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Spinning Secrets: The Dangers of Selective Declassification

ABSTRACT. The U.S. classification system leaves billions of documents hidden from view. Any departure from secrecy therefore grabs headlines worldwide. Presidents and others leverage the system by leaking or planting information with the press to bring attention to selected topics. A lesser-studied, and more insidious, way Presidents take advantage of widespread secrecy is by selective declassification—declassifying documents that fit their chosen narratives, while keeping conflicting documents classified. The first sustained analysis in the scholarly literature, this Note explores the uses and dangers of selective declassification through case studies from the three most recent presidencies. President Bush selectively declassified documents regarding Iraq’s possession of weapons of mass destruction; President Obama did so with documents from the Osama Bin Laden raid; and President Trump did the same with documents on the investigation of Russian interference in the 2016 election. As these case studies show, selective declassification misleads the public and harms the free flow of information by skewing our discussions and choices. To understand why selective declassification is concerning, this Note uses First Amendment theory to show how its harms are rooted in the manipulation of the marketplace of ideas. To see why those harms last, this Note turns to cognitive political science and examines our predisposition to believe information aligned with our partisan beliefs. The Note concludes by offering solutions for the Executive, Congress, the judiciary, and the press.

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INTRODUCTION

The Bush Administration needed to boost support for the Iraq War. This effort involved making hundreds of public statements but, to gain maximum traction, officials needed to cite evidence for their claims. Much of it came from a classified National Intelligence Estimate (NIE), a compilation of intelligence agencies' findings, written at Congress's request.¹ The document concluded—based on faulty intelligence—that Saddam Hussein had weapons of mass destruction (WMD) and was actively pursuing a nuclear program.² But it also included a dissent attacking these claims.³ Days before Congress was scheduled to vote on authorizing military force, the Administration released an unclassified summary of the NIE.⁴ It excised all dissents and exaggerated the NIE's conclusions. Based in part on this information, Congress voted to authorize the invasion. It went poorly, and no WMD were found.⁵

Months later, a former diplomat blasted the Administration's key claims on WMD in a *New York Times* editorial.⁶ President Bush soon declassified the NIE's actual eight-page "Key Judgments" section, which helped refute the criticism.⁷ But it was not until 2004 that the public could see the entire NIE—still heavily redacted—at which point the war was well underway.⁸ Throughout, these selective declassifications amplified the Administration's faulty intelligence and false statements.⁹

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1. *Iraq's Continuing Programs for Weapons of Mass Destruction*, NAT'L INTELLIGENCE COUNCIL (Oct. 2002) [hereinafter *NIE 2004 Release*], <http://nsarchive.gwu.edu/NSAEBB/NSAEBB129/nie.pdf> [<https://perma.cc/BYB4-9MRE>]; see also *Key Judgments (from October 2002 NIE)*, NAT'L INTELLIGENCE COUNCIL 1 (Oct. 2002) [hereinafter *NIE 2003 Release*], <https://fas.org/irp/cia/product/iraq-wmd.pdf> [<https://perma.cc/7SQ3-KVDW>].
 2. *NIE 2004 Release*, *supra* note 1, at 5.
 3. *National Intelligence Estimate 2002-16HC, Iraq's Continuing Programs for Weapons of Mass Destruction*, NAT'L INTELLIGENCE COUNCIL (Oct. 2002) [hereinafter *NIE 2018 Release*], <https://documents2.theblackvault.com/documents/cia/iraq-wmd-nie-01-2015-Dec2018Release-highlighted.pdf> [<https://perma.cc/T3YC-ZGC5>].
 4. *Iraq's Weapons of Mass Destruction Programs*, DIRECTOR CENT. INTELLIGENCE (Oct. 2002) [hereinafter *NIE 2002 Release*], <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB254/doc01.pdf> [<https://perma.cc/V5ZE-HPEY>].
 5. See *infra* notes 176-179 and accompanying text.
 6. Joseph C. Wilson IV, Opinion, *What I Didn't Find in Africa*, N.Y. TIMES (July 6, 2003), <https://www.nytimes.com/2003/07/06/opinion/o6WILS.html> [<https://perma.cc/2JJC-B4U9>].
 7. *NIE 2003 Release*, *supra* note 1.
 8. *NIE 2004 Release*, *supra* note 1.
 9. See SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE

President Bush's NIE declassification was just one of many times Presidents have selectively declassified information to serve their political goals, misleading the public. The extensive classification system has sparked criticism from legal scholars,¹⁰ journalists,¹¹ transparency advocates,¹² politicians,¹³ and even officials in charge of the system.¹⁴ Restricting this much information, they contend, hinders the transparency people need to hold leaders accountable and make informed choices. Government secrecy is indeed concerning. But focusing only on the information the government *conceals* overlooks another critical issue—that the government also has the power to *reveal* information, often by telling only one side of a story. Presidents have especially wide latitude in this regard. They may give classified information to favored reporters, use it in speeches, and spread it through social media. And, as this Note explores, they may declassify documents at will while keeping contradictory information classified. Whether their goal is to garner support for a congressional vote, a war, or a political agenda, selective declassification can be a powerful tool for shaping conversations and outcomes. Politicians and the public see only the chosen documents, form a one-sided view, and act accordingly. In making selective disclosures, Presidents are not promoting transparency, although they say they are. They are spinning secrets.

Selective declassification is arguably the President's strongest and most dangerous information-shaping tool. Secrecy is the norm, so declassifications grab

INFORMATION, S. REP. NO. 110-345, at 3, 88 (2008) [hereinafter 2008 SENATE INTELLIGENCE REPORT], <https://www.intelligence.senate.gov/sites/default/files/publications/110345.pdf> [<https://perma.cc/4JB8-2V7AJ>].

10. See, e.g., Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 404 (2009); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 894-95 (2008).
11. See Scott Shane, *Increase in the Number of Documents Classified by the Government*, N.Y. TIMES (July 3, 2005), <https://www.nytimes.com/2005/07/03/politics/increase-in-the-number-of-documents-classified-by-the-government.html> [<https://perma.cc/PUT8-5KHR>].
12. See, e.g., *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 77 (2010) (statement of Thomas S. Blanton, Director, National Security Archive, George Washington University) [hereinafter 2010 Blanton Statement]; Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability*, BRENNAN CTR. JUST. 7-11, 29-30 (Oct. 5, 2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf [<https://perma.cc/W2FL-V64U>].
13. See 2010 Blanton Statement, *supra* note 12, at 84.
14. See, e.g., Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES (Aug. 1, 2011), <https://www.nytimes.com/2011/08/02/us/02secret.html> [<https://perma.cc/CB6G-HTYX>] (quoting former Information Security Oversight Office Director J. William Leonard as saying he "saw routine overclassification of government documents, rarely saw it challenged and never saw it punished").

public attention. But the information revealed is one-sided, released only if it advances a chosen agenda. Unlike other ways in which national-security information comes to light – such as unauthorized leaks of government documents or authorized plants of information with favored reporters – Presidents can openly discuss selective disclosures while praising their own transparency. They can use the declassified documents as evidence for their claims and benefit from a false sense of credibility while hiding inconsistent information. This “spin” on national-security information creates long-lasting harms, as politicians and the public base policy choices on partial, misleading information.¹⁵ Because our brains cling to misperceptions, the effects can last even after accurate information comes to light.¹⁶

Each of the past three Presidents selectively declassified materials. President Bush targeted his NIE disclosures at Congress before it voted to authorize the use of force in Iraq. President Obama released some documents captured in the Osama Bin Laden raid, which supported the White House’s narrative that Bin Laden remained a major player whose demise was strategically important.¹⁷ President Trump ordered the partial declassification of a Foreign Intelligence Surveillance Act (FISA) surveillance warrant of former campaign adviser Carter Page, seeking to reveal anti-Trump bias in the Justice Department and discredit Robert Mueller’s investigation of Russian interference.¹⁸ In each case, Presidents used their declassification authority to shape politics and public opinion in their favor while concealing undesirable truths. These disclosures were part of broader, largely successful public-relations campaigns: Congress authorized the use of military force in Iraq with solid public support;¹⁹ heroic accounts of the

15. See Jonathan Abel, *Do You Have to Keep the Government’s Secrets? Retroactively Classified Documents, the First Amendment, and the Power to Make Secrets Out of the Public Record*, 163 U. PA. L. REV. 1037, 1039-40 (2015).

16. See *infra* notes 338-341 and accompanying text.

17. See Matthew Rosenberg, *In Osama Bin Laden Library: Illuminati and Bob Woodward*, N.Y. TIMES (May 20, 2015), <https://www.nytimes.com/2015/05/21/world/asia/bin-laden-bookshelf-list-released-by-us-intelligence-agency.html> [<https://perma.cc/T347-4TSM>].

18. See Matt Zapotosky, Devlin Barrett & Karoun Demirjian, *Trump Orders Justice Dept. to Declassify Russia-Related Material*, WASH. POST (Sept. 17, 2018, 6:44 PM EDT), https://www.washingtonpost.com/world/national-security/trump-orders-justice-dept-to-declassify-russia-related-material/2018/09/17/661b7c78-bac1-11e8-9812-a389be6690af_story.html [<https://perma.cc/8XKF-3EE7>].

19. See Lydia Saad, *Top Ten Findings About Public Opinion and Iraq*, GALLUP (Oct. 8, 2002), <https://news.gallup.com/poll/6964/top-ten-findings-about-public-opinion-iraq.aspx> [<https://perma.cc/84ZU-ZK3Y>].

Bin Laden raid predominate;²⁰ and most Republicans see the Russia investigation as a “political witch hunt.”²¹ In each case, the President’s selective declassification helped supplant a more complicated, less favorable truth.

