit

74. FREDERICK M. KAISER, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT, at CRS-4 (2007), available at https://www.policyarchive.org/bitstream/handle/10207/19765/98-379_20070621.pdf?sequence=2; PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 39, 62-63 (1993) ("[A]ll twelve departments covered by the [Inspector General Act of 1978] testified in opposition [to it]."). In addition to ferreting out waste, fraud, and abuse, Inspectors General also make recommendations on how agencies can increase their efficiency and effectiveness. *Id.*

75. 5 U.S.C. app. 3 § 6 (2006). *But see* 50 U.S.C. app. 3 §§ 8D, 8E (permitting Treasury Secretary and Attorney General to restrict IGs' access to information relating to ongoing investigations, confidential sources, and other matters).

76. 5 U.S.C. app. 3 § 5.

77. 5 U.S.C. app. 3 § 5(d).

78. LIGHT, *supra* note 74, at 56 (quoting "a key legislative player" as stating that "IGs gave us . . . someone who would give us regular input through the semi-annual reports and irregular access [to information] through the development of good working relationships").

79. For example, during the Reagan Administration, the IG at the Department of Housing and Urban Development (HUD) discovered serious problems with the operation of a program related to Section 8 housing and recommended suspending that program. HUD Secretary Samuel Pierce refused to suspend the program, which spawned a massive scandal and Independent Counsel investigation of criminal wrongdoing. LIGHT, *supra* note 74, at 69.

80. In addition, something akin to rectification occurs when the agency adopts the IG's recommendations.

the FBI's use of NSLs.⁸¹ Those audits revealed widespread problems in the FBI's administration of NSLs⁸² and helped spur legislation cutting back the FBI's authority to issue them.⁸³

There are two different classes of statutorily created IGs—those who require presidential nomination with Senate confirmation and those who are appointed by heads of departments. The President nominates and the Senate confirms IGs in all fifteen cabinet departments and in fourteen other federal agencies.⁸⁴ In thirty-one smaller agencies and the Office of the Director of National Intelligence, IGs are appointed by department heads.⁸⁵ The Inspector General Act directs the President and department heads to select IGs on the basis of their expertise and without regard to political affiliation.⁸⁶ They generally have independence in how they conduct their work,⁸⁷ but on occasion, Congress has responded to specific allegations of wrongdoing by requiring IGs to investigate

81. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

82. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), *available at* <http://www.justice.gov/oig/special/s0703b/final.pdf>; U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (2008), *available at* <http://www.justice.gov/oig/special/s0803b/final.pdf>.

83. After the first Inspector General report, Representative Jerrold Nadler introduced a bill to place limits on the use of National Security Letters on July 26, 2007, H.R. 3189, 110th Cong. (2007), and Senator Russ Feingold introduced a companion bill in the Senate on Sept. 25, 2007, S. 2088, 110th Cong. (2007).

84. 5 U.S.C. app. 3 § 2 (2006) (creating two Inspectors General within the Treasury Department); 5 U.S.C. app. 3 § 3(a) (Presidential appointment process); 5 U.S.C. app. 3 § 11 (identifying the twenty-nine agencies with presidentially appointed IGs).

85. 5 U.S.C. app. 3 § 8G (identifying thirty agencies with department head-appointed IGs); 5 U.S.C. app. 3 § 8K (authorizing Director of National Intelligence to create an office of Inspector General); 5 U.S.C. app. 3 § 8G note (Special Inspector General for Iraq Reconstruction) (indicating in subsection (c) that the Secretary of Defense, in consultation with the Secretary of State, appoints the Special Inspector General for Iraq Reconstruction).

86. 5 U.S.C. app. 3 § 3(a).

87. The heads of seven departments (Defense, Homeland Security, Justice, Treasury, CIA, the Federal Reserve, and the U.S. Postal Service) can prevent their Inspector General from pursuing an investigation in order to protect an ongoing criminal investigation or national security, but must report to the congressional committees. FREDERICK M. KAISER & WALTER J. OLESZEK, CONGRESSIONAL OVERSIGHT MANUAL, at CRS-94 (2007), *available at* <http://www.fas.org/sgp/crs/misc/RL30240.pdf>.

and report on the allegations.⁸⁸ The President or department head who appointed the IG can also remove an IG without cause, but must inform Congress of the reasons for removal.⁸⁹

In 1988, when Congress created an Inspector General for the Justice Department, the Department successfully resisted congressional efforts to fold the Office of Professional Responsibility (OPR) into the Justice IG.⁹⁰ Although members of Congress and the Justice Department IG himself have proposed placing OPR within the Office of Inspector General in order to give it more independence, the Executive Branch has repeatedly resisted these proposals.⁹¹

Folding OPR into the Justice IG could go a long way toward improving accountability by ensuring that OPR is responsive to the legislative branch and making OPR processes more transparent. Currently, the head of OPR is appointed by the Attorney General and is subject to the Attorney General's incentive awards. The Justice Department's IG, on the other hand, is nominated by the President and confirmed by the Senate. Furthermore, while the head of OPR reports to the Attorney General and Deputy Attorney General, the IG reports both to Congress and the Attorney General. Finally, while OPR generally keeps its investigative reports secret, the IG regularly issues public reports on its investigations.⁹² The Justice

88. *See, e.g.*, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

89. 5 U.S.C. app. 3 §§ 3(b), 8G(e). President Reagan's second act as President was his decision to remove all of the Inspectors General who had been appointed by President Carter. LIGHT, *supra* note 74, at 102.

90. LIGHT, *supra* note 74, at 129–30.

91. In 2007, for example, Representative John Conyers proposed an amendment to the Improving Government Accountability Act, H.R. 928, 110th Cong. (2007), which would have removed the requirement that the Department of Justice (DOJ) IG refer to OPR any investigations of DOJ lawyers. *See* Summary and Text of Amendments Submitted to the Rules Committee for H.R. 928, http://www.rules.house.gov/announcement_details.aspx?NewsID=3052; Amendment 4 to H.R. 928, as Reported: Offered by Mr. Conyers of Michigan, *available at* http://www.rules.house.gov/110/amendments/hr928/110_hr928_conyers4.pdf. While the House of Representative adopted Conyers' amendment, it was later dropped in Conference. *See* Bruce Moyer, *Congress Declines to Give DOJ Watchdog More Teeth*, FED. LAWYER, Oct. 2008, at 10; *see also Strengthening the Unique Role of the Nation's Inspectors General: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Congress (July 11, 2007) (statement of Glenn A. Fine, Inspector General, U.S. Department of Justice), *available at* <http://www.usdoj.gov/oig/testimony/0707/index.htm>.

92. OPR does issue annual reports summarizing the kinds of cases it has investigated, but these reports provide few details about specific allegations and outcomes, and there are long delays in even this information being disclosed. As of January 2010, for example, the

Department's IG, with its congressional mandate and independence from the Department leadership, has produced a more robust accountability regime than OPR. This contrast in the records of the Justice Department's IG and OPR reveals the limits that may be inherent in a purely internal executive branch accountability mechanism.

Inspectors General have sometimes succeeded in achieving accountability where other mechanisms have failed. For example, in the wake of the Justice Department's arrest of more than 1200 aliens after September 11th, there was concern that these prisoners were languishing and being abused in jail, unable to contact family or lawyers.⁹³ Despite requests by members of Congress and newspaper editorials, the government refused to reveal the names of these prisoners, the reasons they were being detained, or their location.⁹⁴ Several public interest organizations filed a Freedom of Information Act (FOIA) lawsuit in an attempt to force the government to reveal the identities of these prisoners, the dates of their arrests, and the nature of the charges against them, but the government convinced the D.C. Circuit that release of this information could help a terrorist group impede the government's investigation of the September 11th attacks and thus was exempt from disclosure under FOIA.⁹⁵ Nonetheless, the Justice Department's Inspector General initiated an investigation into the detention and treatment of these prisoners, and ultimately issued a report criticizing several aspects of this mass detention.⁹⁶ That report described just how broadly the September 11th investigative dragnet fell, and indicated that immigrants with no connection to terrorism were nonetheless

most recent OPR Annual Report available was for fiscal year 2007 (a period ending on Sept. 30, 2007). See OPR Annual Reports, <http://www.usdoj.gov/opr/reports.htm> (last visited Mar. 2, 2010).

93. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., SEPT. 11 DETAINEES 1-2 (2003) [hereinafter DOJ IG, SEPT. 11 DETAINEES].

94. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

95. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 931 (D.C. Cir. 2003) (FOIA exception 7 for law enforcement documents applies to the information requested).

96. While the DOJ IG report provided aggregate totals of the number of immigration detainees and their locations, it was not coextensive with the concerns expressed by the public interest groups, and in particular did not examine the treatment of prisoners who were held pursuant to material witness warrants rather than immigration violations. DOJ IG, SEPT. 11 DETAINEES, *supra* note 93, at 4.

classified as “of interest to the September 11 investigation.”⁹⁷ While the report did not provide all the information that the public interest organizations had requested in the FOIA suit, it did provide aggregate information on the number of prisoners, their countries of origin, and their dates of arrest.⁹⁸

b. Ombudspersons. A second type of internal executive branch mechanism created by Congress is the ombudsperson, an official who receives and investigates complaints by individuals, businesses or others who have been aggrieved by an agency.⁹⁹ Ideally, an ombudsperson is both independent (in that she is not subject to the control of the agency officials that she investigates) and is impartial (in that she does not have conflicts of interest).¹⁰⁰ Ombudspersons partake of the first three stages of accountability: informing, justification, and evaluation. They have the authority to investigate and recommend action, and sometimes serve as a mediator between the agency and the complaining party. While ombudspersons can

97. *Id.* at 16.

98. *Id.* at 21–22. The report indicated that 491 were arrested in New York and seventy were arrested in New Jersey, but redacted the names of the eleven other states where individuals were arrested. *Id.* at 22; see also Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1148–63 (2007).

99. The complaining party may be external, such as a small business complaining about agency regulations, or internal, such as an agency employee complaining about her treatment within the workplace. The Small Business Administration’s Office of the National Ombudsman “receives [complaints] from small business[es] . . . and acts as a liaison between them and federal agencies.” About the Office of the National Ombudsman, http://www.sba.gov/aboutsba/sbaprograms/ombudsman/aboutus/OMBUD_ABOUTUS.html (last visited Jan. 22, 2010). It was created by Congress and has the power “to receive, substantiate, and report to Congress complaints and comments from small business owners regarding regulatory enforcement actions taken against small businesses by federal agencies.” See U.S. Small Business Administration, Nicholas Owens, National Ombudsman, SBA Office of the National Ombudsman, http://www.sba.gov/tools/monthlywebchat/2007/CHAT_OWENS_BIO.html (last visited Apr. 2, 2010); U.S. GEN. ACCOUNTING OFFICE, HUMAN CAPITAL: THE ROLE OF OMBUDSMEN IN DISPUTE RESOLUTION 2 (2001) [hereinafter HUMAN CAPITAL] (identifying ten agencies that had ombudspersons addressing employee complaints).

