

Known Unknowns

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I. “SECURITY”

One hundred sixty-six men are imprisoned at the U.S. Naval Station at Guantánamo Bay.¹ Many of these men the government intends to imprison indefinitely without charge or trial.² Some, though, will be tried for war crimes, and most of these, including those alleged to have planned the 9/11 attacks, will be tried not before regular criminal courts, but before military commissions.³ These commissions are convened at “Camp Justice,” a collection of low-slung, prefabricated structures built on a former military airfield several miles from the base’s detention facilities.⁴ The principal courtroom is in most respects unremarkable. The judge presides from a raised bench at the front of the room. There is a witness box to each side of the bench. Against the wall to the judge’s right is a long, narrow box that can seat as many as thirty jurors. There are similar courtrooms in cities across the United States and around the world.

What distinguishes the courtroom at Guantánamo from others is that, in place of the railing that customarily separates trial participants from the public gallery behind them, there is a floor-to-ceiling barrier of soundproofed glass.⁵ Those who travel to Guantánamo to observe the proceedings — journalists, representatives of civil society organizations, and family members of those who died in the 9/11 attacks — are seated behind the glass and listen

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¹ *Guantánamo by the Numbers*, AM. CIVIL LIBERTIES UNION (Dec. 27, 2012), <http://www.aclu.org/national-security/Guantánamo-numbers>.

² *Id.*; see also President Barack Obama, Remarks by the President on National Security, THE WHITE HOUSE (May 21, 2009, 11:17 AM), <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

³ Stephanie Condon, *KSM to Be Tried by Military Commission at Guantánamo*, CBS NEWS (Apr. 4, 2011, 5:55 PM), http://www.cbsnews.com/8301-503544_162-20050405-503544.html; Obama, *supra* note 2.

⁴ Except where otherwise indicated, my description of Camp Justice and its facilities is taken from the Defense Department’s website. See *Facilities*, MILITARY COMMISSIONS, <http://www.mc.mil/FACILITIESSERVICES/Facilities.aspx> (last visited Mar. 11, 2013); *Courtroom II*, MILITARY COMMISSIONS, <http://www.mc.mil/FACILITIESSERVICES/Facilities/Courtrooms/CourtroomII.aspx> (last visited Mar. 11, 2013) (includes photographs).

⁵ Richard Serrano, *Sept. 11 Judge Angrily Rules Against Government Censors*, L.A. TIMES (Jan. 31, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-0201-gitmo-trial-2013-0201,0,1548676.story>; Jane Sutton, *Judge Orders End to Secret Censorship of Guantánamo Court*, REUTERS (Jan. 31, 2013, 5:29 PM), <http://www.reuters.com/article/2013/01/31/us-usa-guantanamo-idUSBRE90UOZ720130131>.

to the proceedings on an audio feed.⁶ The audio feed is delayed by forty seconds and can be suppressed with white noise if a trial participant discloses information that the government deems to be classified.⁷ To the right of the judge is a desk for the “court security officer” whose finger is on the switch and whose assignment is to ensure that the government’s secrets are kept.⁸

This elaborate system of information control was designed with a specific set of secrets in mind. Some of the prisoners to be tried before the commissions, including those said to have planned the 9/11 attacks, were once held in the CIA’s secret prisons overseas and subjected to the agency’s “enhanced interrogation techniques.”⁹ The soundproof barrier is meant to prevent the prisoners from testifying publicly about that experience. A protective order makes this explicit.¹⁰ It designates as “classified” all information concerning the capture of the accused or the location of the CIA’s black sites in which the accused were once imprisoned.¹¹ It also designates as classified the conditions in which the accused were held and the interrogation methods that were used against them, including “descriptions of the techniques as applied, [and] the duration, frequency, sequencing, and limitations of those techniques.”¹² The designation extends not only to factual information, but also “without limitation” to the defendants’ “observations and experiences” about their treatment in custody.¹³ The delayed audio feed, the protective order explains, is necessary to prevent trial participants, including the accused, from disclosing classified information without the government’s authorization.¹⁴

The infrastructure of information control at Guantánamo is perplexing because most of the information that the government is suppressing is already available to anyone with an Internet connection. The *Washington Post* exposed the CIA’s secret prisons eight years ago, writing in a front-page story that the agency was holding captives in a “covert prison system” that

⁶ Sutton, *supra* note 5.

⁷ Charlie Savage, *Defendants in Sept. 11 Case Cooperate as Proceedings Resume at Guantánamo*, N.Y. TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/16/us/sept-11-terrorism-case-resumes-smoothly-at-guantanamo.html>.

⁸ Until recently, the court security officer was evidently not the only person with the ability to silence the audio feed. See Carol Rosenberg, *Strange Censorship Episode at Guantánamo Enrages Judge*, MIAMI HERALD (Jan. 28, 2013), <http://www.miamiherald.com/2013/01/28/3205391/strange-censorship-episode-at.html> (discussing incident in which an unseen and unidentified official silenced the audio feed when a defense attorney referred to the CIA’s black sites).

⁹ See, e.g., Jonathan Karl, *High-Value Detainees Transferred to Guantánamo*, ABC NEWS (Sept. 6, 2006), <http://abcnews.go.com/International/story?id=2400470>.

¹⁰ Protective Order #1, *United States v. Mohammad*, No. AE 013P (Military Comm’ns Trial Judiciary Dec. 6, 2012) (protective order to protect against disclosure of national security information), available at http://www.aclu.org/files/assets/gitmo_protective_order.pdf.

¹¹ *Id.* ¶ 2(g)(4)(a).

¹² *Id.* ¶ 2(g)(4)(d).

¹³ *Id.* ¶ 2(g)(5).