Despite selective declassification’s distorting effects and serious policy impacts, the phenomenon has not yet received in-depth scholarly attention. It is “a strange lacuna in the secrecy literature,” as David Pozen has observed.²² Scholars and others have identified the phenomenon²³ – which has also been called “ad hoc”²⁴ or “instant”²⁵ declassification – but have not given selective declassification the attention it deserves. This Note begins to fill that gap. Part I defines “selective declassification,” with a focus on its misleading effects. Section I.A distinguishes selective declassification from the other irregular ways in which classified information comes to light: leaks and plants. These phenomena are more

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20. See Jonathan Mahler, *What Do We Really Know About Osama Bin Laden’s Death?*, N.Y. TIMES MAG. (Oct. 15, 2015), <https://www.nytimes.com/2015/10/18/magazine/what-do-we-really-know-about-osama-bin-ladens-death.html> [<https://perma.cc/7ZSA-54ZS>].
21. See *84% of U.S. Voters Want to See Mueller Report, Quinnipiac University National Poll Finds; Dems Divided on Support for Israelis or Palestinians*, QUINNIPIAC U. POLL 10 (Mar. 26, 2019), https://poll.qu.edu/images/polling/us/us03262019_ujfb92.pdf [<https://perma.cc/A8Y7-EEPJ>].
22. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 566 n.273 (2013).
23. See, e.g., Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24 ST. THOMAS L. REV. 399, 408–14 (2012) (describing how selective declassifications like the Bush Administration’s weapons-of-mass-destruction disclosures can “impart faulty portrayals”); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 540 (2007) (noting how “secrecy” can “intentionally be misused by those set on manipulating public debate toward their own ends,” including by “executive branch ‘spinning of information’ through selective declassification or leakage of otherwise classified information”); John F. Murphy, *Knowledge Is Power: Foreign Policy and Information Interchange Among Congress, the Executive Branch, and the Public*, 49 TUL. L. REV. 505, 539 (1975) (“[T]he executive branch . . . has selectively disclosed classified information supportive of its programs while withholding adverse information.”); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 251–53 (2008) (focusing on leaks, but describing how selective declassification similarly “distort[s] the public debate on fundamental public issues”); Alexander M. Taber, Note, *Information Control: Making Secrets and Keeping Them Safe*, 57 ARIZ. L. REV. 581, 596 (2015) (“The executive branch can then spin government information through selective declassification or leakage of otherwise classified information.”); Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 913–14 (1990) (explaining how “the executive’s power to classify and declassify information” allows it to “releas[e] selected fragments of information while carefully guarding others,” thereby “distort[ing] public perception of a particular issue or event”).
24. See Pozen, *supra* note 22, at 566 n.273.
25. E.g., JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 16 (2017).

common and have received greater academic treatment, but are a less potent tool for Presidents because they cannot publicly stand behind the revealed documents. Section I.B situates selective declassification in the context of the current classification system.

Part II examines selective declassifications by the three most recent Presidents. Part III draws on these case studies to identify selective declassification's uses and dangers. Selective declassification has long-lasting effects and can lead to policy choices the public may have rejected given accurate information. Part III also responds to the counterarguments that, in the face of widespread government secrecy, all disclosures are beneficial—or that misleading disclosures can at least be corrected. To the contrary, affirmatively misleading information is worse than none, creating misperceptions that last even after more complete information surfaces. To explore these effects further, Part III looks beyond the national-security literature, drawing on First Amendment theory and the political-science literature on misinformation. It finds that selective declassification has a unique ability to distort the marketplace of ideas by authoritatively spreading inaccurate narratives. When these inaccuracies align with people's preexisting views, people are likely to believe them even after corrective information is provided.

Part IV concludes by recommending potential remedies to the distorting effects of selective declassification. While the ideal solution would be for Presidents to make only declassifications that provide an accurate picture, they are unlikely to give up a powerful political tool. Congress can help by increasing declassification funding and legislatively ordering declassification. When there are fewer secrets overall, there are fewer secrets to spin. Strengthening the Freedom of Information Act (FOIA) in the national-security context would also help, as would a statutory shield law and Espionage Act reforms. Last, the press plays a critical role in reducing the impact of selective declassification by revealing the full story.

I. DEFINING SELECTIVE DECLASSIFICATION

This Note defines selective declassification as:

- (1) the *authorized declassification*;
- (2) of a *discrete set of material*;
- (3) done to achieve a *self-serving political goal* (beyond simply transparency);
- (4) shared with a chosen *audience* (often the press);
- (5) that results in an *intentionally misleading* impression of the topic.

Each component of this definition is critical. First, selective declassifications are authorized. The documents are formally declassified by someone with

authority to do so. They are not leaked, planted, hacked, or otherwise revealed outside formal channels of disclosure. They are official acts, and the documents can be disseminated widely. This Note focuses on Presidents' declassifications, as they receive the most attention and can make the biggest impact on policies and public opinion. But Congress, intelligence agencies, and the military also have declassification authority.²⁶

Second, selective declassifications involve discrete sets of material. They are distinct from massive leaks like Edward Snowden's²⁷ or the millions of pages routinely declassified each year.²⁸ Although they can vary in size from a few documents (like President Bush's NIE declassifications) to a larger trove (like President Obama's declassifications of documents obtained in the Bin Laden raid), they are selected to highlight a chosen topic. From the vast universe of classified documents, Presidents making selective declassifications cherry-pick the ones they think will help them achieve their goals.

Third, selective declassification has self-serving, political goals. This feature distinguishes it from purely transparency-focused initiatives such as efforts to declassify records of President Kennedy's assassination²⁹ or the systematic declassification process by which old records are routinely released.³⁰ These goals include policy and personal agendas. They can be large-scale undertakings (the Iraq War) or smaller political fights (discrediting Mueller). They are often tied to an administration's national-security and foreign-policy aims, but can also be more personal. For instance, Presidents Bush and Obama both selectively declassified documents to counter critics days after damaging news articles made headlines.³¹

Fourth, selectively declassified documents must be shared with an audience. An unannounced declassification cannot shape policies and perceptions.

26. See, e.g., Karoun Demirjian, *CIA Declassifies Memo Clearing Haspel of Responsibility for Destroying Evidence*, WASH. POST (Apr. 20, 2018, 8:09 PM EDT), https://www.washingtonpost.com/powerpost/cia-declassifies-memo-clearing-haspel-of-responsibility-for-destroying-evidence/2018/04/20/a79e9bfc-44de-11e8-bba2-0976a82b05a2_story.html [<https://perma.cc/9ZQT-FBFD>] (describing the CIA's selective declassification of favorable documents on director-candidate Gina Haspel).

27. See Paul Szoldra, *This Is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks*, BUS. INSIDER (Sept. 16, 2016, 8:00 AM), <https://www.businessinsider.com/snowden-leaks-timeline-2016-9> [<https://perma.cc/82CN-JCWH>].

28. See, e.g., Info. Sec. Oversight Office, *2017 Report to the President*, NAT'L ARCHIVES & RECORDS ADMIN. 14 (May 31, 2018) [hereinafter *2017 Report to the President*], <https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf> [<https://perma.cc/3NWC-CK8K>].

29. President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443.

30. See *infra* Section I.B.2.

31. See *infra* Sections II.A and II.B.

Presidents typically disclose information to the press and, by extension, the public. In doing so, they call widespread attention to the revelations and shape debate accordingly. Other possible audiences include Congress and foreign leaders, as seen when President Bush used the NIE disclosures to influence the Senate and United Nations.³²

Fifth, selective declassification creates an intentionally misleading impression of the topic at hand, typically by withholding related classified documents that do not support the President's goals. The public is told a partial truth and lacks the means to uncover the full story given the executive branch's near monopoly on classified information. Even when the public does learn the full truth, such as through investigative journalism reliant on leaks, the misconception often lingers, reifying longstanding partisan beliefs. This is the greatest danger of selective declassification. "By releasing selected fragments of information while carefully guarding others, an administration can distort public perception of a particular issue or event," "rais[ing] the specter of government misinformation" and "spin control."³³ This has driven intelligence officials to highlight Presidents' "dangerous" ability to "spin a narrative . . . to their point of view" through selective declassification.³⁴ This feature is also how the public can best spot a selective declassification: when a disclosure aligns with a President's self-serving goals and reveals only information supporting those goals, the disclosure should be viewed skeptically. Spotting selective declassifications can be difficult given the extent of government secrecy, but the warning signs are there.

As the case studies show, various declassifications by Presidents have met this definition. While they differ in scope and effect—from prolonged wars to shorter-term political moves—each shares these five core components. The remainder of this Part distinguishes selective declassification from leaks, plants, and other ways through which information escapes the classification system. It

32. See David C. Gompert, Hans Binnendijk & Bonny Lin, *Blinders, Blunders, and Wars: What America and China Can Learn*, RAND CORP. 170 (2014), https://www.rand.org/content/dam/rand/pubs/research_reports/RR700/RR768/RAND_RR768.pdf [<https://perma.cc/QX2C-YP5S>] ("The flawed NIE and associated press leaks had a profound impact on votes in Congress and at the United Nations.")

33. Note, *supra* note 23, at 913.

34. Maggie Haberman & Michael S. Schmidt, *Trump Gives Attorney General Sweeping Power in Review of 2016 Campaign Inquiry*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/trump-barr-intelligence.html> [<https://perma.cc/G6NC-FSL6>]; see also Shane Harris, *Barr Could Expose Secrets, Politicize Intelligence with Review of Russia Probe, Current and Former Officials Fear*, WASH. POST (May 24, 2019, 6:53 PM EDT), https://www.washingtonpost.com/world/national-security/barr-could-expose-secrets-politicize-intelligence-with-review-of-russia-probe-current-and-former-officials-fear/2019/05/24/58f822f8-7e2f-11e9-8bb7-ofc796cf2eco_story.html [<https://perma.cc/H3LW-VGGM>] (quoting former CIA Deputy Director Michael Morell saying "[t]his is yet another destruction of norms that weakens our intelligence community").

then places selective declassification in the context of the classification and disclosure systems and explains that widespread secrecy and strong executive authority enable the President to selectively declassify.

A. *What Selective Declassification Is Not*

Because of its ad hoc nature, selective declassification is often confused with other informal ways in which the government publicizes once-secret information: leaks and plants. Leaks are unauthorized disclosures, typically to the press, whereas plants are officially authorized. Even experts conflate the three terms, using “leak” as a catch-all.³⁵ The confusion arises because it can be “hazy at best” whether a disclosure was authorized and whether the information has been declassified.³⁶ And, selective declassification is understudied.³⁷ Analytically distinguishing these phenomena, however, is important to understanding selective declassification and its singular harms.

1. *Leaks*

First, selective declassification is different from leaking. In the national-security context, leaking involves the unauthorized disclosure of classified information. Leaks of national secrets have occurred since the Founding³⁸ and have long captured the public imagination.³⁹ While people often use the term “leak” to describe a variety of disclosures,⁴⁰ Pozen neatly defines it as follows: “(i) a targeted disclosure (ii) by a government insider (employee, former employee, contractor) (iii) to a member of the media (iv) of confidential information the

35. See, e.g., ELSEA, *supra* note 25, at 16 (“Such Executive Branch *leaks* may be *planted* with friendly news columnists.” (emphases added)).