100. See AMERICAN BAR ASSOCIATION (ABA) STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 2 (2004), available at <http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf> (identifying independence, impartiality and confidentiality as “essential characteristics of [all] ombuds”). The ABA indicates that an ombudsperson is “independent” if no one who is “subject to the ombuds’s jurisdiction or anyone directly responsible for a person under the ombuds’s jurisdiction (a) can control or limit the ombuds’s performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.” *Id.* at 3.

recommend to the agency or to Congress specific reforms,¹⁰¹ they lack the power to impose their view or require the agency to respond.¹⁰²

In the federal government, members of Congress have long served an ombuds-like role when they provide constituent service.¹⁰³ In recent decades, Congress and the executive branch have created specific ombudsperson positions to take on this task in dozens of agencies.¹⁰⁴ Some of these officials are called “ombudspersons,” but others serve this ombuds function while having a different title, such as the National Taxpayer Advocate,¹⁰⁵ Office of Special Counsel, and Office of Government Information Services (OGIS).¹⁰⁶

Ombudspersons have two distinct functions relevant to executive branch accountability: assisting individuals or businesses that have been harmed by illegal government action and providing Congress with information about problems within the executive branch. The executive branch sometimes chafes at the efforts of ombudspersons and attempts to limit their independence or close them down. For example, in 2007, Congress passed legislation to establish the Office of Government Information Services (OGIS), which would serve as an ombudsperson to those making FOIA requests.¹⁰⁷ Congress placed this office within the National Archives and mandated that it would “offer mediation services to resolve disputes between” FOIA

101. See, e.g., HUMAN CAPITAL, *supra* note 99, at 8 (“An ombudsman . . . brings to an entity’s attention chronic or systemic problems and makes recommendations for improvement.”).

102. MULGAN, *supra* note 46, at 91 (2003).

103. Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 17 (1996) (“[C]ongressional casework covers much of the same terrain as might be handled through an ‘ombudsman’ system in other nations.”).

104. The website of the Coalition of Federal Ombudsmen lists thirty-four executive branch agencies (or subparts) with ombudspersons. See Coalition of Federal Ombudsmen, <http://ombudsman.ed.gov/federalombuds/membership.html> (last visited Jan. 22, 2010).

105. The Internal Revenue Service (IRS) created the Office of Taxpayer Ombudsman in 1979, and Congress codified the position in 1988, eventually changing its name to National Taxpayer Advocate (NTA) and expanding its authority to protect the interests of taxpayers and to report to Congress. See Evolution of the Office of the Taxpayer Advocate, http://www.irs.gov/pub/irs-utl/evolution_of_the_office_of_the_taxpayer_advocate.pdf (last visited Jan. 14, 2010). Unlike most ombudspersons, the NTA can issue orders requiring its agency (the IRS) to take certain actions in the interests of taxpayers. *Id.*

106. 5 U.S.C. § 552(h)(1) (2009).

107. See generally Openness Promotes Effectiveness in our National Government Act, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

requesters and agencies as an alternative to litigation.¹⁰⁸ While President Bush signed the bill that established this office, five weeks later he proposed abolishing the office and transferring its functions to the Department of Justice.¹⁰⁹ Open government advocates decried this move, arguing that placing OGIS in the Department of Justice would destroy its independence because it would place the office within the department tasked with defending agencies sued by FOIA requesters.¹¹⁰

Agency officials have sometimes resisted the efforts of ombudspersons, and in one case an agency eventually dissolved the ombuds office. Congress created the EPA's National Ombudsman in 1984 to deal with public complaints related to the Resource Conservation and Recovery Act (RCRA), but when statutory authority expired in 1989, EPA retained the office, and expanded its mandate to deal also with Superfund and other EPA programs.¹¹¹ In January of 2001, the EPA issued new guidance for the National Ombudsman, clarifying that he could not play a role on issues that were the subject of litigation.¹¹² The incumbent Ombudsman protested this limitation, as did several members of Congress.¹¹³ Despite these protests, the EPA effectively diminished the office's independence, transferring the incumbent Ombudsman to the Office of the Inspector General, an office that had allegedly interfered with earlier Ombudsman investigations.

108. 5 U.S.C. § 552(h)(1), (3) (2010).

109. Letter from Access Reports, Inc. et al. to Senators Robert C. Byrd & Thad Cochran (Feb. 6, 2008), in 154 CONG. REC. S1051 (daily ed. Feb. 14, 2008).

110. See, e.g., *Structure and Function of the Office of Government Information Services Established by the "Openness Promotes Effectiveness in Our National Government Act of 2007"* (P.L. 110-175): Hearing Before the H. Subcomm. on Info. Policy, Census, & Nat'l Archives, 110th Cong. (2008) (Testimony of Thomas Blanton, Executive Director, National Security Archive, George Washington Univ.), available at <http://informationpolicy.oversight.house.gov/documents/20080919140008.pdf>.

111. Draft Guidance for National Hazardous Waste Ombudsman and Regional Superfund Ombudsmen Program, 66 Fed. Reg. 365, 366 (Jan. 3, 2001).

112. See *id.* at 365-68.

113. See *Office of the Ombudsman at the Environmental Protection Agency: Hearing Before the S. Comm. On Environmental & Public Works*, 107th Cong. 65-72 (June 25, 2002) (statement of Robert J. Martin, Former EPA National Ombudsman), available at http://fwwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:83699.pdf.

2. Congressionally created mechanisms within the executive branch that involve outside actors

This section describes accountability mechanisms that are located within the Executive but also involve nonexecutive actors. These include information requests under the Freedom of Information Act (FOIA), protection of whistleblowing by executive branch employees, and specially created investigative commissions.

a. Freedom of Information Act. The Freedom of Information Act and its 1974 Amendments were a radical departure that set the stage for a new era of increased transparency in government. Under the Act, individuals and organizations can request government information for any reason.¹¹⁴ Requestors are not limited to seeking information about government wrongdoing, and most FOIA requests are entirely unrelated to allegations of government misconduct. Nonetheless, FOIA requests have been instrumental in revealing numerous government scandals,¹¹⁵ and the statute has enabled countless people and organizations to partake of the discovery stage of accountability.

The process of seeking information can be cumbersome and may entail long delays. Where the request is initially denied, the requestor can administratively appeal¹¹⁶ and even file a lawsuit if the administrative appeal is unsuccessful. Some nongovernmental organizations (NGOs) such as the National Security Archive, Judicial Watch, and Citizens for Responsibility and Ethics in Washington have utilized FOIA extensively.¹¹⁷ Unlike individuals, these

114. 5 U.S.C. § 552 (2006); *see also* *Central Intelligence Agency: Observations on GAO Access to Information on CIA Programs and Activities: Hearing Before H. Subcomm. on Gov't Efficiency, Financial Mgmt. & Intergovernmental Relations, and H. Subcomm. on Nat'l Sec., Veterans Affairs, and Int'l Relations, H. Comm. on Governmental Reform*, 107th Cong. (July 18, 2001) (statement of Henry L. Hinton, Jr., Managing Director, Defense Capabilities and Management), *available at* http://www.fas.org/irp/congress/2001_hr/071801_hinton.html ("Almost 90 percent of our staff days are in direct support of Congressional requestors, generally on the behalf of committee chairmen or ranking members."). In 2002, Congress limited the ability of foreign governments to seek information under the statute. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, sec. 312, § 552(a)(3), 116 Stat. 2383, 2390-91 (2002).

115. *See* Kreimer, *supra* note 15, at 1056-59.

116. 5 U.S.C. § 552(a)(6)(A)(i) (2006).

117. *See, e.g.*, About the National Security Archive, http://www.gwu.edu/~nsarchiv/nsa/the_archive.html (last visited Mar. 2, 2010) ("The Archive obtains its materials through a variety of methods, including the Freedom of Information act Archive staff members systematically track U.S. government agencies and federal records repositories for

organizations can take the long view in their investigations of government wrongdoing, sometimes receiving documents more than a decade after they initially requested them.¹¹⁸ These NGOs' FOIA work can lead to further government investigations and legislative change. For example, a FOIA lawsuit brought by the Electronic Privacy Information Center resulted in the disclosure of abuses of Patriot Act authority, which then led to an investigation by the Justice Department's Inspector General.¹¹⁹

In the FOIA, Congress granted a general right to access government information, but it also limited that right by including in the statute broad exemptions.¹²⁰ Two of those exemptions are particularly relevant to national security information: the (b)(1) exemption for information that is classified pursuant to executive order, and the (b)(3) exemption for information that is protected pursuant to statute.¹²¹ Several statutes instruct the executive branch to protect national security-related information, including the statutory protection for intelligence sources and methods, encryption, and atomic weapons information.¹²²

b. Whistleblower protection. Whistleblowers serve as an accountability mechanism when they call attention to illegal executive branch actions. From Pentagon employee Ernest Fitzgerald's 1969 testimony to Congress about billion dollar cost overruns,¹²³ and chemist Frederic Whitehurst's letters to the Justice

documents that either have never been released before, or that help to shed light on the decision-making process of the U.S. government and provide the historical context underlying those decisions.”); Judicial Watch: About Us, <http://www.judicialwatch.org/about-us> (last visited Mar. 2, 2010) (“The motto of Judicial Watch is ‘Because no one is above the law.’ To this end, Judicial Watch uses the open records or freedom of information laws and other tools to investigate and uncover misconduct by government officials and litigation to hold to account politicians and public officials who engage in corrupt activities.”); About CREW, <http://www.citizensforethics.org/about> (last visited Mar. 2, 2010) (“CREW employs the law as a tool to force officials to act ethically and lawfully and to bring unethical conduct to the public’s attention through: . . . Freedom of Information Act Requests . . .”).

118. National Security Archive, *40 Years of FOIA, 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s* (2007), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf.

119. Kreimer, *supra* note 15, at 1056–57.

120. See 5 U.S.C. § 552(b) (2006).

121. 5 U.S.C. §§ 552(b)(1), (3).

122. 50 U.S.C. § 403-1(i) (intelligence sources and methods); 18 U.S.C. § 798 (cryptographic information); 42 U.S.C. §§ 2014(y), 2162 (atomic weapons).

123. Myron Glazer, *Ten Whistleblowers and How They Fared*, 13 HASTINGS CENT. REP. 33, 39 (1983).

Department's Inspector General about junk science in the FBI crime lab during the 1990s,¹²⁴ to Coleen Rowley's memorandum to FBI Director Robert Mueller in 2002 about the investigation of Zacarias Moussaoui,¹²⁵ whistleblowers' willingness to come forward with information has been instrumental in triggering other accountability mechanisms. Whistleblowing involves two stages of accountability, but reverses their usual order. A whistleblower engages in evaluation when she determines that the government conduct is improper and in informing when she discloses the alleged misconduct. Executive branch whistleblowers may report illegal activity internally to an executive branch official or externally to Congress or the press. Congress has provided some protection for executive branch whistleblowers, but has excluded significant portions of the federal bureaucracy—those who engage in intelligence work—from its protection.

Congress has recognized the importance of whistleblowers by enacting a series of legal protections for them. In 1912, Congress declared that the right of executive branch civil service employees to furnish information to Congress “shall not be denied or interfered with.”¹²⁶ But this declared right did not provide any concrete protection for employees who reported wrongdoing to Congress. In 1978, Congress provided a cause of action for certain executive branch employees who experienced retaliation for disclosing information about waste, fraud, and abuse.¹²⁷ The 1978 legislation created a new executive branch agency, the Office of Special Counsel, which was tasked with the role of protecting whistleblowers.¹²⁸

124. DEP'T OF JUSTICE OFFICE OF INSPECTOR GEN., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997), *available at* <http://www.justice.gov/oig/special/9704a/>.