¹⁴ *Id.* ¶ 8(a)(3)(a).

included sites in Afghanistan, Thailand, and Eastern Europe.¹⁵ A year later, President George W. Bush acknowledged the existence of black sites, identified some of the prisoners who had been imprisoned in them, and described some of the valuable information that the prisoners had purportedly surrendered to their interrogators.¹⁶ Journalists and human rights researchers have documented the precise locations of many of the black sites and the specific flights — the dates, times, routes, airplanes, and flight-services companies — that were used to transport captives to and from the prisons.¹⁷

Many details about the CIA's now-discontinued interrogation methods are similarly matters of public record. Bush Administration officials testified before Congress about the CIA's interrogation program, acknowledging, for example, that the agency had "waterboarded" three prisoners.¹⁸ The Obama Administration released the legal memos that laid the foundation for the program, and these memos describe the agency's interrogation methods in granular detail.¹⁹ A report of the International Committee of the Red Cross, leaked to the *New York Review of Books* and published three years ago, supplies prisoners' first-hand accounts of their treatment.²⁰ These accounts, too, are detailed and explicit. One prisoner recounts that he had been confined in a box "specially designed to constrain his movement," slammed against the walls, kept naked for a month, and waterboarded at least ten times in a single week.²¹

Given the volume of information already in the public domain, the system of information control at Guantánamo can seem arbitrary and pointless,

¹⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

¹⁶ *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, THE WHITE HOUSE (Sept. 6, 2006, 1:45 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

¹⁷ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1103–31 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting); STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA RENDITION AND TORTURE PROGRAM* (2007).

¹⁸ Randall Mikkelsen, *CIA Says Used Waterboarding on Three Suspects*, REUTERS (Feb. 5, 2008, 6:13 PM), <http://www.reuters.com/article/2008/02/05/us-security-usa-waterboarding-idUSN0517815120080205>.

¹⁹ For example:

Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. . . . During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted and the individual is allowed to breathe unimpeded for three or four breaths. . . . The procedure may then be repeated.

Memorandum from Jay S. Bybee, Assistant Attorney Gen., to John Rizzo, Acting Gen. Counsel of the CIA 4 (Aug. 1, 2002), available at http://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOJOLC000780.pdf.

²⁰ INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY (2007), available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

²¹ *Id.* at 13 (confinement in box), 12 (slamming against wall), 14 (forced nudity), 10 (suffocation by water).

even absurd. But the fiction of secrecy has a function: it decouples transparency from accountability. It saves the government from having to answer — to the public, to the courts — for facts that are publicly known.

II. ACKNOWLEDGEMENT

We live in an era of unprecedented government secrecy. It is not simply that the quantity of government secrets has increased, though by some measures it has.²² The quality of these secrets, too, has changed, as have the means the government uses to safeguard them. Judicial rulings about national security matters are issued with redactions or with classified annexes, or after hearings closed to the public.²³ In each of the last few years, the FBI has issued thousands of national security letters, each one accompanied by a judicially enforceable demand that the recipient not disclose the letter's contents or existence.²⁴ The Obama Administration has prosecuted more Espionage Act²⁵ cases than all previous administrations combined, and all of these cases involved individuals alleged to have supplied information to the media about the government's national security policies.²⁶ The government sometimes seems to have more secrets than ever and to be more committed than ever to protecting them.

But a less noted feature of our era is that some of the government's most vigorously defended secrets are not really secrets at all. In court, the

²² See, e.g., NAT'L ARCHIVE & RECORDS ADMIN., INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 8 (2011) (showing dramatic increase in derivative classification activity between 1996 and 2011); DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE 12 (2011) ("'The cumulative number' of covert operations during the Cold War 'pales in comparison to the number of programs, number of activities the CIA was asked to carry out in the aftermath of 9/11 in the counterterrorism area.'" (quoting John Rizzo, former Acting General Counsel of the CIA)); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010) (listing more than 100 cases in which state secrets privilege was invoked by the Bush Administration).

²³ See, e.g., *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (redacted opinion issued after closed hearing); *N.Y. Times v. Dep't of Justice*, Nos. 11 Civ. 9336(CM), 12 Civ. 794(CM), 2013 WL 50209 (S.D.N.Y. Jan. 3, 2013) (opinion issued with classified appendix); *Doe v. Ashcroft*, 317 F. Supp. 2d 488, 492 (S.D.N.Y. 2004) (holding that nondisclosure provisions of statute authorizing issuance of national security letters necessitated process under which government would propose redactions to plaintiffs' legal papers).

²⁴ See Letter from Ronald Weich, Assistant Attorney Gen., Office of Legislative Affairs, to Joseph R. Biden, Jr., President, U.S. Senate 2 (Apr. 30, 2012), available at <https://www.fas.org/irp/agency/doj/fisa/2011rept.pdf> (16,511 national security letters ("NSLs") served in 2011 for information pertaining to 7,201 U.S. persons); Letter from Ronald Weich, Assistant Attorney Gen., Office of Legislative Affairs, to Harry Reid, Majority Leader, U.S. Senate (Apr. 29, 2011), available at <http://www.fas.org/irp/agency/doj/fisa/2010rept.pdf> (24,287 NSLs served in 2010 for information pertaining to 14,212 U.S. persons); Letter from Ronald Weich, Assistant Attorney Gen., Office of Legislative Affairs, to Joseph R. Biden, Jr., President, U.S. Senate (Apr. 30, 2010), available at <https://www.fas.org/irp/agency/doj/fisa/2009rept.pdf> (14,788 NSLs served in 2009 for information pertaining to 6,114 U.S. persons).

²⁵ 18 U.S.C. §§ 1831–39 (2006).