36. Papandrea, *supra* note 23, at 253.

37. See sources cited *supra* note 23.

38. Thomas Paine published documents revealing that France had secretly aided the United States during the Revolution. See R.B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y. L. SCH. L. REV. 873, 884–85 (1994); see also Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 432–46 (2006) (describing the history of leaks since the Founding); Papandrea, *supra* note 23, at 249–57 (same).

39. See Ben Zimmer, *Leaks*, N.Y. TIMES MAG. (Aug. 20, 2010), <https://www.nytimes.com/2010/08/22/magazine/22FOB-onlanguage-t.html> [<https://perma.cc/3GAV-TWCY>] (dating the term to 1887).

40. Leaks get confused with plants, hacking by outsiders, see DAVID E. MCCRAW, TRUTH IN OUR TIMES: INSIDE THE FIGHT FOR PRESS FREEDOM IN THE AGE OF ALTERNATIVE FACTS 130 (2019), and “rumor, gossip, and other back-channel exchanges between sources and reporters,” STEPHEN HESS, THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES 75 (1984).

divulgence of which is generally proscribed by law, policy, or convention (v) outside of any formal process (vi) with an expectation of anonymity.”⁴¹

Comparing leaking with selective declassification demonstrates not only that these are distinct phenomena—but also that selective declassification can be a stronger presidential tool.

More documents are leaked than selectively declassified, so the public focus on leaks can be less intense. In part, leaks are more frequent because they can come from more people. Anyone with access to classified information can leak it. Selective declassification is rarer because few government employees have formal declassification authority and the political capital to use it successfully for their own ends. Additionally, because selective declassifications typically go through an interagency declassification review process, they involve fewer documents than do massive leaks like Edward Snowden’s or WikiLeaks’s, increasing the focus on each disclosure.

Selective declassification also gives Presidents greater control over the process and results of disclosure. This is because, unlike illicit leaks, it is formally authorized. While Presidents do sometimes desire leaks to help test public opinion toward new policies, support or undermine policies, settle grudges, and more,⁴² they have incomplete control over what leakers release and how the press covers it. After the leak, Presidents are expected to stick to their firmly antileak rhetoric in public.⁴³ By contrast, selective declassification allows Presidents to choose which documents to make public and when. Presidents can then openly praise and discuss the declassification to sway public opinion in their favor (gaining protransparency points in the process).

2. *Plants*

Selective declassifications are also distinct from plants, which are “‘authorized’ disclosures designed to advance administration interests and goals.”⁴⁴ Plants are leaks’ officially sanctioned cousin. The government intentionally blurs the line between plants and leaks so it can deny making plants, such as of

41. Pozen, *supra* note 22, at 521.

42. See Pozen, *supra* note 22, at 532 & nn.99-101 (citing HESS, *supra* note 40, at 77-78). As Pozen shows, this “logic of leakiness,” *id.* at 544, has led the executive branch to adopt the “rational, power-enhancing strategy” of taking a permissive approach toward leakers, *id.* at 515.

43. See STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON LEAKS AND OTHER DISCLOSURES OF CLASSIFIED DEFENSE INFORMATION 1-2 (2017).

44. Pozen, *supra* note 22, at 534. The question of whether a disclosure was authorized can be complicated, but Pozen makes a convincing case for distinguishing plants from leaks.

unfavorable information about a political opponent.⁴⁵ Typically, plants involve top government employees disclosing information to trusted reporters. The resulting story does not name the employee or share the classified documents. Plants help convey policy information and measure public sentiment.

Plants are often confused with selective declassifications because both are authorized, goal-oriented, ad hoc disclosures. However, plants are a weaker tool for two key reasons. First, plants are attributed to anonymous sources, whereas selective declassifications are officially acknowledged. Because the government can fully stand behind selectively declassified information and use it to advocate for a policy, it can have a stronger impact. Second, planted information remains classified, so news coverage excludes the underlying documents. In comparison, selectively declassified documents are fair game to distribute, amplifying their message. So, while the ease and anonymity of plants make them more common, they have less opinion-shaping power.

The differences between selective declassification, leaks, plants, and the regular declassification process can be summarized as follows:

	Selective Declassification	Leaks	Plants	Regular Declassification Processes
Authorized	Yes	No	Yes (but remains anonymous)	Yes
Declassification	Yes	No	No	Yes
Discrete set of material	Yes	Sometimes	Sometimes	Sometimes (but not usually)
Self-serving political goal	Yes	Yes	Yes	No
Shared with a chosen audience	Yes	Yes	Yes	No
Results in an intentionally misleading impression of the topic	Yes	Sometimes	Sometimes	No

45. *See id.* at 559-64.

Though these categories are analytically distinct, it can be hard to determine which one a specific disclosure falls into – after all, the President may publicly condemn an authorized plant or claim purely protransparency motives when selectively declassifying. Yet line-drawing is both possible and worthwhile. We may learn a disclosure was a plant when the President admits it was authorized.⁴⁶ Or we may spot a selective declassification when more complete information comes to light, revealing a disclosure’s intentional one-sidedness.⁴⁷ Making these distinctions is important because, as subsequent Parts will illustrate, selective declassification has uniquely harmful distorting effects on public discourse and policy, and requires unique solutions.

B. Classification, Declassification, and a System of Secrecy

Before information can be *declassified*, selectively or otherwise, it must first be classified. The current classification system contributes to the use of selective declassification by enabling large-scale overclassification and empowering the President to declassify at will.

1. How Classification Works

While executive-branch secrecy dates to the Founding,⁴⁸ the modern classification system originated during World War II. In 1940, President Roosevelt signed the first executive order governing classification.⁴⁹ Since then, the system has expanded dramatically under later Presidents’ classification executive orders.⁵⁰ President Roosevelt’s order applied only to information about vital

46. For example, as discussed *infra* Section II.A, President Bush admitted that he and Vice President Cheney planted the classified NIE on Iraq with *New York Times* reporter Judith Miller. *Bush Acknowledges Declassifying Intelligence*, CNN (Apr. 11, 2006, 7:21 PM EDT), <http://www.cnn.com/2006/POLITICS/04/10/whitehouse.leak> [<https://perma.cc/L46D-R8FC>]; see also *Timeline: The CIA Leak Case*, NPR (July 2, 2007), <https://www.npr.org/templates/story/story.php?storyId=4764919> [<https://perma.cc/95FE-9CPN>].

47. See, e.g., *infra* Section II.A (describing how the public learned that the various declassified NIEs were misleading).

48. See THE FEDERALIST NO. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961) (describing the benefits of “secrecy and dispatch” in the President’s treaty-making efforts); see also THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (touting a unitary executive’s ability to operate in secrecy). However, the Constitution only references secrecy in the context of the legislature. U.S. CONST. art. I, § 5 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . .”).

49. Exec. Order No. 8381, 3 C.F.R. § 634 (1938-1943).

50. See Taber, *supra* note 23, at 591-94 (describing various classification executive orders).

military and naval installations and equipment, whereas the classification system now covers all information that could harm national security if disclosed.⁵¹ The number of classified documents has ballooned since 9/11 and the advent of digital communications.⁵² Presidents' claimed authority over the system has also grown. Though President Roosevelt's order cited a statute for its authority,⁵³ Presidents have since rooted their classification powers in the Constitution.⁵⁴

Executive Order 13,526 is the current classification executive order, issued by President Obama in 2009.⁵⁵ It establishes that documents should be classified when "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security."⁵⁶ There are three classification levels: confidential, secret, and top secret.⁵⁷ The order specifies that classification decisions must turn *only* on national security, not factors like avoiding embarrassment or concealing illegal activity.⁵⁸ The order does not include punishments for disclosing classified information; rather, a complex system of statutes, including the Espionage Act, criminalizes such disclosure.⁵⁹ In fiscal year 2017, the Information Security Oversight Office (ISOO) reported that federal agencies made over forty-nine million decisions to classify information and spent \$18.39 billion on the classification system⁶⁰ (data left out of ISOO's much-shortened 2018 and 2019 reports⁶¹).

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51. Compare 3 C.F.R. § 634 (governing the classification of information about vital military and naval installations), with Exec. Order No. 13,526, § 1.1, 75 Fed. Reg. 707, 707 (Dec. 29, 2009), reprinted in 50 U.S.C. § 435 app. at 204-15 (2018) (governing the classification of information that may result in damage to national security).
 52. See *infra* note 94 and accompanying text.
 53. The order relied on Section 795 of the Espionage Act. See 3 C.F.R. § 634 (citing 18 U.S.C. § 795 (2018)).
 54. See ELSEA, *supra* note 25, at 1; Note, *supra* note 23, at 907-08. For a discussion of the limitations on this executive authority, see *infra* Section IV.A.
 55. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).
 56. *Id.* § 1.1(a)(4).
 57. *Id.* § 1.2(a).
 58. *Id.* § 1.7(a).
 59. See MULLIGAN & ELSEA, *supra* note 43, at 1.
 60. 2017 Report to the President, *supra* note 28, at 1, 4, 8-10.
 61. Info. Sec. Oversight Office, 2018 Report to the President, NAT'L ARCHIVES & RECORDS ADMIN. (Aug. 16, 2019) [hereinafter 2018 Report to the President], <https://www.archives.gov/files/isoo/images/2018-isoo-annual-report.pdf> [<https://perma.cc/R7Z5-XCC2>]; Info. Sec. Oversight Office, 2019 Report to the President, NAT'L ARCHIVES & RECORDS ADMIN. (June 22, 2020) [hereinafter 2019 Report to the President], <https://www.archives.gov/files/isoo/reports/2019-isoo-annual-report.pdf> [<https://perma.cc/JC3B-UBGD>].