125. Amanda Ripley & Maggie Sieger, *The Special Agent*, TIME, Dec. 30, 1992, at 34.

126. Lloyd-LaFollette Act, § 6, 37 Stat. 555 (1912).

127. Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 703(a)(2), 92 Stat. 1111, 1216-17 (1979). Congress strengthened those protections in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, sec. 2(b), 103 Stat. 16 (1989). For a discussion of federal whistleblower protection, see LOUIS FISHER, NATIONAL SECURITY WHISTLEBLOWERS (2005); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 533-36 (1999).

128. Civil Service Reform Act of 1978, Pub. L. No. 94-454, sec. 202, §§ 1204, 1206, 92 Stat. 1111, 1112 (1979).

While Congress has made several efforts to encourage accountability through whistleblower protection, robust whistleblower protection has proven difficult to achieve. The first head of the Office of Special Counsel, a presidential nominee, actually worked to subvert the agency's purpose, and trained governmental managers on how they could fire whistleblowers with impunity.¹²⁹ The Federal Circuit Court of Appeals, the only court that hears whistleblower lawsuits, has repeatedly interpreted the whistleblower protection statute narrowly, excluding many whistleblowers from its protection.¹³⁰ Employees who blow the whistle on illegal government action continue to suffer retaliation, including the loss of their jobs, security clearances and careers.¹³¹ Even apart from these weaknesses in implementation of whistleblower protection, the statutes themselves exclude from their coverage executive branch employees who do intelligence-related work.¹³² In addition, the statutes explicitly exclude from protection the public disclosure of classified information.¹³³

c. Special Commissions. In addition to FOIA and legislation prohibiting retaliation against whistleblowers, Congress has occasionally acted to heighten executive accountability by establishing ad hoc investigative commissions that include members chosen by the House or the Senate as well as by the President. These commissions can partake of all four stages of accountability: informing (when the commission gathers information), justification (when executive branch officials attempt to defend their conduct), evaluation (when the commission decides whether that conduct was proper), and—to a limited degree—rectification (if the commission states authoritatively that the government's conduct was improper).

Recognizing that Congress and the executive branch sometimes

129. Devine, *supra* note 127, at 544.

130. See COMM. ON OVERSIGHT & GOV'T REFORM, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007, H.R. REP. NO. 110-42, pt. 1, at 4 ("This bill [the Whistleblower Protection Enhancement Act of 2007] also responds to decisions by the U.S. Court of Appeals for the Federal Circuit and the MSPB limiting the scope of disclosures covered under the federal whistleblower protection statute.").

131. See James Sandler, *The War on Whistleblowers*, SALON, Nov. 1, 2007, <http://www.salon.com/news/feature/2007/11/01/whistleblowers/>.

132. 5 U.S.C. § 2302(a)(2)(C)(ii) (2006).

133. 5 U.S.C. § 2302(b)(8)(A) (excluding from protection the disclosure of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs").

disagree about whether particular information should be classified, in 2004 Congress passed legislation giving an advisory group, the Public Interest Declassification Board, responsibility to review the disputed material and make a recommendation to the President on whether particular information identified by a congressional committee should be classified.¹³⁴ The Board consists of nine members, five appointed by the President and four chosen by congressional leaders.¹³⁵

At times, these specially appointed committees conduct investigations of past government conduct, and these investigations “are often the key factor in provoking the executive into itself undertaking *rectification*.”¹³⁶ One example of this phenomenon is the Commission on the Japanese Internment, which, forty years after the fact, investigated the executive branch’s internment of over 100,000 Japanese Americans during World War II. The internment was essentially approved by the Supreme Court in *Korematsu v. United States*,¹³⁷ but it is now seen as unnecessary, unjust, and based on the prejudices of certain military officials rather than on military necessity. President Ford officially withdrew the Executive Order that had established the internment policy;¹³⁸ Congress passed legislation authorizing reparations, based in part on the work of the Commission,¹³⁹ and courts overturned criminal convictions against three Japanese Americans who violated the internment orders.¹⁴⁰

When a purely internal executive branch investigation is deemed inadequate, Presidents may establish an ad hoc commission to

134. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1102, 118 Stat. 3638 (2004) (codified at 50 U.S.C. § 435 note (2006) (Declassification of Information)). Congress had authorized the creation of the Public Interest Declassification Board in 2000, but its responsibilities were limited to making general policy recommendations on declassification efforts rather than reviewing specific disputed documents. See Intelligence Authorization Act for Fiscal Year 2001, Pub. L. No. 106-567, Title VII, 114 Stat. 2831, 2856–64 (2000).

135. 50 U.S.C. § 435 note (2006) (Declassification of Information, sec. 703(c)).

136. MULGAN, *supra* note 46, at 47.

137. 323 U.S. 214 (1944).

138. Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976).

139. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified at 50 U.S.C. app. 1989).

140. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985). For a discussion of these cases, see ERIC YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG & FRANK WU, RACE, RIGHTS & REPARATION: LAW & THE JAPANESE AMERICAN INTERNMENT (2001).

investigate alleged wrongdoing. Presidents can create commissions unilaterally, as President Reagan did when he established the Rogers Commission to investigate the Challenger space shuttle disaster in 1986¹⁴¹ and President Johnson did when he established the Warren Commission to investigate the assassination of President Kennedy.¹⁴² On occasion (and sometimes over the objection of the President) Congress has established investigative commissions through statute, including the 9/11 Commission.¹⁴³ Such commissions may or may not have subpoena power, and may be of short duration or limited staff. Their purpose tends to be both retrospective and prospective: finding facts about past wrongdoing and making recommendations about future government action.¹⁴⁴

IV. A CASE STUDY IN ACCOUNTABILITY: THE NATIONAL SECURITY AGENCY'S WARRANTLESS SURVEILLANCE PROGRAM

One might expect that the multiplicity of the accountability mechanisms described above would hold the executive branch in check. But the executive branch has at times used claims of national security secrecy to avoid or defeat their effectiveness. This section examines the role these accountability mechanisms played in connection with the NSA's warrantless domestic surveillance program, and the degree to which the Bush Administration's claims of national security secrecy undermined those mechanisms.

141. REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT (1986), *available at* <http://history.nasa.gov/rogersrep/genindex.htm>.

142. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY (1964), *available at* <http://www.archives.gov/research/jfk/warren-commission-report/index.html>.

143. The National Commission on Terrorist Attacks upon the United States (known as the 9/11 Commission) was created by the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-611, 116 Stat. 2383, 2408-13 (2002); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004); *see* Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008).

144. *See* KENNETH KITTS, PRESIDENTIAL COMMISSIONS & NATIONAL SECURITY: THE POLITICS OF DAMAGE CONTROL (2006); Lance Cole, *Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations)*, 41 MCGEORGE L. REV. 1 (2009).

A. The NSA's Warrantless Surveillance Program

During the 1970s, Congress undertook extensive investigations of U.S. intelligence activities, spurred in part by Watergate, and discovered that intelligence agencies had engaged in warrantless surveillance of U.S. citizens based on their political beliefs and activities.¹⁴⁵ In response, Congress passed the Foreign Intelligence Surveillance Act in 1978, and in doing so it clarified that within the United States, electronic surveillance is legal only if it is authorized by statute. There are two statutory regimes that specifically authorize and regulate electronic surveillance: Title III of the Omnibus Crime Control Act of 1968,¹⁴⁶ which authorizes a warrant where there is probable cause to believe that the communication would reveal evidence of a crime; and the Foreign Intelligence Surveillance Act (FISA),¹⁴⁷ which authorizes a warrant where there is probable cause to believe that one of the parties is the agent of a foreign power or an international terrorist organization. To enforce this new regime, Congress included in FISA a criminal prohibition on any electronic surveillance not authorized by statute so that government officials who engage in surveillance without a warrant have committed a felony.¹⁴⁸ Congress also provided a private cause of action to anyone subjected to such illegal surveillance.¹⁴⁹

The Fourth Amendment's warrant requirement does not reach individuals outside the country, and the two statutes discussed above (Title III and FISA) do not limit the government's ability to conduct electronic surveillance of communications that take place entirely outside of the United States.¹⁵⁰ The National Security Agency (NSA) does not need a warrant to monitor communications between two individuals if both are outside the United States.¹⁵¹

145. FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. Rep. No. 94-755 (1976) (The "Church Committee Report").

146. 18 U.S.C. §§ 2510-22 (2006).

147. 50 U.S.C. §§ 1801-71 (2006).

148. 50 U.S.C. § 1809.

149. 50 U.S.C. § 1810.

150. 18 U.S.C. § 2511(2)(f) ("Nothing contained in this chapter . . . shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications . . .").

151. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION, at CRS-17 (2006) (noting that FISA does not restrict the government's ability

In October 2001, the Bush Administration expanded this surveillance to reach the content of telephone and e-mail communications where one party is inside the United States and another party to the communication is suspected of having a link to al Qaeda or a related terrorist organization.¹⁵² The traditional understanding is that because one of the parties is inside the United States, such surveillance requires a warrant, either under Title III or FISA.¹⁵³ Nonetheless, the Bush Administration went forward with this surveillance without warrants, and without informing most members of the congressional intelligence committees. In addition,

to engage in surveillance of communications outside the United States); JAMES BAMFORD, *BODY OF SECRETS* 441 (2002).

152. John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (citing Letter from William E. Moschella, Assistant Attorney General, U.S. Department of Justice, to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, *Responses to Questions from Chairman Sensenbrenner*, (Mar. 24, 2006)); HOUSE COMM. ON THE JUDICIARY MAJORITY STAFF, REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 146 (2009) (the program began on or about Oct. 4, 2001). President Bush indicated that he authorized the program “[i]n the weeks following” September 11, 2001. *President’s Radio Address* (White House Radio broadcast Dec. 17, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html>. The exact parameters of this expanded surveillance have not been disclosed, and the surveillance has been described in varying ways. See, e.g., *id.* (asserting that one of the parties to the communication has “known links to al Qaeda and related terrorist organizations”); see also Press Briefing by Att’y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence (Dec. 19, 2005) [hereinafter Gonzales & Hayden Press Briefing], available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html> (statement of Attorney General Alberto Gonzales that “we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda”). While it is not entirely clear what quantum of evidence constitutes a “reasonable basis,” it presumably is less than probable cause because if there were probable cause to believe that one of the parties were a member of al Qaeda, the government would be able to obtain a FISA warrant to monitor the communication. See Michael Avery, *The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to the National Security of the United States*, 62 U. MIAMI L. REV. 541, 544–45 (2008) (laying out additional formulations of the criteria used for surveillance); Sims, *supra*, at 126 (noting that a single phone call between a suspected terrorist in Pakistan and a person in the United States would not provide probable cause to believe that the person in the United States is an agent of a foreign power under FISA).