²⁶ Phil Mattingly & Hans Nichols, *Obama Pursuing Leakers Sends Warning to Whistle-Blowers*, BLOOMBERG NEWS (Oct. 17, 2012, 8:01 PM), <http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html>.

government invokes various national security privileges to protect information about the CIA's interrogation of prisoners in black sites overseas,²⁷ the National Security Agency's surveillance activities,²⁸ the FBI's infiltration of mosques,²⁹ and the use of drones to carry out targeted killings.³⁰ Yet, on each of these subjects, much of the information the government is ostensibly trying to protect is public already. In some cases, it has been leaked to the press by whistleblowers;³¹ in others, it has been unearthed by investigative reporters;³² in still others, it has been released by the government itself — that is, by government officials speaking anonymously to reporters or even speaking in their official capacities on the record.³³ If this information is “secret,” it is not secret in any ordinary sense of the word. It is a secret only formally, only officially. It is an open secret, a known unknown.³⁴

²⁷ See, e.g., *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 65 (2d Cir. 2012) (affirming government's refusal to release records responsive to FOIA request relating to CIA's use of waterboarding); *Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 616 (D.C. Cir. 2010) (affirming government's refusal to release transcripts in which individuals formerly held in black sites recounted treatment in CIA custody); *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007) (affirming government's invocation of state secrets privilege in case concerning torture of German national at CIA facility in Afghanistan).

²⁸ See, e.g., *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (affirming government's reliance on state secrets privilege in case concerning warrantless wiretapping of plaintiff charity).

²⁹ See *Fazaga v. Fed. Bureau of Investigation*, 884 F. Supp. 2d 1022, 1042–49 (C.D. Cal. 2012) (affirming FBI's invocation of state secrets privilege in case concerning agency's use of informant in mosques).

³⁰ See *N.Y. Times Co. v. Dep't of Justice*, Nos. 11 Civ. 9336(CM), 12 Civ. 794(CM), 2013 WL 238928, at *1 (S.D.N.Y. Jan. 22, 2013) (affirming government's refusal to release records responsive to FOIA request relating to government's killing of three American citizens in Yemen); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) (noting government's invocation of state secrets privilege in case challenging government's contemplated killing of plaintiff's son).

³¹ See, e.g., James Bamford, *NSA Chief Denies Domestic Spying but Whistleblowers Say Otherwise*, WIRED (Mar. 21, 2012, 2:37 PM), <http://www.wired.com/threatlevel/2012/03/nsa-whistleblower>.

³² See, e.g., Priest, *supra* note 15; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST (Dec. 26, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all>.

³³ See, e.g., Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (quoting named and unnamed officials); Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, WASH. POST (Oct. 24, 2012), http://www.washingtonpost.com/world/national-security/cia-veteran-john-brennan-has-transformed-us-counterterrorism-policy/2012/10/24/318b8eec-1c7c-11e2-ad90-ba5920e56eb3_story.html.

³⁴ I am not the first to observe that many purported secrets relating to security are not in fact secrets. See, e.g., Alasdair S. Roberts, *Open Secrets and Dirty Hands*, in *THE SECRETS OF LAW* 25, 26 (Austin Sarat et al. eds., 2012); Slavoj Žižek, *What Rumsfeld Doesn't Know That He Knows About Abu Ghraib*, in *THESE TIMES* (May 21, 2004), http://inthesetimes.org/article/747/what_rumsfeld_doesn_know_that_he_knows_about_abu_ghraib (discussing “the disavowed beliefs, suppositions and obscene practices we pretend not to know about, even though they form the background of our public values”). Žižek uses the phrase “unknown knows” to describe the government's open secrets, but it seems to me that “known unknowns” better

When open secrets are accorded judicial sanction, it is typically because of the “official acknowledgement” doctrine, which distinguishes facts that are publicly known from facts that the government has expressly confirmed.³⁵ The theory is that official acknowledgement of a given set of facts can cause harm that is distinct from any harm caused by (for example) media speculation about those facts or the isolated disclosures of officials not authorized to speak.³⁶ As the Fourth Circuit has written, “[i]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.”³⁷ Because official acknowledgement can cause distinct harm, the government sometimes has an interest in refusing to confirm facts that the rest of us know to be true. To avoid official acknowledgement, the government withholds information — or suppresses it, as it does in the military commissions — even when that information is already in the public domain. The practice can seem mad, but there is a method to it.

So the government has argued, at any rate. Relying on the official acknowledgement doctrine, the government has refused to release records in response to Freedom of Information Act (“FOIA”) requests; in some cases, it has refused even to say whether responsive records exist.³⁸ In tort litigation (including constitutional tort litigation and litigation under the Alien Tort Statute), it has invoked the official acknowledgement doctrine to justify the dismissal of suits on state secrets grounds.³⁹ In litigation under the First Amendment, it has invoked the doctrine to deny the public access to judicial records and hearings.⁴⁰ In each of these contexts, the government has con-

captures the phenomenon of information that is publicly known but not officially acknowledged.

³⁵ See, e.g., *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 765–66 (D.C. Cir. 1990); *Afshar v. Dep’t of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

³⁶ *Fitzgibbon*, 911 F.2d at 765 (stating that “in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures”).

³⁷ *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975).

³⁸ See, e.g., *Am. Civil Liberties Union v. Dep’t of Justice*, 808 F. Supp. 2d 280, 294–98 (D.D.C. 2011) (noting CIA’s refusal to say whether it possessed records about agency’s involvement in targeted killing); Declaration of John Bennett, Dir., Nat’l Clandestine Serv., CIA ¶ 29, *N.Y. Times Co. v. Dep’t of Justice*, No. 11-cv-9336 (S.D.N.Y. Jan. 22, 2013), available at <http://www.emptywheel.net/wp-content/uploads/2013/02/120620-Bennett-Declaration.pdf> (stating that disclosing even “the number and dates of responsive records would tend to reveal whether or not the CIA has been granted the authority to directly participate in lethal operations that could potentially target senior operational leaders of al-Qa’ida who have U.S. citizenship”).