2. *How Declassification Works*

The declassification process forms the other side of the classification system. Executive Order 13,526 grants declassification authority to the original classifying official, their successor or supervisor, other designated officials, and the Director of National Intelligence.⁶² It created a National Declassification Center to oversee these activities.⁶³

Executive Order 13,526 establishes four types of declassification. First, automatic declassification directs the release of records twenty-five years or older with permanent historical value but excepts nine categories of information – including that which would reveal a source’s identity.⁶⁴ Automatic declassification is by far the largest category: in fiscal year 2017 (the most recent data available), it accounted for 99% of all pages reviewed for declassification, totaling over eighty-three million pages.⁶⁵ Of those, 55% were approved for release.⁶⁶

Second, systematic declassification involves the rereview of records exempted from automatic release at twenty-five years, occurring fifty years after the document’s classification date.⁶⁷ In fiscal year 2017, around 700,000 documents fell into this category, 35% of which were declassified.⁶⁸

Third, the discretionary declassification system directs release when information “no longer meets the standards for classification” – based on potential harm to national security – or in “exceptional cases” where “the need to protect such information may be outweighed by the public interest in disclosure of the information.”⁶⁹ Around 57,500 documents fell into this category in fiscal year 2017, 38% of which were released.⁷⁰ These numbers are not divided into the two subcategories. However, the “exceptional” public-interest option “has rarely been exercised. Moreover, when it has been exercised, it has more often been because the department or agency wants to get its own position out” – a selective declassification.⁷¹

62. Exec. Order No. 13,526, § 3.1(b)-(c), 75 Fed. Reg. at 713.

63. *Id.* § 3.7.

64. *Id.* § 3.3.

65. *2017 Report to the President*, *supra* note 28, at 14.

66. *Id.*

67. Exec. Order No. 13,526, § 3.4, 75 Fed. Reg. at 717.

68. *2017 Report to the President*, *supra* note 28, at 14.

69. Exec. Order No. 13,526, § 3.1(d), 75 Fed. Reg. at 713.

70. *2017 Report to the President*, *supra* note 28, at 14.

71. *Improving Declassification*, PUB. INT. DECLASSIFICATION BOARD 29 (Dec. 2007), <https://www.archives.gov/files/declassification/pidb/improving-declassification.pdf> [https://perma.cc/7XX4-C3JQ].

Fourth, Mandatory Declassification Review (MDR) allows anyone to request declassification from the agency that classified the document.⁷² Requesters appeal denials first within the agency, and then to the Interagency Security Classification Appeals Panel (ISCAP).⁷³ MDR is the smallest category and has the highest declassification rate.⁷⁴ Agencies received 6,540 MDR requests in fiscal year 2017.⁷⁵ In the 4,581 requests resolved, agencies partially or fully declassified 91% of the documents requested.⁷⁶ ISCAP decided 359 MDR appeals that year and ordered partial or full declassification of 93% of requested documents.⁷⁷ ISCAP does continue to publish its data, which show declines in both resolutions and release rates. In fiscal year 2018, ISCAP decided just thirty-seven appeals, declassifying 77% of requested documents.⁷⁸ In fiscal year 2019, ISCAP decided twenty-four appeals, declassified 53% of requested documents, and had a backlog of 1,286 cases.⁷⁹

3. *How Selective Declassification Fits in*

While selective declassification is a departure from the routinized declassification system, it is related in two key ways. First, although Executive Order 13,526 bars some reasons for classification, it does not address reasons for *declassification*. Additionally, overclassification and the slow, underfunded, and overcautious declassification system provide a large pool of classified documents from which to cherry-pick. As more documents become classified and stay classified, there will be more secrets to spin.

a. *Broad Presidential Authority*

Presidents enjoy a near monopoly over the classification system. They can declassify essentially at will. Presidents since World War II have cited the

72. Exec. Order No. 13,526, § 3.5, 75 Fed. Reg. at 717-18.

73. *Id.* § 5.3(b)(3). The Interagency Security Classification Appeals Panel also reviews appeals of classification challenges and agency exemptions from automatic declassification. *Id.* § 5.3(b)(1)-(2).

74. See 2017 Report to the President, *supra* note 28, at 14, 16-17.

75. *Id.* at 16.

76. *Id.*

77. *Id.* at 27.

78. Info. Sec. Oversight Office, *Interagency Security Classification Appeals Panel (ISCAP) Mandatory Declassification Review (MDR) Forum*, NAT'L ARCHIVES & RECORDS ADMIN. 10-11 (Nov. 18, 2019), <https://www.archives.gov/files/declassification/isicap/2019-11-18-isicap-presentation.pdf> [<https://perma.cc/7JJM-FB6M>].

79. *Id.* at 10, 12; 2019 Report to the President, *supra* note 61, at 9.

Constitution itself as granting them authority over the system, as part of their broader national-security powers.⁸⁰ The Supreme Court supported this view in *Department of the Navy v. Egan*, stating that, as commander-in-chief, the President’s “authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant.”⁸¹ Although lower-level executive-branch employees must follow the declassification procedures outlined above, the President can change or override them, as commentators often note following controversial selective declassifications.⁸² As one article put it, “Nixon’s infamous comment that ‘when the president does it, that means that it is not illegal’ is actually true about some things. Classified information is one of them.”⁸³

There are likely *some* outer limits to the President’s declassification power. Releasing highly sensitive information, such as the name of a source, could violate the Espionage Act, which predates the classification system and restricts the sharing of “information relating to the national defense” that could “be used to the injury of the United States or to the advantage of a foreign nation.”⁸⁴ While a prosecution would be unlikely, especially during a President’s term in office, it is possible.⁸⁵ The Constitution also requires the President to “take care that the

80. See ELSEA, *supra* note 25, at 1.

81. 484 U.S. 518, 527 (1988). Congress does possess its own declassification authority, which gained public attention during debates over President Trump’s release of the Nunes memo, as described in Section II.C, *infra*. See Sarah Levine & Simon Brewer, *Devin Nunes and the Chamber of Secrets: Congress’s Power of Declassification*, MEDIA FREEDOM & INFO. ACCESS CLINIC (Mar. 1, 2018), <https://law.yale.edu/mfia/case-disclosed/devin-nunes-and-chamber-secrets-congress-power-declassification> [<https://perma.cc/SY8K-2J7>].

82. See, e.g., Jack Goldsmith, Susan Hennessey, Quinta Jurecic, Matthew Kahn, Benjamin Wittes & Elise Julian Wittes, *Bombshell: Initial Thoughts on the Washington Post’s Game-Changing Story*, LAWFARE (May 15, 2017, 7:47 PM), <https://www.lawfareblog.com/bombshell-initial-thoughts-washington-posts-game-changing-story> [<https://perma.cc/YD5Y-YRPM>]; Louis Jacobson, *Does the President Have ‘the Ability to Declassify Anything at Any Time’?*, POLITIFACT (May 16, 2017), <https://www.politifact.com/truth-o-meter/statements/2017/may/16/james-risch/does-president-have-ability-declassify-anything-an> [<https://perma.cc/7R6G-2MSN>]; *Presidential Declassification of Previously Classified Material*, U. CHI. L. SCH. FAC. BLOG (Apr. 9, 2006), https://uchicagolaw.typepad.com/faculty/2006/04/presidential_de.html [<https://perma.cc/UPH6-QDEE>].

83. Goldsmith et al., *supra* note 82.

84. 18 U.S.C. § 794(a) (2018); see Marty Lederman & David Pozen, *Why Trump’s Disclosure to Russia (and Urging Comey to Drop the Flynn Investigation, and Various Other Actions) Could Be Unlawful*, JUST SECURITY (May 17, 2017), <https://www.justsecurity.org/41024/why-trumps-disclosure-and-more-might-be-unlawful> [<https://perma.cc/A38L-DGF4>]; see also ELSEA, *supra* note 25, at 14-15 (describing statutory schemes punishing disclosures).

85. See Lederman & Pozen, *supra* note 84.

laws are faithfully executed”⁸⁶ and swear an oath to “faithfully execute the Office of President of the United States.”⁸⁷ These duties may extend to the responsible use of classification authority. And, as Justice Stewart wrote in the Pentagon Papers case, the same constitutional structure that gives Presidents national-security powers also imposes “the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.”⁸⁸ Further, the President faces external constraints. Congress can set declassification procedures⁸⁹ and request specific declassifications,⁹⁰ and intelligence-community pushback can prevent selective declassifications.⁹¹ Still, the President’s strong authority enables selective declassifications nearly on demand.

b. Lack of Constraint on Reasons to Declassify

Besides giving the President broad declassification authority, Executive Order 13,526 does not constrain the reasons for declassifying documents. Classification orders dating to President Nixon have banned some reasons for classification, such as concealing embarrassing information,⁹² but have never restricted the motives behind *declassification*. While selective declassification to achieve political goals is inconsistent with the system’s security-only focus, Executive Order 13,526 is silent on the issue. Instead, as the Congressional Research Service observed, it “seem[s] to presuppose that agencies and classifying officials will not have any need or desire to disclose classified information in their possession other than to comply with the regulations.”⁹³ Yet as the case studies in the next Part show, officials do declassify for instrumental reasons – the system just isn’t set up to deal with them.

86. *Id.* (citing U.S. CONST. art. II, § 3).

87. Goldsmith et al., *supra* note 82 (quoting U.S. CONST. art. II, § 1).

88. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

89. *EPA v. Mink*, 410 U.S. 73, 83 (1973).

90. See Levine & Brewer, *supra* note 81.

91. See, e.g., Ken Dilanian, *Trump Surrenders on Demand for Declassification of Russia Probe Docs*, NBC NEWS (Sept. 21, 2018, 12:37 PM EDT), <https://www.nbcnews.com/politics/national-security/trump-surrenders-demand-declassification-russia-probe-docs-n911871> [<https://perma.cc/Q5U4-ZHHC>].