153. See, e.g., Letter from Curtis A. Bradley, Richard and Marcy Horvitz Professor of Law, Duke University, et al., to Bill Frist, Majority Leader, U.S. Senate, et al. (Jan. 9, 2006), reprinted in N.Y. REV. BOOKS, Feb. 9, 2006 [hereinafter Bradley Letter] (response of scholars of constitutional law and former government officials to “Justice Department’s December 22, 2005 letter to the majority and minority leaders of the House and Senate Intelligence Committees setting forth the administration’s defense of the [domestic spying] program”).

news reports indicate that AT&T, Verizon, and BellSouth turned over to the NSA the companies' records of their customers' phone calls, enabling the NSA to use these records as part of a massive data-mining operation.¹⁵⁴ Such disclosure of customer calling records may violate federal and state privacy law.¹⁵⁵

Despite the multiple checks on executive branch illegality discussed in the previous section, this apparently illegal surveillance program continued from October 2001 until January 2007, when the government obtained orders from the Foreign Intelligence Surveillance Court (FISC) for the targeting of "communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization."¹⁵⁶ How, if at all, did the accountability mechanisms operate in connection to this program? While much remains secret, it is possible to sketch out some of the ways that these accountability mechanisms failed to control this program. This discussion is divided into two parts: how these mechanisms operated while the program remained secret, and then how they operated after the *New York Times* revealed the program in December of 2005.

B. Executive, Congressional, and Judicial Checks while the Surveillance Program Remained Secret

One of the checks on this surveillance program was its automatic sunset provision. The President initially authorized the program for about forty-five days and then renewed that authorization at the end of each forty-five-day period.¹⁵⁷ This kind of automatic sunset constitutes an internal check on executive power in that it requires renewed attention to the program each time it expires. This sunset provision proved particularly important because it was tied to

154. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1 (indicating that Qwest refused to turn over these customer records without a court order).

155. *Id.* (citing Communications Act of 1934, Pub. L. No. 73-416, § 222, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 222 (2006))).

156. Letter from Alberto R. Gonzales, Attorney Gen., to Patrick Leahy and Arlen Specter (Jan. 17, 2007) (on file with author) [hereinafter Gonzales Letter], available at <http://fas.org/irp/agency/doj/fisa/ag011707.pdf>; see also ROBERT TIMOTHY REAGAN, TERRORISM-RELATED CASES: SPECIAL CASE-MANAGEMENT CHALLENGES—CASE STUDIES 124–25 (2008).

157. See *President's Radio Address*, *supra* note 152.

another accountability mechanism: a requirement that the Attorney General certify the legality of the program each time that it was renewed.

Before the surveillance program could proceed, the Attorney General had to certify its legality.¹⁵⁸ Generally, the Attorney General defers to the Justice Department's Office of Legal Counsel (OLC) regarding legal opinions, so it fell to OLC to analyze the legality of the surveillance program. At this time, Assistant Attorney General Jay Bybee and his Deputy, John Yoo, were in charge of OLC.¹⁵⁹ The OLC surveillance opinion has not yet been made public in its entirety, but a 2009 Inspectors General report described and quoted from the opinion.¹⁶⁰ Like the notorious 2002 torture memorandum described above,¹⁶¹ the surveillance opinion failed to mention *Youngstown Sheet & Tube v. Sawyer*,¹⁶² the leading Supreme Court decision setting out the limits on the President's ability to act contrary to statute, even in the area of national security.¹⁶³ It asserted that in enacting FISA, Congress did not purport to limit the President's authority to engage in wartime surveillance, but failed to acknowledge that a provision of FISA explicitly applies during wartime.¹⁶⁴ And the opinion was inaccurate in its factual description of intelligence activities.¹⁶⁵

In 2003, Jack Goldsmith replaced Jay Bybee as Assistant Attorney General and began to review the opinions issued by his predecessor. Goldsmith informed Attorney General John Ashcroft and Deputy Attorney General James Comey that he needed to withdraw the earlier opinion because of problems in its legal analysis, and they concurred. Because of the forty-five day sunset period and the requirement that the Attorney General sign off each time on the

158. *Id.* (indicating that the program had to be approved "by our nation's top legal officials, including the Attorney General and the Counsel to the President").

159. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, A16 ("John Yoo . . . worked on a classified legal opinion on the N.S.A.'s domestic eavesdropping program.").

160. OFFICES OF INSPECTORS GENERAL OF THE DEP'T OF DEFENSE, DEP'T OF JUSTICE, CIA, NSA & DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 11-13 (2009) [hereinafter UNCLASSIFIED IGS' REPORT] (referring to a Nov. 2, 2001, opinion by John Yoo).

161. *See supra* text accompanying notes 24-30.

162. 343 U.S. 579 (1952).

163. UNCLASSIFIED IGS' REPORT, *supra* note 160, at 13.

164. *Id.* at 12, 20.

165. *Id.* at 13, 22.

legality of the surveillance program, withdrawal of the earlier OLC opinion would have the effect of halting the program in its then-current form.¹⁶⁶

The end of the forty-five day period occurred at a time when Attorney General Ashcroft was hospitalized and had transferred his responsibilities to Deputy Attorney General Comey, who became the Acting Attorney General. When the White House learned that the Justice Department was withdrawing its imprimatur for the surveillance program, White House Counsel Alberto Gonzales went to Ashcroft's hospital room, apparently to ask him to overrule Comey. In dramatic testimony before the Senate Judiciary Committee in 2007, Comey testified about the March 2004 confrontation between Gonzales and the Justice Department lawyers in Ashcroft's hospital room.¹⁶⁷ Ashcroft refused to re-approve the program, and the Bush Administration reauthorized the program without the Attorney General's certification.¹⁶⁸ In response, Comey and other high level Justice Department officials, including FBI director Robert Mueller, prepared to resign.¹⁶⁹ President Bush's Chief-of-Staff Andrew Card expressed concern "that there were to be a large number of resignations at the Department of Justice."¹⁷⁰ Later, Comey and Mueller each met privately with President Bush, and after those meetings, the President indicated that the program would be modified so that it could receive the Justice Department's approval.¹⁷¹

While the executive branch is statutorily required to "keep the [full] congressional intelligence committees fully and currently informed of all intelligence activities,"¹⁷² the Bush Administration informed only the chair and ranking members of those committees,

166. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part IV: Hearing Before the S. Judiciary Comm.*, 110th Cong. 213–40 (2007) (statement of James Comey, Former Deputy Attorney General, United States Dep't of Justice).

167. *Id.* at 213–15.

168. *Id.* at 215, 219.

169. *Id.* at 219. Comey later explained that "I couldn't stay, if the administration was going to engage in conduct that the Department of Justice had said had no legal basis." *Id.*

170. *Id.* at 218.

171. *Id.* at 223–24; *see also* UNCLASSIFIED IGS' REPORT, *supra* note 160, at 27–30.

172. 50 U.S.C. § 413a(1) (2006). This obligation extends only "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C. § 413a.

along with the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate about the program.¹⁷³ The Bush Administration used a claim of national security secrecy to prevent even this smaller group of legislators from effectively exercising any oversight regarding the program by insisting that they not discuss this issue with other members of the intelligence committees or even their staffs.¹⁷⁴ The powerlessness of these legislators is illustrated by the handwritten note that Senator Jay Rockefeller sent to Vice President Cheney, noting that Rockefeller is “neither a technician nor an attorney,” and decrying his “inability to consult staff or counsel” in order to evaluate the legality of the program.¹⁷⁵

The Justice Department informed the Chief Judge of the Foreign Intelligence Surveillance Court (FISC) about the program, and that judge expressed concern about the program’s possible illegality.¹⁷⁶ The judge did not believe that she had the power to rule on the legality of the program, but did insist that the government not use any information derived from the program in its warrant applications with the FISC.¹⁷⁷ When a senior Justice Department lawyer discovered that such information had been used in FISA warrant applications and informed the FISC Chief Judge, the judge complained to the Attorney General and insisted “that high-level Justice officials certify the [warrant application] information was complete” in order to prevent future lapses.¹⁷⁸ The Justice

173. This is the group of legislators (sometimes referred to as “the gang of eight”) to whom the executive branch must disclose covert actions, 50 U.S.C. § 413b(c)(2) (2006), and the Bush Administration may have claimed that the surveillance program was a covert action, thus allowing for narrower disclosure. But covert actions are defined by statute as activities to secretly “influence political, economic, or military conditions abroad” 50 U.S.C. § 413b(e). Furthermore, the statute excludes from the definition of covert action any “activities the primary purpose of which is to acquire intelligence” 50 U.S.C. § 413b(e)(1).

174. ALFRED CUMMING, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 6 (2009).

175. Letter from Senator Jay Rockefeller to Vice President Cheney (July 17, 2003) (on file with author), available at <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.pdf>; see also Kathleen Clark, *Congress’s Right to Counsel in Intelligence Oversight* (forthcoming 2010) (on file with author) [hereinafter *Congress’s Right to Counsel*].

176. Carol D. Leonnig, *Secret Court’s Judges Were Warned About NSA Spy Data*, WASH. POST, Feb. 9, 2006, at A01.

177. *Id.*

178. *Id.*

Department temporarily suspended part of the program and instituted tighter controls.¹⁷⁹

Another accountability mechanism, whistleblowing, was also at play in connection with warrantless surveillance. Thomas Tamm, a career Justice Department lawyer who worked in the Office of Intelligence Policy and Review (which processes FISA warrant applications and files them with the Foreign Intelligence Surveillance Court), learned of the existence of the warrantless surveillance program and was concerned about its possible illegality. But he was stymied when he sought additional information about it from his supervisors and when he attempted to inform a congressional staff member about it. In the spring of 2004, he went to a payphone in a Washington subway station and called *New York Times* reporter, Eric Lichtblau, who co-authored the article that broke the story a year and a half later.¹⁸⁰ Tamm's information about the program was quite limited, but his "cold call"¹⁸¹ on Lichtblau and their subsequent conversations prompted Lichtblau and his colleague, James Risen, to obtain additional information from other sources, eventually resulting in public disclosure of the program, congressional hearings, statutory reforms, and civil lawsuits over the program.

C. Congressional, Judicial, Executive and Public Responses to the Disclosure of the Program

On December 16, 2005, the *New York Times* published an article revealing the NSA domestic surveillance program.¹⁸² The *Times* had held off from publishing the story for more than a year, apparently at the request of Bush Administration officials who claimed the publication would harm national security.¹⁸³ The *Times*' decision to go ahead with publication was apparently motivated by its desire not to be scooped on the story by its own reporter's publication of his book covering the issue.¹⁸⁴ So competition among

179. Risen & Lichtblau, *supra* note 159, at A1.

180. Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008.

181. *Id.* After the *New York Times* disclosure, the Justice Department instituted a criminal investigation into the leak of this information, eventually focusing on Tamm.

182. See Risen & Lichtblau, *supra* note 159.

183. *Id.* Due to the Administration's security concerns, Risen and Lichtblau also omitted "[s]ome information that administration officials argued could be useful to terrorists . . ." *Id.*

184. Gabriel Sherman, *Risen Gave Times A Non-Disclosure on Wiretap Book*, N.Y. OBSERVER, Jan. 22, 2006, <http://www.observer.com/node/38277> (noting that *Times*

publications was instrumental in ensuring that this program came to light.

The following day, President Bush acknowledged the existence of the surveillance program in his weekly radio address,¹⁸⁵ and a few days later Attorney General Alberto Gonzales and the Principal Deputy Director of National Intelligence, General Michael Hayden, convened a press conference to discuss the legal justification for the program.¹⁸⁶ One of the judges on the FISC resigned in protest,¹⁸⁷ and the Chief Judge arranged for a secret briefing in which the other FISC judges would have an opportunity to question Justice Department officials about the legality of the program.¹⁸⁸ Within one week of the disclosure, the Justice Department released a five-page letter to the Chairs and Ranking Members of the Intelligence Committees defending the program's legality,¹⁸⁹ and a month later, the Justice Department issued a forty-two-page white paper with more detailed legal arguments.¹⁹⁰ Legal scholars and NGOs responded with their own critiques of the white paper.¹⁹¹

The *Times* article indicated that “[n]early a dozen current and former officials” discussed the program with the reporters “because

executive editor Bill Keller denied that Risen's book was a factor in the timing of the NSA story, but other sources said that *Times* editors pressed to publish the story prior to the book's publication).