³⁹ See, e.g., Redacted, Unclassified Brief for United States on Rehearing En Banc at 38, *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2010) (No. 08-15693), 2009 WL 6635974 at *38; Brief of the Appellee at 22–27, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), 2006 WL 2726281 at *22–27; Opposition to Plaintiff’s Motion for Preliminary Injunction at 56–59, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469), 2010 WL 3863135.

⁴⁰ See, e.g., Defendants’ Reply Memorandum in Support of Its Motion for Summary Judgment at 4, *Am. Civil Liberties Union v. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2010) (No. 08-00437), 2009 WL 3365241.

tended that its interests would be compromised if it were required to acknowledge officially some set of publicly known facts.

The proposition that official acknowledgement may cause distinct harm is sometimes plausible. As the D.C. Circuit has observed, public speculation is one thing, but official acknowledgement “ends all doubt.”⁴¹ A foreign government may feel able to ignore news reports about the CIA’s activities within its territory, but unable to ignore the CIA’s official acknowledgement of those activities.⁴² A human source may continue to supply the CIA with information after a newspaper has speculated about her identity, but not once has the CIA publicly confirmed it.⁴³ More generally, the government’s official acknowledgement of publicly reported facts may undermine its reputation for reliability and thereby compromise its ability to secure the cooperation of sources, foreign governments, and foreign intelligence services in the future.⁴⁴ The government has an interest in protecting what the courts have sometimes labeled the “appearance of confidentiality.”⁴⁵

But the argument that official acknowledgement may cause distinct harm has little force with respect to many of the government’s contemporary open secrets. For one thing, media accounts of these ostensible unknowns have been ubiquitous, detailed, and consistent rather than isolated and speculative. To take perhaps the most glaring example, dozens of news stories about the CIA’s role in targeted killings have discussed the substantive legal standards that govern the agency’s kill list, the number of names on the list, the process by which the agency adds names to the list, the identities of the officials who participate in this process, the role of the President himself in approving the list and approving individual strikes, the locations in which strikes have been carried out, the identities of some of the CIA’s targets, the extent to which the program has resulted in the deaths of nontargeted civilians, and the manner in which the CIA determines whether to consider those

⁴¹ *Gardels v. Cent. Intelligence Agency*, 689 F.2d 1100, 1105 (D.C. Cir. 1982); *see also* Declaration of John Bennett, *supra* note 38, ¶ 67 (“[O]ne also cannot assume that such anonymous, unsourced, or otherwise non-authoritative reports are accurate.”).

⁴² *See, e.g., Wilson v. Cent. Intelligence Agency*, 586 F.3d 171, 186 (2d Cir. 2009) (“[A]s a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests.”); Declaration of John Bennett, *supra* note 38, ¶ 45 (“If a foreign liaison service’s cooperation with the CIA were to be officially confirmed by the CIA, then that service and government could face a popular backlash that reasonably could be expected to reduce or eliminate the information-sharing relationship with the CIA.”).

⁴³ *See, e.g., Gardels*, 689 F.2d at 1105 (“Official acknowledgement ends all doubt and gives the . . . organization a firmer basis for its own strategic or tactical response.”).

⁴⁴ *See, e.g., Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 763–64 (D.C. Cir. 2009) (quoting *Cent. Intelligence Agency v. Sims*, 471 U.S. 149, 175 (1985)); Declaration of Marilyn A. Dorn, Info. Review Officer, CIA at ¶ 45, *Am. Civil Liberties Union v. Dep’t. of Def.*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011) (No. 04 Civ. 4151) (“If a potential source has any doubts about the ability of the CIA to preserve secrecy, that is, if he were to learn that the CIA had disclosed the identity of another source, his desire to cooperate with the CIA would likely diminish.”).

⁴⁵ *See, e.g., Sims*, 471 U.S. at 175 (quoting *Snapp v. United States*, 444 U.S. 507, 509 (1979)).

killed in any given strike to be civilians or militants.⁴⁶ Yet, as this Essay goes to press, the government's official position is that the CIA's role in carrying out targeted killings cannot be confirmed or denied.⁴⁷

In addition, many news accounts of contemporary known unknowns have been based not on speculation by individuals outside the government, but on the statements of government officials — sometimes identified generically (“a senior intelligence official”), but often identified by name. Perhaps it is clear that the government should not be required to acknowledge a sensitive fact simply because a single official, speaking under cover of anonymity, has made an isolated disclosure of it without authorization. The calculus must surely change, however, when the number and character of “unofficial” disclosures by the most senior officials leave no room for any conclusion except that the disclosures were tolerated, tacitly approved, or even expressly authorized. Consider again the CIA's targeted killing program. Then—CIA Director Leon Panetta discussed the program in speeches⁴⁸ and media interviews,⁴⁹ and he continued to discuss the agency's program

⁴⁶ See, e.g., Becker & Shane, *supra* note 33; David S. Cloud, *U.S. Begins Using Predator Drones in Libya*, L.A. TIMES (Apr. 22, 2011), <http://articles.latimes.com/2011/apr/22/world/la-fg-gates-libya-20110422>; Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. TIMES (Feb. 20, 2010), <http://www.nytimes.com/2010/02/20/world/asia/20drones.html?pagewanted=all>; Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS (Feb. 4, 2013), http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans; Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST (Dec. 27, 2011), http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIQANpDILP_story_1.html; Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=All>; Eric Schmitt, *American Strike Is Said to Kill a Top Qaeda Leader*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/01/world/asia/01qaeda.html?pagewanted=All>.

⁴⁷ See, e.g., Letter from Sharon Swingle, Dep't of Justice, to Mark J. Langer, Clerk, U.S. Court of Appeals for the D.C. Circuit (Feb. 13, 2013), available at http://www.aclu.org/files/assets/cia_response_to_letter.pdf. The D.C. Circuit held in March 2013 that the CIA had officially acknowledged an “intelligence interest” in the targeted killings, but it declined to reach the question whether the agency had acknowledged a role in carrying out such killings. *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 710 F.3d 422, 430 (D.C. Cir. 2013).