92. See Taber, *supra* note 23, at 592.

93. ELSEA, *supra* note 25, at 16 (noting that the Executive Order may implicitly sanction selective declassification); see also Pozen, *supra* note 22, at 566 (“Although the order does not explicitly prohibit declassifying information immediately . . . it does not clearly countenance such an ad hoc approach either.”).

c. *Overclassification*

The sheer size of the modern classification system also feeds into selective declassification by creating a large pool of classified documents from which to choose. The number of classified documents has skyrocketed due to electronic communications and the post-9/11 growth of the national-security state.⁹⁴ As ISOO reports, “the Government creates electronic petabytes of classified and controlled unclassified data each month, a deluge that we expect will continue to grow unabated.”⁹⁵ Federal agencies made over forty-nine million classification decisions in 2017.⁹⁶ By one estimate, up to a trillion pages may be classified, enough to make up 200 Libraries of Congress.⁹⁷

Although some of this information is truly sensitive, much is not. The eight government studies to address the issue since 1956 have all reported overclassification, as have many politicians and officials.⁹⁸ As one former ISOO director put it, “I’ve seen information that was classified that I’ve also seen published in third-grade textbooks.”⁹⁹ One significant contributor is the fact that employees making classification decisions face no consequences if they overclassify, but fear severe repercussions if they underclassify harmful information.¹⁰⁰

Overclassification has many negative effects. A lack of transparency hinders democratic decisionmaking and oversight. The difficulty of sharing classified

94. See, e.g., Info. Sec. Oversight Office, *2001 Report to the President*, NAT’L ARCHIVES & RECORDS ADMIN. 1, 14 (Sept. 20, 2002), <https://www.archives.gov/files/isoo/reports/2001-annual-report.pdf> [<https://perma.cc/PW5X-X52M>] (charting the leap in classification decisions beginning in fiscal years 2000 and 2001, and citing the war on terror and increasing use of email); see also Goitein & Shapiro, *supra* note 12, at 22 (“Particularly since 9/11, generating and dealing in official secrets is almost a prerequisite for agencies to be taken seriously.”); Shane, *supra* note 11 (“The acceleration of secrecy began after the 2001 attacks . . .”).

95. *2018 Report to the President*, *supra* note 61, at 5.

96. *2017 Report to the President*, *supra* note 28, at 10. This was the lowest number since 2008. *Id.* Further increasing government secrecy is “pseudoclassification,” with agencies creating dozens of labels (such as “sensitive but unclassified”) for information that, while not classified, is restricted in its use. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134 (2006).

97. Peter Galison, *Removing Knowledge*, 31 CRITICAL INQUIRY 229, 230 (2004).

98. Goitein & Shapiro, *supra* note 12, at 4-5; see 2010 Blanton Statement, *supra* note 12, at 8 (reporting officials’ estimates that only ten to fifty percent of the classified information they reviewed, including some of “the government’s most sensitive records about Osama bin Laden and Al-Qaeda,” should have been classified).

99. Shane, *supra* note 11.

100. See Goitein & Shapiro, *supra* note 12, at 29-30. The same incentives discourage declassification.

information across agencies creates security risks.¹⁰¹ And the classification system is expensive, costing \$18.39 billion in 2017.¹⁰² Most relevant to this Note, overclassification creates a large number of documents to selectively declassify.¹⁰³ Further, it creates a norm of secrecy, allowing a President who selectively declassifies a document to capture public attention by departing from that norm, using this attention to shape opinions as desired.

d. Failure of Regular Declassification

The regular declassification system's severe backlogs and low release rates similarly contribute to widespread secrecy. Every year, ISOO decries the state of the system, saying inadequate funding and technology renders agencies unable to keep up¹⁰⁴—longstanding themes in critiques of declassification.¹⁰⁵ Agencies cannot “meet the demands imposed by large volumes of paper records needing timely review, let alone the deluge of electronic records already well underway.”¹⁰⁶ While some experiments with machine-learning technologies are underway, agencies largely remain stuck in the analog age.¹⁰⁷ Only in 2011 did the National Security Agency release some of its oldest classified documents, including a 200-year-old book.¹⁰⁸

Declassification processes are also problematic. “Automatic” declassification of twenty-five-year-old records is anything but. Agencies conduct slow page-by-

101. See THE 9/11 COMMISSION REPORT, NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S. 417 (2004), <https://www.9-11commission.gov/report/911Report.pdf> [<https://perma.cc/AWT2-6UJT>] (calling for less classification and better information sharing between intelligence agencies).

102. 2017 Report to the President, *supra* note 28, at 4.

103. See SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA 237 (2016) (noting that the large number of classified documents allows Presidents to “selectively leak information to shape public attitudes”).

104. See, e.g., 2017 Report to the President, *supra* note 28, at 23-24; 2018 Report to the President, *supra* note 61, at 5-6; 2019 Report to the President, *supra* note 61, at 11.

105. See, e.g., COMM'N ON PROTECTING & REDUCING GOV'T SECRECY, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 60-61 (1997) [hereinafter MOYNIHAN COMMISSION REPORT].

106. 2017 Report to the President, *supra* note 28, at 23.

107. See, e.g., A Vision for the Digital Age: Modernization of the U.S. National Security Classification and Declassification System, PUB. INT. DECLASSIFICATION BOARD 4-21 (May 26, 2020), <https://www.archives.gov/files/declassification/pidb/recommendations/pidb-vision-for-digital-age-may-2020.pdf> [<https://perma.cc/BG2L-3LAL>].

108. See Noah Shachtman, NSA Declassifies 200-Year-Old Book, WIRED (June 10, 2011, 12:19 PM), <https://www.wired.com/2011/06/nsa-declassifies-200-year-old-book> [<https://perma.cc/T7KX-5DAV>].

page reviews, often using a “pass/fail” method whereby reviewers withhold entire documents rather than redact parts unfit for release.¹⁰⁹ Many decisions are “overly risk-averse,” resulting in “unacceptably low” declassification rates.¹¹⁰ Overall, the high volume of records remaining classified allows Presidents to selectively declassify even historical documents,¹¹¹ and contributes to the secrecy that gives selective declassification its attention-grabbing power.

II. CASE STUDIES

With the definition and context of selective declassification in mind, Part II explores case studies from the three most recent presidencies to illustrate the phenomenon and its harms. President Bush used selective declassification to support going to war in Iraq, President Obama did so to bolster his narrative that killing Osama Bin Laden was critical to defeating terrorism, and President Trump used it to discredit claims of Russian interference in the 2016 election. Each time, the President released only documents that fit the chosen story, keeping conflicting documents classified. These selective declassifications shaped debates on national security and foreign affairs, with long-lasting effects.

The case studies are selected from recent presidencies because, while selective declassification has been possible since the classification system’s 1940 creation, the classification landscape changed dramatically after 2000 given the growth of electronic communications and post-9/11 national-security secrecy.¹¹² Additionally, the internet and social media have given selective declassification a far

109. See *Improving the Intelligence Community’s Declassification Process and the Community’s Support to the National Declassification Center*, OFF. DIRECTOR NAT’L INTELLIGENCE 4 (Dec. 2016), https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/CDA3-23-2015-Improving-the-IC-Declass-Process-and-IC-Support-to-NDC_Final.pdf [https://perma.cc/Z3Z7-HTKD]; see also Goitein & Shapiro, *supra* note 12, at 23-24 (describing Congress’s creation of page-by-page review); 2017 *Report to the President*, *supra* note 28, at 23 (calling on agencies to use redaction instead of pass/fail review); *Setting Priorities: An Essential Step in Transforming Declassification*, PUB. INT. DECLASSIFICATION BOARD 17 (Dec. 8, 2014), <https://www.archives.gov/files/declassification/pidb/recommendations/setting-priorities.pdf> [https://perma.cc/4RJD-CENS] (same).

110. 2017 *Report to the President*, *supra* note 28, at 23.

111. See Steven Cohen, *The Ugly Cynicism of Obama’s Declassification Diplomacy*, NEW REPUBLIC (Mar. 25, 2016), <https://newrepublic.com/article/132016/ugly-cynicism-obamas-declassification-diplomacy> [https://perma.cc/5DQF-Y98Z] (criticizing President Obama’s declassification of documents on the fortieth anniversary of Argentina’s Dirty War); cf. Peter Kornbluh & Carlos Osorio, *How Obama’s ‘Declassified Diplomacy’ Could Aid the Cause of Justice in Argentina*, NATION (Mar. 23, 2016), <https://www.thenation.com/article/archive/how-obamas-declassified-diplomacy-could-aid-the-cause-of-justice-in-argentina> [https://perma.cc/NAG8-M9A9] (praising the move).

112. See sources cited *supra* note 94.

greater reach, allowing Presidents to post documents and instantly reach millions worldwide.

These case studies mark the largest selective declassification of each presidency. The Iraq War, the killing of Osama Bin Laden, and Russian election interference were defining moments, and the attendant selective declassifications had an especially significant impact. They were not, however, the only ones. For example, President Obama declassified documents on Argentina's Dirty War before visiting Buenos Aires on the war's fortieth anniversary, hoping to reduce public resentment of U.S. complicity.¹¹³ The CIA supported President Trump's nomination of CIA Director Gina Haspel by declassifying favorable documents from her tenure at the Agency but not damaging documents on the torture program.¹¹⁴ And President Trump authorized Attorney General William Barr to declassify documents on surveillance activities during the 2016 election, politicizing declassification by transferring that authority from the Director of National Intelligence.¹¹⁵ So while selective declassification occurred throughout these presidencies, the rest of this Part focuses on the most impactful example from each.

A. *Bush and the National Intelligence Estimates on WMD*

Even before President Bush's inauguration, the incoming Administration discussed invading Iraq to remove Saddam Hussein. It saw this as "unfinished business" after the 1991 Gulf War left Saddam in power.¹¹⁶ These discussions escalated after 9/11. Within a week of the attacks, President Bush and other high-level officials said Iraq was Al-Qaeda's state sponsor.¹¹⁷ CIA Director George

113. Some commentators found this project insidiously political, *see* Cohen, *supra* note 111, while others called it helpfully protransparency, *see* Kornbluh & Osorio, *supra* note 111. Either way, it may not have been misleading, as it led the Obama and Trump Administrations to declassify over forty thousand pages, accounting for 97% of documents reviewed. *See* Steven Aftergood, *Argentina Declassification Project Sets New Standard*, FED'N AM. SCIENTISTS (Apr. 15, 2019), <https://fas.org/blogs/secrecy/2019/04/argentina-declass> [<https://perma.cc/G8DE-SM75>]. President Obama made several political but nonmisleading declassifications, such as when he declassified the size of the U.S. nuclear weapons stockpile to aid treaty-making efforts with Russia in 2010. *See* Steven Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, 48 HARV. C.R.-C.L. L. REV. 511, 519-21 (2013).

114. Demirjian, *supra* note 26.

115. *See* Agency Cooperation with Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns, 84 Fed. Reg. 24,971 (May 29, 2019); Haberman & Schmidt, *supra* note 34.

116. Gompert et al., *supra* note 32, at 164.

117. *Id.* at 165.