185. *President's Radio Address*, *supra* note 152.

186. Gonzales & Hayden Press Briefing, *supra* note 152. Before becoming Principle Deputy Director of National Intelligence in April 2005, General Hayden had served since March 1999 as Director of the NSA, during which period the surveillance program was developed and implemented. See Biography of Lieutenant General Michael V. Hayden, http://www.nsa.gov/about/leadership/bio_hayden.shtml (last visited Jan. 15, 2010).

187. Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits In Protest; Jurist Concerned Bush Order Tainted Work of Secret Panel*, WASH. POST, Dec. 21, 2005, at A01.

188. Carol D. Leonnig & Dafna Linzer, *Judges on Surveillance Court to Be Briefed on Spy Program*, WASH. POST, Dec. 22, 2005, at A01; Eric Lichtblau, *Judges and Justice Dept. Meet Over Eavesdropping Program*, N.Y. TIMES, Jan. 10, 2006, at A14.

189. Letter from Office of Legislative Affairs, U.S. Department of Justice, to Leadership of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence (Dec. 22, 2005), in David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1360–63 (2006).

190. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), reprinted in Cole & Lederman, *supra* note 189, at 1374–1414.

191. See, e.g., Bradley Letter, *supra* note 153; Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006 (Feb. 2, 2006), reprinted in Cole & Lederman, *supra* note 189, at 1415–25.

of their concerns about the operation's legality and oversight."¹⁹² In response, the Justice Department began a criminal investigation to find out the identity of those who leaked the information.¹⁹³

Several congressional committees initiated investigations of the program, requiring administration officials to answer questions about the program's legality.¹⁹⁴ Nonetheless, Congress eventually passed legislation that specifically authorizes warrantless surveillance, and immunizes telecommunications companies that participated, effectively ratifying the Bush Administration's surveillance program. While the Bush Administration claimed that it already had statutory authority for the program (under the September, 2001 Authorization of Use of Military Force), Congress passed a temporary revision to FISA in August 2007, that authorized the government to engage in warrantless surveillance directed at people outside the United States, even if they are communicating with persons within the United States.¹⁹⁵ This provision lapsed in February 2008, and later that year Congress passed FISA Amendments that again authorized warrantless surveillance, purported to immunize telecommunications companies from private lawsuits based on their cooperation with warrantless surveillance, and prohibited state governments from investigating those companies for such cooperation.¹⁹⁶

Private plaintiffs filed lawsuits against the government and against the telecommunications companies that apparently cooperated with the government's surveillance.¹⁹⁷ Five of these lawsuits were against a federal government agency or government

192. Risen & Lichtblau, *supra*, note 159, at A1.

193. Michael Isikoff, *Looking for a Leaker*, NEWSWEEK, Aug. 13, 2007, at 8 (describing FBI raid on the home of a former Justice Department lawyer who had concerns about the legality of the surveillance).

194. See, e.g., David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act 2* n.4 (Brookings Institution, Series on Counterterrorism and American Statutory Law Working Paper, Nov. 15, 2007), available at http://www.brookings.edu/~media/Files/rc/papers/2007/1115_nationalsecurity_kris/1115_nationalsecurity_kris.pdf (identifying congressional hearings following revelation of the surveillance program).

195. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552; see Avery, *supra* note 152, at 585-86.

196. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

197. For an excellent in-depth discussion of these lawsuits, see REAGAN, *supra* note 156, at 124-59.

official.¹⁹⁸ Dozens of lawsuits were filed against AT&T, Verizon, and MCI, telecommunications companies that allegedly worked with the NSA in intercepting these communications.¹⁹⁹ In addition, the Connecticut, Maine, and Vermont state public utility commissions, two individual commissioners in Missouri, and the New Jersey Attorney General attempted to investigate these companies, seeking information about whether the companies violated state privacy laws in assisting the NSA.²⁰⁰ The federal government sued these state entities and officials to prevent them from investigating the program.²⁰¹

A difficulty facing the private plaintiffs in these suits is proving that they actually were subjected to surveillance. While the government has confirmed the existence of the program, it has not provided specifics of who was targeted for surveillance, so the plaintiffs have had difficulty proving that they have standing. Some of the plaintiffs simply allege that they make international calls, and thus believe that they are subject to surveillance.²⁰² Other plaintiffs, such as the Center for Constitutional Rights lawyers representing Guantanamo prisoners who have communicated with those prisoners' family and friends abroad, seem to have a stronger claim that they were likely subject to this surveillance.²⁰³

In all of the NSA cases involving private plaintiffs, the government filed motions to dismiss based on the state secrets

198. *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); Complaint, *Shubert v. Bush*, No. M:06-cv-01791 (N.D. Cal. May 11, 2007) (filed in Brooklyn, but transferred to N.D. Cal.); Complaint, *Ctr. for Constitutional Rights v. Bush*, No. 06-cv-313 (S.D.N.Y. 2006) (filed in Manhattan but transferred to N.D. Cal.); *Guzzi v. Bush*, No. 1:06-cv-0136 (N.D. Ga. Jan. 20, 2006) (filed in Atlanta, but transferred to N.D. Cal.); *see also* REAGAN, *supra* note 156, at 131–32.

199. REAGAN, *supra* note 156, at 125. A federal judicial center report indicated that “[a]t least 45 suits” have stemmed from the NSA domestic surveillance program revealed by the *New York Times* and the data-mining program revealed by *USA Today*. *Id.* at 124–25, 132.

200. *See* AT&T Mich.’s Motion to Dismiss at 9, *In re ACLU of Mich. v. AT&T Mich.*, No. U-15204 (Mich. Pub. Serv. Comm’n Mar. 2, 2007), *available at* <http://efile.mpsc.cis.state.mi.us> (enter case # 15204; then follow “0016” hyperlink).

201. REAGAN, *supra* note 156, at 140 (identifying the five states as Connecticut, Maine, Missouri, New Jersey, and Vermont).

202. *ACLU*, 493 F.3d at 664; Amended Compl., *Shubert v. Bush*, No. M:06-cv-01791-VRW at 2–4 (N.D. Cal. May 11, 2007), *available at* <http://www.fff.org/files/filenode/att/ShubertAmendedComplaint.pdf>.

203. Complaint, *Ctr. for Constitutional Rights v. Bush*, No. M:06-cv-01791-VRW (N.D. Cal. July 21, 2007). This suit, like almost all other lawsuits, was transferred to the Northern District of California; *see also* REAGAN, *supra* note 156, at 129.

privilege.²⁰⁴ Until recently, the government invoked the state secrets privilege to prevent a private party in civil litigation from accessing or putting into evidence specific items of information that the government asserted must be kept secret for national security or foreign policy reasons. In these NSA cases, the government invoked the state secrets privilege to dismiss the cases in their entirety, asserting either that the plaintiffs could not prove standing or that the defense could not prove its case without accessing information subject to the privilege. While this broad use of the state secrets privilege is not unprecedented, it is occurring on a larger scale than in the past. In the first case to reach a federal appellate court, *ACLU v. NSA*, the Sixth Circuit ruled for the government on standing grounds, finding that the plaintiffs could not prove that they had been subject to the surveillance, and could not get discovery because of the secrets privilege.²⁰⁵

One group of plaintiffs seems to have strong evidence that it was subject to surveillance—that connected with the al-Haramain Foundation, an Oregon charity. In 2004, the Treasury Department froze the Foundation's assets because of its alleged ties to al Qaeda.²⁰⁶ Al-Haramain contested the government's allegations, and as part of that proceeding, the government turned over to al-Haramain's lawyer discovery material that documented private phone conversations between one of the Foundation's officers in Saudi Arabia and two of its U.S.-based lawyers.²⁰⁷ The government later asserted that it had provided this document in error, and retrieved it from al-Haramain's lawyers, but did not retrieve the copies in the hands of al-Haramain itself.²⁰⁸ After the *New York Times* disclosed the NSA program in December of 2005, al-Haramain concluded that this document indicated that it had been subject to the NSA's

204. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007); *ACLU*, 493 F.3d at 650; *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); see also REAGAN, *supra* note 156 at 126 n.1091 (listing state secrets-based motions to dismiss in additional cases).

205. 493 F.3d at 683, 687–88.

206. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007).

207. Patrick Raddan Keefe, *State Secrets: A Government Mistep in a Wiretapping Case*, NEW YORKER, Apr. 28, 2008, at 28, available at http://www.newyorker.com/reporting/2008/04/28/080428fa_fact_keefe; see also REAGAN, *supra* note 156, at 130 n.1117. Plaintiffs described this document as a log of clandestinely monitored telephone calls between the charity's director in Saudi Arabia and its lawyers in Washington, D.C. *Id.*

208. *Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1219.

warrantless surveillance, and filed suit in Oregon District Court, providing the court with a copy of the document in a sealed filing.²⁰⁹

The Oregon District Court denied the government's motion to dismiss based on state secrets grounds, and allowed the plaintiffs to rely on their memories of the sealed document for evidence that they were subject to surveillance.²¹⁰ The government appealed to the Ninth Circuit, which reversed the District Court's decision to allow the plaintiffs to recreate from memory the sealed document, but nonetheless remanded the case on the issue of whether FISA preempts the state secrets privilege.²¹¹ While the *al-Haramain* case was pending in the Ninth Circuit, all of the NSA-related lawsuits (except *ACLU v. NSA*) were transferred to the Northern District of California as part of the multi-district litigation protocol,²¹² so the *al-Haramain* case was remanded to Judge Vaughn Walker in San Francisco. In 2008, Judge Walker ruled that under certain conditions, FISA partially preempts the state secrets privilege.²¹³

The FISA statute provides a civil cause of action to some who have been subject to warrantless surveillance,²¹⁴ and includes procedures allowing discovery that is not available under the state secrets privilege.²¹⁵ Judge Walker ruled that where these procedures apply, they preempt the state secrets doctrine, but in order to benefit from that preemption, plaintiffs must *first* show they have been subjected to electronic surveillance.²¹⁶ In making this preliminary showing, plaintiffs are subject to the state secrets privilege.²¹⁷ Once they make this showing, the court will then turn to the issue of whether the surveillance was legal, and in making that legality determination, the state secrets privilege does not apply.²¹⁸ Instead

209. *Id.* at 1218.

210. *Id.* at 1227, 1229.

211. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007).

212. Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. CHRON., Aug. 11, 2006, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/11/BAGRKGL4S1.DTL>.

213. *In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008).

214. 50 U.S.C. § 1810 (2008) (providing a cause of action to those whose communications were intentionally subject to warrantless electronic surveillance as long as that person is not "a foreign power or an agent of a foreign power").

215. 50 U.S.C. § 1806(f) (2008).

216. *In re NSA*, 564 F. Supp. 2d at 1134.