⁴⁸ For example, responding to a question about “remote drone strikes” in Pakistan, Director Panetta said:

I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. . . . I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.

Leon E. Panetta, Dir., CIA, Director's Remarks at the Pacific Council on International Policy, (May 18, 2009), <https://www.cia.gov/newsinformation/speeches-testimony/directors-remarks-at-pacific-council.html>.

⁴⁹ See, e.g., Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, WALL ST. J. (Mar. 18, 2010), <http://online.wsj.com/article/SB10001424052748704059004575128123449551524.html> (lauding a strike that killed an al-Qaeda leader and stating, “we are continuing to target their leadership”); Evan Harris, *CIA Had Last ‘Precise Informa-*

after he became Secretary of Defense.⁵⁰ President Obama discussed the program on *The Tonight Show*,⁵¹ in a Google Plus hangout,⁵² and in an interview with CNN.⁵³ In an interview with *Newsweek*, the CIA's former Acting General Counsel acknowledged the existence of the CIA's targeted killing program, stated that "[t]he Predator [drone] is the weapon of choice," and discussed the process by which CIA drone strikes are approved and his own central role in that process.⁵⁴ In September 2012, the ACLU compiled a list of nearly two hundred instances in which officials had spoken to the media about the CIA's use of drones for targeted killing.⁵⁵ Given the number and nature of the disclosures, the contention that the disclosures were not sanctioned or tolerated is simply not credible.⁵⁶ Even after these disclosures,

*tion' on Bin Laden in 'Early 2000s,' ABC NEWS (June 27, 2010), <http://abcnews.go.com/blogs/politics/2010/06/cia-had-last-precise-information-on-bin-laden-in-early-2000s/> ("We just took down number three in their leadership a few weeks ago."); Joby Warrick & Peter Finn, *CIA Director Says Secret Attacks in Pakistan Have Hobbled Al-Qaeda*, WASH. POST (Mar. 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702558.html?hpid=topnews> (describing the drone strikes in Pakistan as "the most aggressive operation that [the] CIA has been involved in in our history").*

⁵⁰ See, e.g., *Full Transcript: Defense Secretary Leon Panetta*, ABC NEWS (May 27, 2012), <http://abcnews.go.com/Politics/full-transcript-defense-secretary-leon-panetta/story?id=16437246&singlePage=true#.T8SOVILCwoE> ("First and foremost, I think this is one of the most precise weapons that we have in our arsenal.").

⁵¹ David Nakamura, *Obama on "Tonight Show" with Jay Leno*, WASH. POST (Oct. 26, 2011, 8:52 AM), http://www.washingtonpost.com/blogs/44/post/obama-on-tonight-show-with-jay-leno-full-video-and-transcript/2011/10/26/gIQAHXJIM_blog.html (quoting President Obama: "[Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the [Yemenis], we were able to remove him from the field.").

⁵² Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. TIMES (Jan. 30, 2012), <http://www.nytimes.com/2012/01/31/world/middleeast/civilian-deaths-due-to-drones-are-few-obama-says.html?pagewanted=all> (quoting President Obama's comments on Google Plus: "It is important for everybody to understand that this thing is kept on a very tight leash.").

⁵³ *Obama Reflects on Drone Warfare*, CNN (Sept. 5, 2012, 5:48 PM), <http://security.blogs.cnn.com/2012/09/05/obama-reflects-on-drone-warfare/>.

⁵⁴ Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html>.

⁵⁵ Cora Currier, *How the Government Talks About a Drone Program It Won't Acknowledge*, PROPUBLICA (Sept. 13, 2012), <http://www.propublica.org/article/how-the-govt-talks-about-a-drone-program-it-wont-acknowledge>; see also Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, LAWFARE (May 31, 2012), <http://www.lawfareblog.com/2012/05/drone-stories-the-secrecy-system-and-public-accountability/#more-7465>

("[N]one of the previous Glomar cases involved such extensive and concerted and long-term government leaking and winking.").

⁵⁶ I am not alone in so concluding. See, e.g., Transcript of Oral Argument at 29, *Am. Civil Liberties Union v. Cent. Intelligence Agency*, No. 11-5320 (D.C. Cir. argued Sept. 20, 2012) (Judge Griffith characterizing leaks as "widespread . . . and strategic"); Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/opinion/sunday/the-secrets-of-government-killing.html> (quoting American University law professor Kenneth Anderson: "One area in which I have been relentless in criticism of the Obama administration has been their refusal to say anything about [drone strikes], and at the same time essentially conducting the foreign policy of the U.S. by leaked journalism."); Jack Goldsmith, *More on Al-Aulaqi and Transparency*, LAWFARE (Oct. 5, 2011, 2:17 PM), <http://www.lawfareblog.com/2011/10/more-on-al-aulaqui-and-transparency/> ("[I]t is wrong . . . for the government to maintain technical covertness but then engage in continuous leaks, attrib-

however, the government maintained that the CIA's role in targeted killings had not been acknowledged officially.

In some contexts, there is a still deeper problem with the government's reliance on the official acknowledgement doctrine. This is because what the government is withholding or suppressing is not actually official acknowledgement, but rather private speech about a fact that the government says it has not acknowledged. For example, several years ago, the ACLU sought access to transcripts of proceedings in which prisoners once held at CIA black sites had appeared before Combatant Status Review Tribunals ("CSRTs") at Guantánamo Bay.⁵⁷ The Defense Department had released the transcripts but had redacted passages in which prisoners recounted their treatment at the hands of CIA interrogators.⁵⁸ To justify the redactions, the government relied on the official acknowledgement doctrine: it argued that releasing the redacted portions of the transcripts would be tantamount to confirming officially that the CIA had in fact used the interrogation methods that the prisoners described. But of course the government's release of unredacted transcripts would not have officially confirmed the substance of the prisoners' allegations — only the fact that the prisoners had made those allegations.