Tenet began asserting that Iraq had WMD and was seeking nuclear weapons.¹¹⁸ These claims dovetailed: if Saddam had ties to Al-Qaeda terrorists, he could give them WMD.¹¹⁹ The Administration feared being caught off guard by another attack, further spurring it to act aggressively.¹²⁰ As a RAND report observed, “the sibling of danger was opportunity,” giving the Administration a chance to complete “unfinished business,” appear proactive to a scared public, and build a regional model for democracy.¹²¹ Over the next year, war became increasingly likely. As the case for Iraq’s involvement in 9/11 fell apart, WMD became the dominant narrative.¹²²

At Congress’s request in September 2002, President Bush directed CIA analysts to prepare an NIE summarizing the intelligence community’s findings on whether Saddam had WMD.¹²³ While Congress had also asked for a broader look at a war’s regional impact, the CIA’s report focused only on WMD.¹²⁴ The NIE, sent to the congressional intelligence committees on October 1, 2002, became the key document justifying the invasion.¹²⁵ It concluded that Iraq had chemical and biological weapons, and was planning to develop nuclear weapons. The report was produced in a rush, based on shoddy intelligence, skewed by the fear of missing another attack and the Administration’s proinvasion stance, and written in an atmosphere that suppressed dissent.¹²⁶ It would be labeled “one of the most flawed documents in the history of American intelligence.”¹²⁷ Nevertheless, the final version contained various caveats and counterarguments in its ninety-two pages.¹²⁸

118. *Id.* at 163.

119. *Id.*

120. *Id.*

121. *Id.* at 163-64.

122. *Id.* at 168.

123. SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 298 (2004) [hereinafter 2004 SENATE INTELLIGENCE REPORT].

124. James Risen, *C.I.A. Rejects Request for Report on Preparations for War in Iraq*, N.Y. TIMES (Oct. 3, 2002), <https://www.nytimes.com/2002/10/03/politics/cia-rejects-request-for-report-on-preparations-for-war-in-iraq.html> [<https://perma.cc/9P7L-9GZU>].

125. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 54; Gompert et al., *supra* note 32, at 169-70.

126. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 12-29; Gompert et al., *supra* note 32, at 169.

127. David Barstow, William J. Broad & Jeff Gerth, *The Nuclear Card: The Aluminum Tube Story—A Special Report: How White House Embraced Suspect Iraq Arms Intelligence*, N.Y. TIMES (Oct. 3, 2004), <https://www.nytimes.com/2004/10/03/washington/us/the-nuclear-card-the-aluminum-tube-story-a-special-report-how.html> [<https://perma.cc/DMZ9-XXLB>].

128. *NIE 2018 Release*, *supra* note 3.

At the same time, the White House released what it described as an unclassified summary of the NIE's "Key Judgments."¹²⁹ Congress had requested an unclassified version of the NIE because "[t]he American people needed to know these reservations."¹³⁰ What they received, however, was no unbiased recap.¹³¹ It had been prepared over the summer, before analysts began work on the NIE, and brazenly overstated the NIE's conclusions.¹³² Take, for example, the finding that Iraq had attempted to acquire aluminum tubes in early 2001.¹³³ The CIA told the White House these were for making nuclear weapons.¹³⁴ The government's top nuclear scientists disagreed, finding they were designed for conventional rockets.¹³⁵ These scientists, from the Department of Energy (DOE), were ignored by top officials.¹³⁶ White House officials continued publicly citing the tubes as the main evidence of Iraq's nuclear program, which in turn justified invasion — saying on CNN that they didn't "want the smoking gun to be a mushroom cloud."¹³⁷ In line with the White House and CIA, the unclassified NIE summary reported that "[a]ll intelligence experts agree that Iraq [was] seeking nuclear weapons," though "some" thought the tubes were "probably" for conventional weapons.¹³⁸ As the Senate Intelligence Committee would conclude in its 2004 investigation of prewar intelligence, the summary "misrepresented [the NIE's] judgments to the public which did not have access to the classified

129. *NIE 2002 Release*, *supra* note 4, at 1-2.

130. Bob Graham, Opinion, *What I Knew Before the Invasion*, WASH. POST (Nov. 20, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/11/18/AR2005111802397.html> [<https://perma.cc/SQ6X-NNW3>]; see also 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 12 (quoting Senator Richard Durbin's request for an unclassified version).

131. See 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 286-89 ("The key judgments of the unclassified paper were missing many of the caveats and some references to alternative agency views.").

132. See *id.*; *Iraq's Weapons of Mass Destruction Program*, NAT'L INTELLIGENCE COUNCIL (July 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB254/doc02.pdf> [<https://perma.cc/YQX9-TUD6>]. A similar phenomenon occurred with Attorney General William Barr's summary of the Mueller report. See Nicholas Fandos, Adam Goldman & Katie Benner, *Mueller Report Exceeds 300 Pages, Raising Questions About Four-Page Summary*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/us/politics/mueller-report-length.html> [<https://perma.cc/JB4S-QCRR>].

133. *NIE 2002 Release*, *supra* note 4, at 17.

134. *Id.*

135. Barstow et al., *supra* note 127.

136. *Id.*

137. Gompert et al., *supra* note 32, at 169.

138. *NIE 2002 Release*, *supra* note 4, at 1.

National Intelligence estimate containing the more carefully worded assessments.”¹³⁹

Just days after the NIE’s October 1 release, the Senate voted to authorize the use of military force in Iraq—with the understanding that the President would first pursue diplomatic options via the United Nations (U.N.) Security Council—citing in part Iraq’s nuclear-weapons program.¹⁴⁰ The unclassified summary’s misleading certainty played a role in this vote. Few senators read the classified NIE (beyond its executive summary), though it was available to them in a secure room.¹⁴¹ The *Washington Post* reported that just six senators read it,¹⁴² while the *Hill* counted twenty-two who *said* they did.¹⁴³ Some senators who read both the classified NIE and unclassified summary, such as Intelligence Committee Chair Bob Graham, voted against authorizing force due to the NIE’s dissents on WMD, and decried the differences between the documents.¹⁴⁴ Senator Patrick Leahy said the classified NIE’s reservations were “enough to have me vote against going to war in Iraq.”¹⁴⁵ Meanwhile, senators who had not read the classified NIE, such as John Kerry,¹⁴⁶ used the summary to inform their yes votes.¹⁴⁷ So, while many representatives and senators on both sides of the aisle, including those who claimed to have read the NIE, voted yes on the use of force,¹⁴⁸ the unclassified summary’s selective presentation of intelligence skewed both public debate and congressional votes supporting war.

139. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 295 (including a chart detailing material differences between the documents).

140. See Authorization for Use of Military Force (AUMF) Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

141. Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST (Apr. 27, 2004), <https://www.washingtonpost.com/archive/politics/2004/04/27/congressional-oversight-of-intelligence-criticized/a306890e-4684-4ed4-99a0-c8ae7f47feb7> [https://perma.cc/X4R6-Q5MH].

142. *Id.*

143. Manu Raju, Elana Schor & Ilan Wurman, *Few Senators Read Iraq NIE Report*, HILL (June 19, 2007, 7:45 PM EDT), <https://thehill.com/homenews/news/12304-few-senators-read-iraq-nie-report> [https://perma.cc/PK7X-NVXN].

144. See Graham, *supra* note 130.

145. Raju et al., *supra* note 143.

146. *Id.*

147. 2008 SENATE INTELLIGENCE REPORT, *supra* note 9, at 104. The NIE summary and statements about it similarly informed the passage of a United Nations Security Council Resolution that required inspections but did not authorize using force. Gompert et al., *supra* note 32, at 170.

148. Raju et al., *supra* note 143.

Another selective disclosure of the NIE soon followed: this time, to quiet critics.¹⁴⁹ There had been a recent spate of news articles criticizing the White House's intelligence, and the White House was feeling the pressure.¹⁵⁰ One article in particular prompted this response. On July 6, outspoken war opponent and former diplomat Joseph Wilson published a *New York Times* op-ed criticizing a key rationale for war – that Saddam sought to purchase uranium in Niger – and accusing the President of manipulating information.¹⁵¹ To push back, on July 8, President Bush and Vice President Cheney authorized Cheney's chief-of-staff Scooter Libby to plant the classified NIE with *New York Times* reporter Judith Miller.¹⁵² Libby supported the move because he felt the NIE “pretty definitive[ly]” contradicted Wilson.¹⁵³

This continued the Administration's strategy of using the press to spread prowar messages.¹⁵⁴ The Administration gave the media strategic plants and declassifications “not to inform the public but to buttress a political argument.”¹⁵⁵ The press, for its part, largely went along in what journalist and media observer Howard Kurtz would call “the media's greatest failure in modern times.”¹⁵⁶ This occurred due, in part, to reporters' and editors' credulity, sources' misinformation, and a desire to get scoops.¹⁵⁷ Combined, the Administration's selective disclosures to Miller and others, and the media's coverage of them, created lasting public misperceptions.

149. *NIE 2003 Release*, *supra* note 1.

150. MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 250 (2006).

151. Wilson, *supra* note 6.

152. ISIKOFF & CORN, *supra* note 150, at 260–63 (describing the interview); *Bush Acknowledges Declassifying Intelligence*, *supra* note 46; see also *Timeline: The CIA Leak Case*, *supra* note 46 (describing Scooter Libby's later conviction for exposing Wilson's wife, Valerie Plame, as a CIA operative after Wilson's op-ed).

153. Government's Response to Defendant's Third Motion to Compel Discovery at 23, *United States v. I. Lewis Libby*, No. 1:05-cr-00394-RBW (D.D.C. Apr. 5, 2006), https://nsarchive2.gwu.edu/news/20060407/govt_response.pdf [<https://perma.cc/HXZ8-BZ6W>].

154. LEBOVIC, *supra* note 103, at 237–38.

155. ISIKOFF & CORN, *supra* note 150, at 250.

156. Howard Kurtz, *Media's Failure on Iraq Still Stings*, CNN (Mar. 11, 2013, 1:29 PM ET), <https://www.cnn.com/2013/03/11/opinion/kurtz-iraq-media-failure/index.html> [<https://perma.cc/T643-L984>].

157. *From the Editors: The Times and Iraq*, N.Y. TIMES (May 26, 2004), <https://www.nytimes.com/2004/05/26/world/from-the-editors-the-times-and-iraq.html> [<https://perma.cc/BW4K-D4JR>]; see also Editorial, *Lessons of War*, WASH. POST (Mar. 18, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031700950.html> [<https://perma.cc/9VJA-Z3K7>] (describing the *Post* as “insufficiently skeptical of intelligence reports”).