217. *Id.*

218. *Id.*

the court will use the procedures set forth in FISA.²¹⁹ Those procedures allow the court to examine documents in camera and even to disclose materials to the plaintiffs “under appropriate security procedures and protective orders” if “such disclosure is necessary to make an accurate determination of the legality of the surveillance.”²²⁰ The state secrets privilege prevents al-Haramain from relying on the accidentally revealed document to show that it had been subject to surveillance, and so Judge Walker dismissed al-Haramain’s case without prejudice, allowing it to re-file if it has non-privileged evidence showing that it was subject to electronic surveillance.²²¹

In early 2006, more than forty members of Congress requested that the Justice Department’s Office of Professional Responsibility (OPR) open an investigation into whether the department lawyers acted properly in approving the surveillance program.²²² In response, OPR opened an investigation and planned to interview Justice Department lawyers who had been involved in the approval process. The Bush Administration considered all of this information to be classified, and so in order to pursue the investigation, OPR officials would need security clearances. Such clearances had been granted to Civil Division lawyers defending the program in court and to Criminal Division lawyers investigating the leak to the *New York Times*.²²³ H. Marshall Jarrett, then the head of OPR, requested that he and six OPR employees be given security clearances so that they could begin the investigation, but apparently on the advice of then Attorney General Alberto Gonzales, President Bush denied the clearances, blocking the OPR investigation.²²⁴ This was the first time in its history that OPR shut down an investigation because it was

219. *Id.*

220. *See* 18 U.S.C. § 1806(f).

221. *In re NSA*, 564 F. Supp. 2d at 1137.

222. Memorandum for the Attorney General Through Paul J. McNulty from H. Marshall Jarrett Re: Status of OPR Investigation (Apr. 21, 2006); Letter from Maurice Hinchey, Henry Waxman, John Lewis and Lynn Woolsey to George W. Bush (July 18, 2006) (on file with author), *available at* http://www.house.gov/hinchey/newsroom/press_2006/071806nsaletertobush.html [hereinafter Hinchey Letter].

223. Jason Ryan, *White House Blocked Spy Program Probe*, ABC NEWS, July 18, 2006, <http://abcnews.go.com/Politics/Story?id=2208888&page=1>.

224. Murray Waas, *Aborted DOJ Probe Probably Would Have Targeted Gonzales*, NAT’L J., Mar. 15, 2007, <http://news.nationaljournal.com/articles/0315nj1.htm>; Ryan, *supra* note 223.

denied security clearances.²²⁵ Jarrett notified the members of Congress who had requested the probe, and they responded by writing the President and requesting that the clearances be granted.²²⁶ More than a year later, when Michael Mukasey replaced Gonzales as Attorney General, the Bush Administration granted OPR the clearances, and the investigation began.²²⁷

In January 2007, the Bush Administration apparently modified the surveillance program and brought it under the supervision of the Foreign Intelligence Surveillance Court (FISC).²²⁸ While the Bush Administration officials initially described the program as broad enough to target communications where there is “a reasonable basis to conclude that one party to the communication is . . . a member of an organization affiliated with al Qaeda,”²²⁹ this new iteration of the program called for targeting “communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization.”²³⁰ This decision constitutes partial rectification by ceasing the most controversial aspect of the program: the lack of any judicial supervision. The decision to bring the program under court supervision may have been caused by pressure from the cooperating telecommunications companies or by the prospect of a less friendly 110th Congress controlled by the Democratic Party.

The Bush Administration’s surveillance program appears to have violated FISA, and an intentional violation of FISA is a felony.²³¹ Thus, those who authorized the program may have committed a felony. A few Democratic members of Congress proposed impeaching President Bush for FISA violations, but there was little political support for such a move. Calls for impeachment came from those outside of the mainstream of the Democratic Party such as Cynthia McKinney, who introduced an impeachment bill at the very

225. Shane Harris & Murray Waas, *Justice Department Probe Foiled*, NAT’L L.J., May 25, 2006, <http://news.nationaljournal.com/articles/0525nj2.htm>.

226. Waas, *supra* note 224; Hinchey Letter, *supra* note 222.

227. Terry Frieden, *Justice Department to Re-open No-warrant Wiretap Probe*, CNN (Nov. 15, 2007), <http://www.cnn.com/2007/POLITICS/11/13/domestic.spying/index.html>.

228. Gonzales Letter, *supra* note 156; REAGAN, *supra* note 156.

229. Gonzales & Hayden Press Briefing, *supra* note 152 (emphasis added).

230. Gonzales Letter, *supra* note 156.

231. 50 U.S.C. § 1809 (2008) (prescribing up to five years imprisonment).

end of the 109th Congress, after she had lost reelection, and Dennis Kucinich.²³² More powerful members of Congress, such as Judiciary Committee Chair John Conyers, refused to move forward with impeachment proceedings.²³³

V. IMPLICATIONS FOR CLAIMS OF NATIONAL SECURITY SECRECY

This Article has outlined the multiple mechanisms that can help ensure that the executive branch complies with the law, and hold the executive branch accountable when it violates that law. At first glance, it would appear that this complicated network of multiple overlapping accountability mechanisms would provide a plethora of protections and ensure a robust system of accountability. But all of these accountability mechanisms have one factor in common: their dependence on information. If the mechanism does not or cannot obtain information about a particular program, it cannot ensure legal accountability for that program. Remove the information, and the entire structure of apparently robust accountability collapses.

By reviewing the complex narrative of the Bush Administration's warrantless surveillance program and how accountability mechanisms responded to it, one can see how this central weakness—vulnerability to claims of national security secrecy—played out. The Bush Administration systematically used national security secrecy to prevent multiple accountability mechanisms from scrutinizing its warrantless surveillance program. The case study reveals what is essentially a design flaw in our system of accountability: the executive branch's ability to avoid accountability through claims of national security secrecy. This leads to the next question: How can one cure this design flaw?

While this Article does not purport to provide a complete answer to that question, its analysis does suggest that in evaluating both the need for and efficacy of any particular accountability mechanism, one must consider that mechanism's context, and look at how it functions within the entire architecture of accountability. Where all of the relevant accountability mechanisms share the same weakness—

232. H.R. Res. 1106, 109th Cong., 2d Sess. (2006); H.R. Res. 1258, 110th Cong. (2008). Kucinich's proposal had only eleven cosponsors. See Cosponsors of H.R. 1258, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HE01258:@@P>.

233. See, e.g., Molly K. Hooper, *Kucinich May Get Hearing on Impeachment Resolution*, CQ POLITICS, July 14, 2008, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000002916681>.

the executive branch's ability to opt out of accountability by claiming national security secrecy—there may be a particularly urgent need for reform. Congress needs to consider reforms that would limit the executive branch's ability to opt out of accountability. One possibility would be to require more robust disclosure to Congress. I have explored elsewhere several options for increasing disclosure to Congress.²³⁴ Here I want to sketch out another possible reform: limiting the executive branch's ability to claim the state secrets privilege to avoid judicial scrutiny of allegedly illegal conduct.

Limiting the state secrets privilege could be accomplished in one of several ways. The Bush Administration succeeded in using the state secrets privilege to block dozens of lawsuits arising out of its controversial programs of domestic surveillance and rendition, and the Obama Administration is continuing this practice.²³⁵ In persuading courts to dismiss these lawsuits, the executive branch prevents courts from serving as an accountability mechanism that could independently examine and evaluate the legality of these programs. There are already legislative proposals that would limit the ability of the executive branch to obtain dismissals of lawsuits based on state secrets grounds, requiring that courts consider in camera that information that the executive branch claims is privileged.²³⁶ Alternatively, one could limit the government's ability to assert the state secrets privilege in response to allegations of government wrongdoing.

Courts recognize and give effect to an evidentiary privilege, such as the attorney-client privilege, in order to protect and promote a particular goal, such as facilitating the administration of justice by ensuring that individuals and entities can get legal advice in confidence. Similarly, courts have recognized the state secrets

234. See Kathleen Clark, "A New Era of Openness?": *Disclosing Intelligence to Congress under Obama*, 26 CONST. COMMENT. (forthcoming 2010); *Congress's Right to Counsel*, *supra* note 175.

235. In a lawsuit filed by someone allegedly subjected to extraordinary rendition, the Obama Administration argued that the case should be dismissed under the state secrets privilege, and successfully sought rehearing en banc of a Ninth Circuit panel decision that had reversed dismissal of the case. *Mohamed v. Jeppesen DataPlan, Inc.*, 586 F.3d 1108 (9th Cir. 2009) (ordering rehearing en banc); *Petition for Rehearing or Rehearing en banc, Mohamed v. Jeppesen DataPlan, Inc.*, No. 08-15693 (9th Cir. 2009), available at http://www.aclunc.org/cases/active_cases/asset_upload_file741_8488.pdf.

236. See State Secret Protection Act of 2009, H.R. 984, 111th Cong.; State Secrets Protection Act, S. 417, 111th Cong. (2009).

privilege to protect information the disclosure of which could harm the nation's security. But courts also recognize that privileges have their limits, and at times the goal or interest that is furthered by a privilege must give way to a competing goal. So when the Supreme Court recognized the presidential communications privilege in *United States v. Nixon* in order to ensure that presidents could receive candid advice, the court also acknowledged that this interest in candor and confidentiality is superseded when the information is relevant to a criminal trial.²³⁷ And while courts have recognized that governments, like private parties, can assert the attorney-client privilege to prevent the disclosure of information related to legal advice, the government's ability to assert that privilege must give way in the face of a criminal investigation.²³⁸

These wrongdoing-based exceptions show that even worthy privileges sometimes must give way to the competing public interest in the disclosure of government wrongdoing, and this analysis may be just as applicable to the state secrets privilege as it is to the presidential communications and attorney-client privileges.²³⁹ Recognizing a crime- or fraud-based exception to the state secrets privilege may be necessary to prevent the executive branch from doing an end run around judicial accountability for violations of law.

VI. CONCLUSION

This Article is a first attempt to outline some of the myriad mechanisms that hold the executive branch and its officials accountable for violations of the law. This cataloging of accountability mechanisms reveals a distributed architecture of accountability, with mechanisms of varying independence and

237. *United States v. Nixon*, 418 U.S. 683, 706-07 (1974).

238. *In re A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002) (attorney-client privilege inapplicable because government lawyers have duty to act in the public interest); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (duty of officers of executive branch to uphold the public trust militates against allowing invocation of attorney-client privilege to prevent disclosure of criminal offenses within the government); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (attorney-client privilege held inapplicable to government attorneys, who have a duty to report criminal wrongdoing). *But see In re United States v. Doe*, 399 F.3d 527 (2d Cir. 2005) (attorney-client privilege encourages government officials to seek out and receive fully informed legal advice).

239. *See also* Exec. Order No. 12958, *as amended by* Exec. Order 13292 § 1.7, 68 Fed. Reg. 15315, 15318 (Mar. 28, 2003) (prohibiting classification for the purpose of hiding information about illegality).

efficacy inside and outside the executive branch. In some situations, one mechanism interferes with the operation of another, as when a congressional committee's provision of witness immunity results in overturning of a criminal conviction of a wrongdoer.²⁴⁰ But in other situations, these diverse mechanisms actually build on each other, as when a whistleblower's revelation to a journalist results in news story, which then prompts congressional, inspector general, and sometimes even criminal investigations.²⁴¹ So any attempt to assess the efficacy of an individual accountability mechanism must consider how it builds on and contributes to the work of other accountability mechanisms.