The same point could be made about the system of information control in the military commissions. The government contends that the soundproof barrier, the forty-second delay, and the court security officer serve the government's legitimate interest in withholding official acknowledgement of facts that have not yet been acknowledged.⁵⁹ But even accepting for the sake of argument that the relevant facts have not been acknowledged officially, the function of the censorship scheme is not to withhold official acknowledgement of the prisoners' treatment in CIA custody, but to suppress the prisoners' allegations about that treatment.⁶⁰

uted to government officials, of many (self-serving) details about the covert operations and their legal justifications. It is wrong because it is illegal.").

⁵⁷ *Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 620 (D.C. Cir. 2010). The CSRTs were tasked with reviewing prisoners' designation as "enemy combatants." See generally Memorandum from Paul Wolfowitz, Deputy Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defense.gov/news/jul2004/d20040707review.pdf>.

⁵⁸ *Am. Civil Liberties Union*, 628 F.3d. at 620.

⁵⁹ Government's Response to the American Civil Liberties Union Motion for Public Access to Proceedings and Records at 6, 13, *United States v. Mohammad*, No. AE-013D (Military Comm'ns Trial Judiciary May 16, 2012), available at http://www.aclu.org/files/assets/govt_resp_to_mot_for_public_access_2012.05.16_0.pdf.

⁶⁰ In the government's own words:

Because the accused were participants in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the accused are in a position to disclose classified information publicly through their statements. Consequently, any and all statements by the accused are presumptively classified until a classification review can be completed.

Id. at 5.

All of this is to say that in many cases the official acknowledgement doctrine cannot actually support the weight the government asks it to bear. The doctrine cannot justify the government's refusal to confirm or deny facts that have been reported extensively in the media and discussed on the record by senior officials. It cannot justify the suppression of speech by actors other than government officials. The contention that the fiction of secrecy serves the government's interest in cultivating an "appearance" of confidentiality is also unpersuasive. It is difficult to believe that prospective partners — sources, foreign governments, and foreign intelligence services — will be impressed by the government's mere pretense of confidentiality. If their interest is in guaranteeing that sensitive information they share with the U.S. government will remain confidential, the government's insistence that publicly available information is still confidential is likely to be more bewildering than reassuring.⁶¹

The more significant point, however, is not that the government advances these arguments, but that the courts have almost uniformly accepted them.⁶² They have declined to find official acknowledgement even where media accounts were so numerous, detailed, and consistent that the government's refusal officially to acknowledge the relevant information seemed beside the point.⁶³ They have declined to find official acknowledgement even where media accounts included confirmations by senior government officials of the facts that the government claimed it had not confirmed.⁶⁴ They have given the concept of official acknowledgment the narrowest possible compass, requiring litigants to show a precise match between the information in the public domain and the information that the government refuses to confirm or deny.⁶⁵ They have held that the official acknowledgement test cannot be satisfied by statements made by former officials,⁶⁶ officials of

⁶¹ See Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, LAWFARE (May 1, 2012, 11:12 AM), <http://www.lawfareblog.com/2012/05/john-brennans-speech-and-the-aclu-foia-cases/> (questioning "how the government can still get diplomatic benefit from non-acknowledgment of CIA involvement" given the many disclosures made by government officials to the media).

⁶² A notable exception was the D.C. Circuit's recent decision holding that the CIA had officially acknowledged an "interest" in targeted killing, but the decision was a narrow one because the court did not reach the question of whether the agency had officially acknowledged that it actually carried out such killings. *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 710 F.3d 422, 430, 434 (D.C. Cir. 2013).

⁶³ See, e.g., *Am. Civil Liberties Union v. Dep't of Justice*, 808 F. Supp. 2d 280, 300 (D.D.C. 2011).

⁶⁴ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1090 (9th Cir. 2010) (en banc); *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 766 (D.C. Cir. 2009) ("[T]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations."); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 54 n.17 (D.D.C. 2010) (citing the same principles in support of state secrets analysis).

⁶⁵ See *Afshar v. Dep't of State*, 702 F.2d 1125, 1130, 1133 (D.C. Cir. 1983).

⁶⁶ See *Wilson v. Cent. Intelligence Agency*, 586 F.3d 171, 189 (2d Cir. 2009); *Am. Civil Liberties Union v. Dep't of Justice*, 808 F. Supp. 2d 280, 300 n.6 (D.D.C. 2011).

other agencies,⁶⁷ or officials of other branches of government.⁶⁸ Thus, in two recent FOIA cases, the government was able to argue that statements about the targeted killing program made by the CIA's former Acting General Counsel did not constitute an official acknowledgement because he made the statements after he had retired, and that similar statements made by the CIA's former Director did not constitute an official acknowledgement because he made the statements after he left the CIA to become the Secretary of Defense.⁶⁹

When they have concluded that the government's reliance on the official acknowledgement doctrine is legitimate (as they have done in almost every case in which the government has invoked the doctrine), the courts have also declined to weigh the government's interest in withholding official acknowledgement against countervailing interests in disclosure. In practice, the determination that the government has not officially acknowledged a given fact effectively ends the judicial inquiry.⁷⁰ This has been true even in the context of right-of-access claims made under the First Amendment, though in theory the government's burden in that context is especially heavy.⁷¹ Consider again the ACLU's request for the CSRT transcripts — a request that was filed under the First Amendment as well as the FOIA.⁷² In rejecting the FOIA claims, the district court afforded the deference customarily extended to agencies under FOIA and stated that it was “disinclined to second-guess the agency” by reviewing the transcripts in camera.⁷³ This much was not particularly surprising. In a single paragraph, however, the court then rejected the ACLU's First Amendment claim on the ground that

⁶⁷ See *Frugone v. Cent. Intelligence Agency*, 169 F.3d 772, 773–74 (D.C. Cir. 1999).