On July 18, 2003, the NIE's eight pages of "Key Judgments" were officially declassified and discussed at a White House press briefing.¹⁵⁸ The rest of the document remained classified. While the Administration had used the key findings as a prowar tool with Miller, these eight pages were more balanced than the previous year's unclassified summary. They contained caveats,¹⁵⁹ framed findings as opinions,¹⁶⁰ and noted dissents from DOE and the State Department's Bureau of Intelligence Research (INR).¹⁶¹ The key judgments section gave only "low confidence" to the possibility that Saddam would share weapons with Al-Qaeda.¹⁶² It included the words "we judge that" before its opening line "Iraq has continued its weapons of mass destruction (WMD) programs"¹⁶³ – marking it as opinion, not fact. Notably, its finding on the aluminum tubes was more balanced. It excerpted INR's dissent, which concluded "the tubes are not intended for use in Iraq's nuclear weapon program."¹⁶⁴ INR likewise called the claims on Saddam's efforts to buy uranium "highly dubious,"¹⁶⁵ discrediting the second key piece of evidence for the nuclear program, which Wilson had addressed.¹⁶⁶ The full NIE – released with redactions in response to FOIA and MDR requests in 2004,¹⁶⁷ 2015,¹⁶⁸ and 2018¹⁶⁹ – included five pages of dissent on the aluminum-tubes issue.¹⁷⁰ The key judgments section accurately summarized this

158. *Bush Acknowledges Declassifying Intelligence*, *supra* note 46.

159. See, e.g., *NIE 2003 Release*, *supra* note 1, at 2 (acknowledging that "we have little specific information on Iraq's CW [(chemical weapons)] stockpile").

160. Compare *NIE 2003 Release*, *supra* note 1, at 1 ("We judge that Iraq has continued its weapons of mass destruction (WMD) programs . . ."), with *NIE 2002 Release*, *supra* note 4, at 3 ("Iraq has continued its weapons of mass destruction (WMD) programs . . .").

161. *NIE 2003 Release*, *supra* note 1, at 2, 4-5, 8.

162. *Id.* at 5.

163. *Id.* at 1.

164. *Id.* at 5.

165. *Id.* at 8.

166. See Wilson, *supra* note 6.

167. *NIE 2004 Release*, *supra* note 1.

168. Jason Leopold, *The CIA Just Declassified the Document That Supposedly Justified the Iraq Invasion*, VICE NEWS (Mar. 19, 2015, 1:10 PM), https://news.vice.com/en_us/article/9kve3z/the-cia-just-declassified-the-document-that-supposedly-justified-the-iraq-invasion [<https://perma.cc/88FU-MAPM>]; *National Intelligence Estimate 2002-16HC: Iraq's Continuing Programs for Weapons of Mass Destruction*, NAT'L INTELLIGENCE COUNCIL (Oct. 2002) [hereinafter *NIE 2015 Release*], <https://documents.theblackvault.com/documents/iraq/iraq-wmd-nie-01-2015.pdf> [<https://perma.cc/JE2V-693F>].

169. *NIE 2018 Release*, *supra* note 3.

170. *Id.* at 81-85.

dissent,¹⁷¹ furthering the Administration's goals of placating critics while supporting war.

The disclosures of the unclassified summary in 2002 and key judgments in 2003 demonstrate how the Administration "selectively declassified information in a way that kept from the public important judgments central to the debate at the time."¹⁷² Indeed, one observer called this "the obstruction that *most* exacerbated informed public discourse."¹⁷³ By revealing preferred information, the disclosures tilted the playing field toward the Administration's desired outcomes: going to war and maintaining public support for war.

It bears repeating that the NIE itself was deeply flawed. Still, as the 2004 Senate Report said of the 2002 release, the Administration's selective disclosures "further compounded the errors in the underlying classified analysis."¹⁷⁴ Because few representatives read the full classified NIE before voting – and their constituents could not – the misleading summary had added weight in shaping votes and public opinion. Without full information, politicians and the public ended up supporting a war many would come to regret.¹⁷⁵ It is likely that "Congress would never have given President Bush a blank check for military action" if it knew how shaky his intelligence was.¹⁷⁶ The drawn-out war failed to achieve its goals and led to the rise of the Islamic State.¹⁷⁷ By some counts, the death toll totaled hundreds of thousands, including nearly 5,000 U.S. troops.¹⁷⁸ Millions of Iraqi civilians were displaced, with many lacking food, shelter, and

171. Compare NIE 2003 Release, *supra* note 1, at 8 (truncating the dissent), with NIE 2018 Release, *supra* note 3, at 81-85 (presenting a full version).

172. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 457.

173. Bejesky, *supra* note 23, at 408 (emphasis added).

174. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 456; see also 2008 SENATE INTELLIGENCE REPORT, *supra* note 9, at 3 ("Overlaying this issue of the selective use of intelligence is the more fundamental issue of the selective declassification of intelligence.").

175. See J. Baxter Oliphant, *The Iraq War Continues to Divide the U.S. Public, 15 Years After It Began*, PEW RES. CTR. (Mar. 19, 2018), <https://www.pewresearch.org/fact-tank/2018/03/19/iraq-war-continues-to-divide-u-s-public-15-years-after-it-began> [https://perma.cc/MJ8Q-CW3X].

176. Opinion, *A Pause for Hindsight*, N.Y. TIMES (July 16, 2004), <http://www.nytimes.com/2004/07/16/opinion/a-pause-for-hindsight.html> [https://perma.cc/F9GR-2URL].

177. See Leopold, *supra* note 168.

178. Philip Bump, *15 Years After the Iraq War Began, the Death Toll Is Still Murky*, WASH. POST (Mar. 20, 2018, 12:44 PM EDT), <https://www.washingtonpost.com/news/politics/wp/2018/03/20/15-years-after-it-began-the-death-toll-from-the-iraq-war-is-still-murky> [https://perma.cc/T8PG-ZD9F].

medicine.¹⁷⁹ The misperceptions that the NIE disclosures helped create are lasting, too. A 2014 poll found 42% of respondents believed U.S. forces found WMD in Iraq¹⁸⁰—eleven years after U.N. inspectors confirmed Saddam had none.¹⁸¹ From 2002 to now, the summary and selectively declassified NIE have continued to skew beliefs, with severe consequences.

B. Obama and Bin Laden's Bookshelf

Ten years later, the aftermath of 9/11 led to another selective declassification, this time by President Obama. “Tonight, I can report to the American people and to the world that the United States has conducted an operation that killed Osama bin Laden,” President Obama announced on May 1, 2011.¹⁸² For months, the CIA had been monitoring a compound in Abbottabad, Pakistan that it believed housed a “high-value target,” suspected to be Osama Bin Laden.¹⁸³ Early on May 1, 2011, a Navy SEAL team raided the compound. They arrived in military helicopters, supposedly without alerting the Pakistani government.¹⁸⁴ One helicopter crashed into the compound, and the SEALs blew it up so Al-Qaeda could not capture the machine or its top-secret technology.¹⁸⁵ Once inside, the SEALs killed Bin Laden during a firefight and took custody of his body.¹⁸⁶

179. Elizabeth G. Ferris, *The Looming Crisis: Displacement and Security in Iraq*, BROOKINGS INSTITUTION 3-6, 11 (Aug. 2008), https://www.brookings.edu/wp-content/uploads/2016/06/08_iraq_ferris.pdf [<https://perma.cc/6TB7-7JSF>].

180. *Ignorance, Partisanship Drive False Beliefs About Obama, Iraq*, FAIRLEIGH DICKINSON U. (Jan. 7, 2015), <http://publicmind.fdu.edu/2015/false> [<https://perma.cc/Q6YH-HBYT>].

181. Gompert et al., *supra* note 32, at 170-71.

182. *Obama's Announcement Text*, POLITICO (May 2, 2011, 12:30 AM EDT), <https://www.politico.com/story/2011/05/obamas-announcement-text-054058> [<https://perma.cc/K8KK-54C4>].

183. *See Press Briefing by Senior Administration Officials on the Killing of Osama Bin Laden*, WHITE HOUSE (May 2, 2011, 12:03 AM EDT), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden> [<https://perma.cc/5MX8-5CFU>].

184. Mahler, *supra* note 20.

185. Christopher Drew, *Attack on Bin Laden Used Stealthy Helicopter That Had Been a Secret*, N.Y. TIMES (May 5, 2011), <https://www.nytimes.com/2011/05/06/world/asia/06helicopter.html> [<https://perma.cc/49AG-HJVU>].

186. Scott Wilson, Craig Whitlock & William Branigin, *Osama Bin Laden Killed in U.S. Raid, Buried at Sea*, WASH. POST (May 2, 2011), https://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFxoyAZF_story.html [<https://perma.cc/ZV5G-NHC3>].

Officials soon added details: Bin Laden had attempted to use women as shields.¹⁸⁷ After briefly being taken back to Afghanistan for identification, Bin Laden's body received an Islamic burial at sea.¹⁸⁸ Four others died in the raid.¹⁸⁹ Along with the body, SEALs took a "treasure trove" of documents showing that Bin Laden was actively controlling Al-Qaeda, which CIA Director Leon Panetta said "confirm[ed] how important it was to go after Bin Laden."¹⁹⁰ There were no indications that the Pakistani government knew of Bin Laden's whereabouts.¹⁹¹ According to CIA officials, intelligence obtained through interrogations was critical to finding a courier who led them to the compound.¹⁹²

Over the next few days, the Administration admitted that some of the more dramatic details had proven false. Bin Laden was unarmed and did not hide behind any women.¹⁹³ In the coming months and years, other details were also called into question. The Senate Intelligence Committee's "torture report" found that the information leading to the courier came from a cooperator, not CIA interrogations.¹⁹⁴ There was speculation that the cooperator was a walk-in informant, and that the Pakistani Inter-Services Intelligence agency (ISI) knew Bin Laden was there.¹⁹⁵ After all, the compound was less than two miles from the Pakistan Military Academy.¹⁹⁶

187. *Id.*

188. *Id.*

189. *Id.*

190. Ken Dilanian, *U.S. Releases Videos of Osama Bin Laden*, L.A. TIMES (May 8, 2011, 12:00 AM), <https://www.latimes.com/nation/la-xpm-2011-may-08-la-fg-bin-laden-tapes-20110508-story.html> [<https://perma.cc/N7LX-NQGY>].