The Article also analyzed in detail how these accountability mechanisms operated—or failed to operate—in connection with the Bush Administration's warrantless surveillance program. The executive branch has largely been able to avoid the scrutiny of these multiple accountability mechanisms by asserting national security secrecy. This case study reveals a design flaw in our system of accountability: the executive branch's ability to avoid accountability through claims of national security secrecy. The secrecy surrounding the surveillance program apparently undermined the ability of existing accountability mechanisms to operate, from congressional committee oversight, to Inspector General investigations, to civil lawsuits. There has not yet been a thorough, transparent, and independent evaluation of that controversial surveillance program. And that deficiency will remain the case until we see reform limiting the executive branch's ability to assert national security secrecy in the face of credible allegations of wrongdoing.

240. *See, e.g.*, *Poindexter v. United States*, 951 F.2d 369, 371 (D.C. Cir. 1991).

241. *See, e.g.*, Kreimer, *supra* note 15, at 1056–57 (describing the role of FOIA requests in prompting Inspector General investigations of the military's mistreatment of prisoners and the FBI's abuse of Patriot Act authority); Cynthia M. Nolan, *Seymour Hersh's Impact on the CIA*, 12 INT'L J. INTEL. & COUNTERINTEL. 18 (1999) (the results of the CIA's internal investigation were leaked to journalist Seymour Hersh, who wrote a series of stories in the *New York Times*, leading to congressional investigations of intelligence abuses).

APPENDIX: EXECUTIVE BRANCH OFFICIALS PROSECUTED FOR
MISLEADING CONGRESS (1949 – PRESENT)

Name: Official Position	Predicate Conduct	Result	Date
Bennett E. Meyers US Army Officer – Deputy Chief of Procurement of Aircraft and Aircraft Parts for the Army Air Force ⁱ	After World War II, Meyer was implicated in possible war profiteering and fraud, because he had procured parts for the Army from his own company. In order to escape responsibility for his corrupt practices, Meyers told Bleriot H. Lamarre, the president of Aviation Electric Corporation, which Meyers owned, to lie to Congress about Meyer's ownership of the company and two different gifts from the company to Meyers.	Convicted of three counts of subornation of perjury. ⁱⁱ	1949 (conviction affirmed)
Alger Hiss Director of the Office of Special Political Affairs (Department of State) ⁱⁱⁱ	Denied to the HUAC that he was a communist or had spied for the Soviets. ^{iv}	Convicted of perjury before Congress; sentenced to five years of prison. ^v	1950 (convicted) ^{vi}

357

The Architecture of Accountability

Name: Official Position	Predicate Conduct	Result	Date
Richard Kleindienst Attorney General ^{vii}	Made false statements to Senate committee at hearing on his confirmation as Attorney General regarding White House interference in the Justice Department's antitrust litigation against International Telephone and Telegraph. ^{viii}	Pleaded guilty to withholding information from Congress; cooperated with prosecution; sentence suspended to one month imprisonment, \$100 fine, and one month unsupervised probation; investigated and charged by Watergate Special Prosecutor. ^{ix}	1975 (convicted)
John Mitchell Attorney General ^x	Made false statements to Senate Select Committee on Presidential Campaign Activities regarding his approval of the funding for the Watergate break-in, as well as his later attempts to cover up the scandal. ^{xi}	Convicted of making false statements to Congress under 18 U.S.C. § 1621 and other related crimes; sentenced to 30–96 months imprisonment; investigated and charged by Watergate Special Prosecutor. ^{xii}	1975 (convicted)

BRIGHAM YOUNG UNIVERSITY LAW REVIEW

2010

Name: Official Position	Predicate Conduct	Result	Date
H. R. Haldeman White House Chief of Staff ^{xiii}	Made false statements to Senate Select Committee on Presidential Campaign Activities regarding his and Nixon's contemporaneous knowledge of the Watergate cover-up.	Convicted of three counts of false statements before Congress, and two related counts; sentenced to 30–96 months imprisonment; investigated and charged by Watergate Special Prosecutor. ^{xiv}	1975 (convicted)
Richard Helms CIA Director ^{xv}	Misrepresented the CIA's covert involvement in Chile, which included attempts to influence the 1970 presidential election and assassination and coup attempts, contrary to the policies of the U.S. Government.	Pled guilty to two misdemeanor counts under 2 U.S.C. § 192 (refusal to testify); sentenced to two years in prison (suspended) and \$2,000 fine. ^{xvi}	1977 (convicted)
Rita M. Lavelle EPA Assistant Administrator ^{xvii}	Testified falsely in a sworn statement submitted to a congressional subcommittee and repeated the falsehood under oath that she had recused herself from involvement in an investigation of a former employer. ^{xviii}	Convicted of making a false statement to Congress, obstructing Congress, and two counts of perjury; sentenced to six month imprisonment and fined \$10,000. ^{xix}	1985 (conviction affirmed)

Name: Official Position	Predicate Conduct	Result	Date
Robert C. McFarlane National Security Advisor ^{xx}	Initially denied and then gave partially false information about his role as organizer of the Iran/contra scheme; helped others, including his subordinate North, cover up the scandal and lied about doing so; kept certain parts of the affair secret from Congress.	Pled guilty to four misdemeanor charges that he unlawfully withheld information from Congress about contra-support activities; sentenced to two years probation, 200 hours community service, and \$20,000 fine; charges brought by Independent Counsel Lawrence E. Walsh; pardoned. ^{xxi}	1988 (convicted); 1992 (pardoned)
Oliver L. North Deputy Director of Political-Military Affairs (NSC Staff) ^{xxii}	Helped to “draft a false chronology of the Iran arms sales and altered and destroyed documents in response to congressional inquiries into the Iran initiative.” ^{xxiii}	Found guilty of aiding and abetting obstruction of Congress; sentenced to two years probation and 1,200 hours of community service and fined \$150,000; vacated on appeal; charges brought by Independent Counsel Lawrence E. Walsh. ^{xxiv}	1989 (convicted); 1990 (vacated)

BRIGHAM YOUNG UNIVERSITY LAW REVIEW

2010

Name: Official Position	Predicate Conduct	Result	Date
John M. Poindexter National Security Advisor ^{xxv}	Shredded and altered paper and computer trail regarding Iran/contra; repeatedly gave false version of Iran/contra transactions that exculpated himself and the President to Congress.	Convicted of one count of conspiring to obstruct official inquiries and proceedings, two counts of obstructing Congress, and two counts of false statements to Congress; sentenced to six months in prison; overturned on appeal; charges brought by Independent Counsel Lawrence E. Walsh. ^{xxvi}	1990 (convicted); 1991 (vacated)
Alan D. Fiers, Jr. Chief of CIA Central American Task Force ^{xxvii}	Cooperated with Independent Counsel investigation after it came to light that he had made false statements regarding operational aspects of Iran/contra activities.	Pled guilty to two counts of withholding information from Congress; sentenced to 100 hours community service; charges brought by Independent Counsel Lawrence E. Walsh; pardoned. ^{xxviii}	1991 (convicted); 1991 (pardoned)

Name: Official Position	Predicate Conduct	Result	Date
Elliot Abrams Assistant Secretary of State for Inter-American Affairs ^{xxix}	“[W]ithheld from Senate Foreign Relations Committee and the House Permanent Select Committee on Intelligence (HPSCI) in October 1986 his knowledge of North’s contra-assistance activities. . . . also admitted that he withheld from HPSCI information that he had solicited \$10 million in aid for the contras from the Sultan of Brunei.” ^{xxx}	Pled guilty to two counts of withholding information from Congress under 2 U.S.C. § 192; charges brought by Independent Counsel Lawrence E. Walsh; pardoned; publicly censured by DC bar. ^{xxxi}	1991 (convicted); 1992 (pardoned); 1997 (censured) ^{xxxii}
Duane R. Clarridge Career CIA Officer ^{xxxiii}	Testified about role in Iran/contra but denied contemporaneous knowledge that weapons were being shipped or soliciting support from third countries.	Indicted on seven counts of perjury and false statements to congressional and presidential investigators; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before trial. ^{xxxiv}	1991 (indicted); 1992 (pardoned)

BRIGHAM YOUNG UNIVERSITY LAW REVIEW

2010

Name: Official Position	Predicate Conduct	Result	Date
Clair E. George CIA Deputy Director for Operations ^{xxxv}	“[C]harged with falsely denying before Congress knowledge of who was behind the contra-resupply operation and the true identity of Max Gomez, a former CIA operative whose real name was Felix Rodriguez and whom Hasenfus had publicly identified as part of the resupply operation. According to the charges, George also falsely denied contacts with retired U.S. Air Force Major General Richard V. Secord, who was involved in both the Iran and contra operations.” ^{xxxvi}	Convicted of one count of making false statements before Congress and one count perjury before Congress; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before sentencing. ^{xxxvii}	1992
Caspar W. Weinberger Secretary of Defense ^{xxxviii}	Testified, contrary to evidence, that he was not a knowing participant in Iran/contra and withheld from Congress relevant personal notes indicating his participation.	Indicted on obstructing a congressional investigation, making false statements to Congress, and two counts of perjury before Congress; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before trial. ^{xxxix}	1992 (indicted, pardoned)

Name: Official Position	Predicate Conduct	Result	Date
Deborah Gore Dean Department of Housing and Urban Development Official ^{xl}	Lied to the Senate Committee on Banking, Housing and Urban Affairs about her nomination to the position of Assistant Secretary for Community Planning and Development; “key-player” in the department’s use of funds to favor “developers willing to pay huge fees to lobbyists with whom she associated.” ^{xli}	Convicted of four counts of false statements to Congress under 28 U.S.C. § 1001, four counts of perjury under 28 U.S.C. § 1621 for the same statements, and four related counts; § 1001 convictions reversed on appeal, three of § 1621 convictions upheld; prosecuted by Independent Counsel Arlin M. Adams. ^{xlii}	1993 (convicted); 1995 (appeal)
Michael Horner Former U.S. Customs Service Inspector ^{xliii}	In retaliation against his former employers, Horner fabricated a memo on Customs Service letterhead that suggested the Customs Service was aiding Mexican drug smugglers; in order to convince Senator Diane Feinstein to pursue an investigation, Horner produced additional false affidavits from Customs Service officials which stated that the original document was legitimate.	Pled guilty to conspiracy to obstruct a congressional investigation ^{xliv}	2000 (convicted)

Name: Official Position	Predicate Conduct	Result	Date
John T. Korsmo Federal Housing Finance Board Chairman ^{xlv}	Lied in a written response to the Senate Committee on Banking, Housing, and Urban Affairs, which was investigating the propriety of his being listed as a “special guest” on a campaign fundraising letter sent to banking officials he regulated	Pled guilty to making false statements to Congress; sentenced to 18 months probation and a \$5,000 fine.	2005
David H. Safavian Chief of Staff for the General Services Administra- tion ^{xlvi}	Accused of concealing information from a Senate investigator looking into Jack Abramoff’s activities.	Convicted for obstructing a Senate proceeding and making false statements to a Senate investigator, along with related crimes; all counts reversed and case remanded on appeal. ^{xlvii}	2006 (convicted); 2008 (reversed) ^{xlviii}

- i. *Meyers v. United States*, 171 F.2d 800, 802–03 (D.C. Cir. 1949).
- ii. *Id.* at 800–02. Convicted of three counts under D.C. CODE § 22-2501 (1940). *Id.*
- iii. *United States v. Hiss*, 185 F.2d 822, 824–25 (2d Cir. 1950).
- iv. *Hiss*, 185 F.2d at 824–25.
- v. The statute of limitations had already run on possible espionage charges. Janny Scott, *Alger Hiss, Divisive Icon of the Cold War, Dies at 92*, N.Y. TIMES, Nov. 16, 1996, at 1, available at <http://query.nytimes.com/gst/fullpage.html?res=9D02E0D9143AF935A25752C1A960958260&sec=&spon=&pagewanted=all>. Hiss was also charged with and convicted of perjury for his later grand jury testimony to the same. *Hiss*, 185 F.2d at 824–25.
- vi. Scott, *supra* note v.
- vii. *D.C. Bar v. Kleindienst*, 345 A.2d 146, 147 (D.C. 1975).
- viii. *Id.* at 147–50.
- ix. *Id.* at 149 n.5 (convicted under 2 U.S.C. § 192 (1970)).
- x. *In re Mitchell*, 370 N.Y.S.2d 99, 100–01 (N.Y. App. Div. 1975); Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988, at A01, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/>

stories/mitchobit.htm.