⁶⁸ See *Fitzgibbon*, 911 F.2d at 765–66; *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982).

⁶⁹ See Brief for Appellee at 25–26, 39, *Am. Civil Liberties Union v. Cent. Intelligence Agency*, No. 11-5320 (D.C. Cir. May 21, 2012), available at <http://www.lawfareblog.com/wp-content/uploads/2012/05/2012-05-21-ACLU-v-CIA-Appellee-Brief.pdf>; Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 33–34, *N.Y. Times Co. v. Dep't of Justice*, Nos. 11 Civ. 9336(CM), 12 Civ. 794(CM) (S.D.N.Y. June 20, 2012), available at http://www.aclu.org/files/assets/https___ecf.nysd_uscourts.gov_cgi-bin_show_temp_pl_file10176016-0—17573.pdf.

⁷⁰ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (“[N]o attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.”); *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (“[T]he text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified.”); *N.Y. Times Co. v. Dep't of Justice*, Nos. 11 Civ. 9336(CM), 12 Civ. 794(CM), 2013 WL 50209, at *19 (S.D.N.Y. Jan. 3, 2013) (“It lies beyond the power of this Court to declassify a document that has been classified in accordance with proper procedures on the ground that the court does not think the information contained therein ought to be kept secret.”).

⁷¹ The Supreme Court has held that “[t]he presumption of openness may be overcome only by an overriding [government] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

⁷² *Am. Civil Liberties Union v. Dep't of Def.*, 584 F. Supp. 2d 19, 25 (D.D.C. 2008).

⁷³ *Id.* at 24.

“there is obviously no First Amendment right to receive classified information.”⁷⁴ In effect, the court allowed the government to defeat the constitutional claim by making only the minimal showing ordinarily required to defeat a statutory one.⁷⁵

Thus, the courts have been remarkably tolerant of the government’s known unknowns. They have accommodated them and given them legitimacy, even when doing so served no readily discernible interest.

III. ACCOUNTABILITY

Criticisms of the government’s known unknowns are often framed as criticisms of government secrecy.⁷⁶ This is unsurprising. The government often explains its refusal to confirm publicly known facts using the language of secrecy; it is natural that critics of the government’s explanations use the language of transparency in response.⁷⁷ It is also true that the government’s refusal to confirm publicly known facts can have real implications for transparency. For example, it can supply officials with a basis for refusing to answer questions about those facts.⁷⁸ It can also supply officials with an

⁷⁴ *Id.* at 25.

⁷⁵ See also *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 497 (Foreign Intelligence Surveillance Ct. 2007) (rejecting ACLU’s contention that First Amendment affords a presumptive right of access to certain opinions of the Foreign Intelligence Surveillance Court and that First Amendment required court to subject classification decisions to “independent review” under a standard more rigorous than that customarily applied in FOIA cases).

⁷⁶ See, e.g., Daphne Eviatar, *Secrecy Continues to Dominate 9/11 Hearings*, HUMAN RIGHTS FIRST (Jan. 28, 2013), <http://www.humanrightsfirst.org/2013/01/28/secracy-continues-to-dominate-911-hearings/>; Carol Rosenberg, *Guantánamo: A Place of Sometimes-Puzzling Secrecy*, MIAMI HERALD (Jan. 5, 2013), <http://www.miamiherald.com/2013/01/05/3168998/Guantánamo-a-place-of-sometimes.html>.

⁷⁷ Alasdair Roberts proposes, provocatively, that some journalists and nongovernmental organizations have used the language of transparency because there are “strong incentives for media outlets and publishers to deny the significance of what is already known” (and to exaggerate the importance of what is being revealed), and because nongovernmental organizations that focus on transparency have an interest in persuading funders (among others) “that transparency is a gravely threatened value.” Roberts, *supra* note 34, at 36–37.

⁷⁸ President Obama, for example, has used the formal secrecy surrounding the targeted killing program as a means of deflecting questions about his own role in the selection of targets:

[Yellin:] My question to you is, do you personally decide who is targeted and what are your criteria if you do for the use of lethal force? [Obama:] I’ve got to be a little careful here. There are classified issues, and a lot of what you read in the press that purports to be accurate isn’t always accurate. What is absolutely true is that my first job, my most sacred duty as President and Commander-in-Chief, is to keep the American people safe. . . . [Yellin:] Sir, do you personally approve the targets? [Obama:] You know, I can’t get too deeply into how these things work, but as I said as Commander-in-Chief ultimately I’m responsible for the process that we’ve set up”

Jessica Yellin, *Obama Reflects on Drone Warfare*, CNN (Sept. 5, 2012, 5:48 PM), <http://security.blogs.cnn.com/2012/09/05/obama-reflects-on-drone-warfare/>; see also Goldsmith, *supra* note 55 (“[O]fficial acknowledgment [of the CIA’s targeted killing program] might

opportunity for selective disclosure⁷⁹ — a practice that some proponents of the original FOIA considered more insidious than secrecy.⁸⁰ In the context of FOIA litigation, the government’s refusal to acknowledge publicly known facts can supply federal agencies with a basis for refusing to produce *Vaughn* declarations — declarations that list the records responsive to a given FOIA request and explain why those records are being withheld.⁸¹ In short, the government’s refusal to acknowledge publicly known facts can excuse it from having to explain which other facts are being kept secret, and why.