- x. *Mitchell*, 370 N.Y.S.2d at 100-01; Meyer, *supra* note x.
- xii. *United States v. Haldeman*, 559 F.2d 31, 51-53 (D.C. Cir. 1976). Mitchell was also convicted of obstruction of justice under 18 U.S.C. § 1503, false statements to a grand jury under 18 U.S.C. § 1623, and conspiracy under 18 U.S.C. § 371. *Mitchell*, 370 N.Y.S.2d at 100.
- xiii. JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 74 (1976); *Haldeman*, 559 F.2d at 106.
- xiv. *Haldeman*, 559 F.2d at 52. The related crimes were one count of conspiracy to obstruct the investigation into the Watergate cover-up and one count of obstruction of justice. CONGRESSIONAL QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS 535, 836 (Mercer Cross et al. eds., 1975); *see also Haldeman*, 559 F.2d at 51 n.3.
- xv. Thomas Powers, *Inside the Department of Dirty Tricks*, ATLANTIC MONTHLY, Aug. 1979, at 33, available at <http://www.theatlantic.com/unbound/flashbks/cia/powers.htm>.
- xvi. *Id.*; PUB. INTEGRITY SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 1978, at 4, available at <http://www.usdoj.gov/criminal/pin/docs/arpt-1978.pdf>. Investigators contemplated bringing other charges, such as perjury, but it was far from certain that they would be able to force Helms to disclose the classified information needed for such a conviction. Thus, they offered the two misdemeanor withholding of information counts in exchange for no jail time or sentencing. Helms accepted the deal, but the judge felt it necessary to impose a stronger sentence, resulting in the jail time and fine. Powers, *supra* note xv.
- xvii. *United States v. Lavelle*, 751 F.2d 1266, 1268 (D.C. Cir. 1985).
- xviii. *Id.* at 1268-70.
- xix. *Id.* One count under 18 U.S.C. § 1001 (1982), one count under 18 U.S.C. § 1505, and two counts under 18 U.S.C. § 1621 (1982). *Id.* at 1271 n.4. Ms. Lavelle bears the dubious distinction of being the only executive branch official actually charged for lying to Congress under 18 U.S.C. § 1001 between 1955 and 1986. Peter W. Morgan, *The Underfined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 182 (1992). 1955 marked the first time the Court held § 1001 applied to false statements made to any branch of government. 1986 was the date of the first Iran/contra trials. Elkan Abramowitz, *The Limitation of USC §1001 to the Executive Branch*, 214 N.Y. L.J. 3 (1995).
- xx. LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, VOLUME I: INVESTIGATIONS AND PROSECUTIONS 79-104 (1994), available at http://fas.org/irp/offdocs/walsh/chap_01.htm.
- xxi. *Id.* McFarlane was one of six Iran/contra defendants pardoned by President Bush. "In recommending the acceptance of this plea of guilty, Independent Counsel gave up the opportunity to prosecute McFarlane as a member of the conspiracy to defraud the United States by conducting an unauthorized covert activity, for making false statements to Congress, and for obstruction of a congressional investigation. The strength of such felony prosecutions would lie in the admissions of McFarlane and the documentary proof of memoranda from North to McFarlane. In addition, members of the NSC staff could have testified to North's direct access to McFarlane, notwithstanding their difference in rank." *Id.* However, North and Poindexter both refused to testify without immunity, and McFarlane denied all other guilt. Additionally, the independent investigator was worried that McFarlane's trial and testimony might disrupt their other prosecutions. McFarlane agreed to cooperate with the investigation as part of his plea agreement. *Id.*
- xxii. *Id.* at 105-22, available at http://fas.org/irp/offdocs/walsh/chap_02.htm.
- xxiii. *Id.*

xxiv. *Id.* North was originally charged on twelve counts: two counts of obstructing Congress, three counts of false statements to Congress, an additional count of obstruction of Congress on an aiding and abetting theory, one count of obstructing a presidential inquiry, one additional count of false statements (to the presidential investigator), one count of shredding and altering official documents, accepting an illegal gratuity, conversion of traveler's checks, and one conspiracy to defraud the United States. The major conspiracy charges had to be dropped due to information classification issues. In addition to the aiding and abetting obstruction count, North was also found guilty of shredding and altering official documents and accepting an illegal gratuity. North was not given prison time because the sentencing judge felt that probation and community service would be more effective, but this also gave North little incentive to cooperate with the ongoing independent investigation. On appeal, the D.C. Circuit Court of Appeals found that North's trial had been tainted by the immunized congressional testimony he had given on national television and vacated the convictions. *Id.*

xxv. *Id.* at 123–36, available at http://fas.org/irp/offdocs/walsh/chap_03.htm.

xxvi. *Id.* Poindexter was originally indicted on seven counts. Two conspiracy charges were dropped due to the confidential information required for conviction. His conviction was overturned on appeal because his trial had been tainted by earlier immunized testimony and other grounds. *Id.*

xxvii. *Id.* at 263–86, available at http://fas.org/irp/offdocs/walsh/chap_19.htm.

xxviii. *Id.* Fiers' plea was part of a testimony agreement. *Id.*

xxix. *In re Abrams*, 689 A.2d 6, 6 (D.C. 1997).

xxx. WALSH, *supra* note xx, at 375–92.

xxxi. *Abrams*, 689 A.2d at 9, 19.

xxxii. *Id.* at 6–9.

xxxiii. WALSH, *supra* note xx, at 247–62.

xxxiv. *Id.* “On November 26, 1991, a federal Grand Jury indicted Clarridge on seven counts of perjury and false statements to congressional investigators and to the President's Special Review Board (the Tower Commission) stemming from his testimony about his role in the November 1985 arms shipment to Iran.” *Id.* Counts one through three charged perjury before the Senate Select Committee on Intelligence under 28 U.S.C. § 1621. Count four charged perjury before the House Permanent Select Committee. Count five charged false statements before the president's Tower Commission. Count six charged perjury before the Select Iran/contra Committees. Count seven charged false statements in a deposition before the staff of the Select Iran/contra Committees. Clarridge was pardoned before trial along with five others. *Id.*

xxxv. *Id.* at 233–46.

xxxvi. *Id.*

xxxvii. *Id.* George was initially indicted by a grand jury on ten felony counts of perjury, false statements, and obstruction of Congressional and grand jury investigations. Three obstruction counts were then dropped after the narrow construal of the statute in the Poindexter case. Several months later, George was indicted by a grand jury of two supplemental counts. Nine counts were brought to trial: two counts of false statements to the Senate Foreign Relations Committee (SFRC), two counts of obstructing Congress, two additional counts of false statements to the House Permanent Select Committee on Intelligence (HPSCI), perjury before the Senate Select Committee on Intelligence (SSCI), obstructing a grand jury investigation, and perjury before a grand jury. The first trial resulted in a mistrial after the jury could not reach a unanimous verdict regarding any count. The independent investigator then dropped the two obstruction counts and some of the charged false statements where more than one statement was charged as false. The jury returned a guilty verdict as to one of the counts of false statements before the HPSCI and the perjury

count before the SSCI. George was pardoned, along with five others, a month before sentencing. *Id.*

xxxviii. *Id.* at 405–42.

xxxix. *Id.* Weinberger was also indicted on one count of perjury to the Office of Independent Council and the FBI. He was pardoned before his CIPA issues could be litigated. *Id.*

xl. United States v. Dean, 55 F.3d 640 (D.C. Cir. 1995).

xli. *Id.* at 646.

xl. *Id.* “On July 7, 1992, a grand jury returned a thirteen-count indictment against Dean. The indictment charged Dean with three counts of conspiracy in violation of 18 U.S.C. § 371, one count of accepting an illegal gratuity in violation of 18 U.S.C. § 201(c)(1)(B), four counts of perjury in violation of 18 U.S.C. § 1621, and five counts of concealment and false statements in violation of 18 U.S.C. § 1001. The district court dismissed one of the counts brought under 18 U.S.C. § 1001. On October 26, 1993, a jury found Dean guilty of the twelve remaining counts.” *Id.* at 644. Before Dean’s appeal the Supreme Court decided *Hubbard v. United States*, 514 U.S. 695 (1995), which held that 18 U.S.C. § 1001 did not apply to statements made before Congress. Thus, these convictions were overturned. The single 18 U.S.C. § 1621 count, which was reversed on factual grounds. *Id.* at 644, 658–66. *Hubbard’s* interpretation of 18 U.S.C. § 1001 was later superseded by statute in 1996. *See* United States v. Butler, 351 F. Supp. 2d 121 (S.D.N.Y. 2004).

xl. PUBLIC INTEGRITY SECTION, CRIMINAL DIV., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS OF THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2000, at 20 (2001), *available at* <http://www.usdoj.gov/criminal/pin/docs/arpt-2000.pdf>.

xli. *Id.* Horner also pled guilty to giving false information to the FBI. *Id.*

xli. PUBLIC INTEGRITY SECTION, CRIMINAL DIV., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS OF THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2005, at 22–23 (2006) [hereinafter PUBLIC INTEGRITY SECTION 2005 REPORT], *available at* <http://www.usdoj.gov/criminal/pin/docs/arpt-2005.pdf>.

xli. PUBLIC INTEGRITY SECTION, CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, REPORT TO CONGRESS OF THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2006, at 18–19 (2007) [hereinafter PUBLIC INTEGRITY SECTION 2006 REPORT], *available at* <http://www.usdoj.gov/criminal/pin/docs/arpt-2006.pdf>.

xlii. *Id.* Safavian was also convicted of obstructing a GSA inquiry, making false statements, or withholding information from, a GSA inspector general investigator and GSA ethics officials. *Id.*; PUBLIC INTEGRITY SECTION 2005 REPORT, *supra* note xli, at 25–26. The GSA counts were later reversed because it was not clear that Safavian had a legal duty to disclose his activities to the GSA. The counts before Congress were also reversed because the appellate court found that the district court abused its discretion in “excluding favorable expert testimony” regarding the meaning Safavian might have attached to jargon used in his testimony. United States v. Safavian, 528 F.3d 957, 966 (D.C. Cir. 2008).

xliii. PUBLIC INTEGRITY SECTION 2006 REPORT, *supra* note xlii, at 18–19; *Safavian*, 528 F.3d at 966–69.