But the problem of known unknowns is not principally a problem of inadequate transparency, but a problem of inadequate accountability. It is public knowledge that the CIA is carrying out targeted killings.⁸² It is public knowledge which flight services companies provided logistical support for the CIA’s rendition program.⁸³ Former CIA prisoners’ accounts of torture in the agency’s black sites are public knowledge, too. The problem is not that these facts have yet to be exposed, but that the exposure of the facts has been, in important senses, inconsequential. The government continues to treat the facts as secret, declining to answer for them or answer questions about them. And the courts are “ignorant as judges of what [they] know as men.”⁸⁴ The facts are known, but they are not judicially cognizable.

The fiction of secrecy permits the government to argue that the courts should dismiss, on “state secrets” grounds, cases brought by individuals tortured in CIA black sites;⁸⁵ cases brought by individuals “rendered” by the CIA to the torture chambers of other countries;⁸⁶ cases brought by family members of Americans killed by CIA drone strikes;⁸⁷ and cases brought by

make it harder for the USG [U.S. government] to avoid uncomfortable questions — like, e.g., the methods by which it calculates civilian casualties.”)

⁷⁹ See, e.g., Jameel Jaffer, *National Security: When Secrecy Is a Weapon*, L.A. TIMES (Apr. 6, 2011), <http://articles.latimes.com/2011/apr/06/opinion/la-oe-jaffer-nationalsecurity-20110406>; Jameel Jaffer & Nathan Freed Wessler, *The C.I.A.’s Misuse of Secrecy*, N.Y. TIMES (Apr. 29, 2012), <http://www.nytimes.com/2012/04/30/opinion/the-cias-misuse-of-secrecy.html>.

⁸⁰ See Reply Brief for Plaintiffs-Appellants at 16–20, *Am. Civil Liberties Union v. CIA*, No. 11-5320 (D.C. Cir. June 4, 2012), available at http://www.aclu.org/files/assets/drone_foia_reply_brief.pdf.

⁸¹ See, e.g., Declaration of John F. Hackett, Chief of the Information and Data Management Group, Office of the Chief Information Officer ¶ 28, *N.Y. Times Co. v. Dep’t of Justice*, No. 11 Civ. 9336(CM) (S.D.N.Y. June 20, 2012), available at http://www.publicrecordmedia.com/wp-content/uploads/2012/07/NYTOLC2011_pd_008.pdf (“[I]f all the defendants in this matter . . . were to provide the volume, dates, authors and other information about the classified records located [sic] which is typically included in agency Vaughn indexes, our adversaries would have significant information about U.S. Government counterterrorism activities”); Goldsmith, *supra* note 55 (noting that Vaughn indices can supply “important information” and can be the basis for further disclosures).

⁸² See *supra* note 46 and accompanying text.

⁸³ See *supra* note 17 and accompanying text.

⁸⁴ *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion).

⁸⁵ See *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007).

⁸⁶ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc).

⁸⁷ See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).

targets of the NSA's warrantless wiretapping program⁸⁸ — even though, in each of these instances, much of the information that is purportedly secret is already in the public domain.

It also supplies the government with a pretext to refuse cooperation with other countries' investigative efforts. Thus, the Bush Administration declined to cooperate with a Canadian Commission of Inquiry examining the case of Maher Arar, a Canadian citizen who was detained by the United States and then transferred to Syria for interrogation and torture.⁸⁹ It declined to cooperate with Polish prosecutors examining the cases of men whom the CIA had imprisoned in a black site in Poland.⁹⁰ When the British High Court of Justice considered releasing seven paragraphs about the CIA's collusion in the torture of Binyam Mohamed, a British resident, then-Secretary of State Hillary Clinton intervened in the proceeding to request that the passage not be released.⁹¹ In each of these instances, the government was purporting to protect the confidentiality of information that was, at least in significant part, already in the public domain. And in each of these cases, the government's action is best explained as accountability avoidance — as the refusal to answer for policies or conduct already in public view.⁹²

Known unknowns sever the connection between transparency and accountability. We often take for granted that “transparency promotes accountability,”⁹³ that sunlight is “the best of disinfectants,”⁹⁴ and that the mere exposure of waste, venality, and abuse will be enough to ensure their

⁸⁸ See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (dismissing the charity's challenge to warrantless wiretapping program despite the “cascade of acknowledgements and information [about the program] coming from the government,” and holding that the state secrets privilege precluded the charity from relying on a document already in its possession that purportedly established that its communications had been collected under the program).

⁸⁹ COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 11 (2006) (“The governments of the United States, Jordan and Syria declined my invitation to give evidence or otherwise participate in the hearings.”), available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.

⁹⁰ See Joanna Berendt & Nicholas Kulish, *Polish Ex-Official Charged With Aiding C.I.A.*, N.Y. TIMES (Mar. 27, 2012), <http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html>; Letter from Robert Majewski, Deputy of the Appellate Prosecutor in Warsaw, to the Helsinki Found. for Human Rights (Dec. 15, 2010), available at <http://www.interights.org/userfiles/Documents/20101215ProsecutorLettertoHFHRRreFOIEnglish.pdf>.

⁹¹ Richard Norton-Taylor, *Clinton Moved to Halt Disclosure of Torture Evidence, Court Told*, GUARDIAN (July 29, 2009, 3:36 PM), <http://www.guardian.co.uk/world/2009/jul/29/binyam-mohamed-cia-torture>.

⁹² The effort to impede the accountability efforts of judicial bodies outside the United States has not always been successful. See *El-Masri v. Former Yugoslav Republic of Macedonia*, 66 Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>.

⁹³ Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.

⁹⁴ Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10.

eradication. But, of course, there is no natural law that requires accountability to follow inevitably from transparency. If government officials must answer for their decisions, it is because courts and other institutions compel them to do so. The recent proliferation of known unknowns suggests that these institutions are failing us. The substantive policies discussed here — torture, rendition, targeting killing, unregulated surveillance — involve controversial choices with far-reaching implications. They are policies for which the government should have to answer.