191. See Karin Brulliard & Karen DeYoung, *Failure to Discover Bin Laden's Refuge Stirs Suspicion Over Pakistan's Role*, WASH. POST (May 2, 2011), https://www.washingtonpost.com/world/pakistan-stresses-that-raid-was-a-us-mission/2011/05/02/AFdoeeXF_story.html [<https://perma.cc/M7WH-CQK8>]; Wilson et al., *supra* note 186.

192. Matt Apuzzo, Haeyoun Park & Larry Buchanan, *Does Torture Work? The C.I.A.'s Claims and What the Committee Found*, N.Y. TIMES (Dec. 9, 2014), <https://www.nytimes.com/interactive/2014/12/08/world/does-torture-work-the-cias-claims-and-what-the-committee-found.html> [<https://perma.cc/JG2E-7J66>].

193. Josh Gerstein & Matt Negrin, *W.H. Changes Bin Laden Account*, POLITICO (May 2, 2011, 11:37 PM EDT), <https://www.politico.com/story/2011/05/wh-changes-bin-laden-account-054162> [<https://perma.cc/G7SC-P6LA>].

194. SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 378-79 (2014); see also Apuzzo et al., *supra* note 192 (explaining that the intelligence that led to the courier came from a cooperator before he was subject to the CIA interrogation).

195. Mahler, *supra* note 20.

196. Seymour M. Hersh, *The Killing of Osama Bin Laden*, LONDON REV. BOOKS (May 21, 2015), <https://www.lrb.co.uk/the-paper/v37/n10/seymour-m.-hersh/the-killing-of-osama-bin-laden> [<https://perma.cc/9EWB-HEAA>].

As one reporter asked in retrospect, “Was the story of Osama bin Laden’s death yet another example of American mythmaking?”¹⁹⁷ The dramatic raid was recounted in magazines, books, and the award-winning blockbuster *Zero Dark Thirty*.¹⁹⁸ Its success contributed to President Obama’s reelection, allowed him to declare victory over Al-Qaeda, and enabled withdrawal from Afghanistan.¹⁹⁹ But reporters wondered, what if, instead of a stealth operation involving a shootout with a resistant Bin Laden, the raid was a kill mission based on intelligence from a walk-in source and conducted with the ISI’s cooperation?²⁰⁰

In a 10,000-word article published in the *London Review of Books* in May 2015, veteran investigative reporter Seymour Hersh claimed to answer these questions – and more.²⁰¹ He reported that the operation was set in motion when an ex-ISI official approached the CIA station chief in Islamabad.²⁰² The walk-in said Bin Laden had been an ISI prisoner at the Abbottabad compound since 2006, with his upkeep financed by the Saudis.²⁰³ Top Pakistani officials knew of the raid and – incentivized by promises of money and threats of leaks – told the U.S. military that Pakistan would not interfere.²⁰⁴ The Pakistani military helped by describing the compound’s layout and cutting the power.²⁰⁵ Hersh’s sources described the raid as a “premeditated murder,” after which the body was tossed into the mountains, not buried at sea.²⁰⁶ As to the documents collected, Hersh’s

197. Mahler, *supra* note 20.

198. See, e.g., MARK BOWDEN, *THE FINISH: THE KILLING OF OSAMA BIN LADEN* (2012); Nicholas Schmidle, *Getting Bin Laden*, *NEW YORKER* (Aug. 1, 2011), <https://www.newyorker.com/magazine/2011/08/08/getting-bin-laden> [<https://perma.cc/9WTM-HKS7>]; *ZERO DARK THIRTY* (Sony Pictures 2012).

199. Mahler, *supra* note 20.

200. E.g., Mark Follman, *What Really Happened in the Bin Laden Raid?*, *MOTHER JONES* (Aug. 26, 2011), <https://www.motherjones.com/politics/2011/08/osama-bin-laden-killing-media> [<https://perma.cc/6ZA9-PXFA>]; Carlotta Gall, *What Pakistan Knew About Bin Laden*, *N.Y. TIMES MAG.* (Mar. 19, 2014), <https://www.nytimes.com/2014/03/23/magazine/what-pakistan-knew-about-bin-laden.html> [<https://perma.cc/52RU-TC38>]; Glenn Greenwald, *The Bin Laden Raid Exposes the Obama Administration’s Selective Secrecy*, *GUARDIAN* (Aug. 23, 2012, 10:42 EDT), <https://www.theguardian.com/commentisfree/2012/aug/23/bin-laden-raid-exposes-obama-administration-selective-secrecy> [<https://perma.cc/TSC4-K4CL>]; David Ignatius, Opinion, *What Did Pakistan Know About Bin Laden?*, *WASH. POST* (Feb. 17, 2012), https://www.washingtonpost.com/opinions/what-did-pakistan-know-about-bin-laden/2012/02/16/gIQAccLhKR_story.html [<https://perma.cc/G4CH-535F>].

201. Hersh, *supra* note 196.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

source said the “treasure trove” story was a false post hoc justification for the raid: “The guys just stuffed some books and papers they found in his room in their backpacks. The Seals weren’t there because they thought bin Laden was running a command centre for al-Qaida operations, as the White House would later tell the media.”²⁰⁷ After the raid, the U.S. military was supposed to wait a week and then claim it killed Bin Laden in a drone strike in Afghanistan.²⁰⁸ President Obama’s fear that the downed helicopter would reveal the raid, however, led him to announce it publicly that day.²⁰⁹ U.S. officials then hurried to get their story straight.²¹⁰

Officials quickly rejected Hersh’s reporting as “utter nonsense”²¹¹ — and followed up ten days later by declassifying the first batch of materials collected during the raid.²¹² Although the Office of the Director of National Intelligence (ODNI) spokesperson denied it, the timing “gave the administration a chance to push back indirectly.”²¹³ The Administration had kept the 2.7 terabytes of records almost entirely classified until then,²¹⁴ even secretly moving them from military to CIA custody in what some saw as an attempt to shield them from FOIA requests.²¹⁵ Congress had ordered a declassification review by November 2014, yet nothing happened until the Hersh article.²¹⁶ Labeled “Bin Laden’s Bookshelf,” the disclosure included 103 documents, 266 English-language books and

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Seán D. Naylor, *Obama Administration: Hersh Account of Bin Laden Raid ‘Patently False,’* FOREIGN POL’Y (May 11, 2015, 5:34 PM), <https://foreignpolicy.com/2015/05/11/obama-administration-hersh-account-of-bin-laden-raid-patently-false> [<https://perma.cc/YN6E-H3VY>].

212. Rosie Gray, *U.S. Releases Contents of Bin Laden’s English-Language “Bookshelf,”* BUZZFEED NEWS (May 20, 2015, 9:49 AM ET), <https://www.buzzfeednews.com/article/rosiegray/us-releases-contents-of-bin-ladens-english-language-bookshel> [<https://perma.cc/KL6M-NK6R>].

213. Rosenberg, *supra* note 17; *see also* Gray, *supra* note 212.

214. *See* Emily Rand, *Source: 2.7 Terabytes of Data Recovered from Bin Laden Compound*, CBS NEWS (May 6, 2011, 2:38 PM), <https://www.cbsnews.com/news/source-27-terabytes-of-data-recovered-from-bin-laden-compound> [<https://perma.cc/3F3N-E55G>] (noting that, for scale, “just one terabyte of data could hold about 2,000 hours of audio or 220 million pages of text”); *see also* Gray, *supra* note 212 (describing a few documents’ declassification for use in terrorism trials and on the raid’s one-year anniversary).

215. *See* Richard Lardner, *Secret Move Keeps Bin Laden Records in the Shadows*, ASSOCIATED PRESS (July 8, 2013), <https://apnews.com/dd6b2d52b98e4446868351588b666bacb> [<https://perma.cc/MWP3-E4DW>].

216. *See* Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, § 313, 128 Stat. 1390, 1399.

U.S. government publications, press clippings, and other materials (including pornography).²¹⁷ The documents included letters in which Bin Laden directed the organization's managers and plotted attacks.²¹⁸ While some press coverage noted that the "sample size [was] too small relative to the cache of material that remains classified" to draw conclusions, others observed that they showed Bin Laden had continued to control Al-Qaeda.²¹⁹ This fit the Administration's desired picture. Whereas Hersh described a weak man whose death was more political theater than military victory, these documents showed Bin Laden "was an active player, making the recent operation even more essential for our nation's security," as Panetta had said.²²⁰ Equally important is what the documents did not show: past reports speculated that they contained correspondence with Pakistani officials, but the release did not.²²¹ ODNI's two follow-up declassifications in 2016²²² and 2017²²³ contained similar documents, though its 2016 press release noted an "emergent portrait" of a Bin Laden who knew Al-Qaeda was fading but sought to portray it as strong.²²⁴

This was not the first or last time that documents from the raid were selectively declassified. In 2012, a seventeen-document release on the raid's one-year anniversary had painted the opposite picture: that Bin Laden was weak.²²⁵ This narrative aligned with President Obama's campaign-trail claims of success in

217. *Bin Laden's Bookshelf*, OFF. DIRECTOR NAT'L INTELLIGENCE, <https://www.dni.gov/index.php/features/bin-laden-s-bookshelf> [<https://perma.cc/TK9N-3JKD>].

218. *Id.*

219. Rosenberg, *supra* note 17.

220. Dilanian, *supra* note 190.

221. Gall, *supra* note 200.

222. *Newly Declassified Documents From "Bin Laden's Bookshelf,"* OFF. DIRECTOR NAT'L INTELLIGENCE (Feb. 29, 2016, 3:34 PM), <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2016/item/1633-newly-declassified-documents-from-bin-laden-s-bookshelf> [<https://perma.cc/6SD6-RP47>].

223. *Closing the Book on Bin Laden: Intelligence Community Releases Final Abbottabad Documents*, OFF. DIRECTOR NAT'L INTELLIGENCE (Jan. 19, 2017, 5:16 PM), <https://www.dni.gov/index.php/newsroom/press-releases/item/1737-closing-the-book-on-bin-laden-intelligence-community-releases-final-abbottabad-documents> [<https://perma.cc/LET4-52D8>].

224. *Newly Declassified Documents From "Bin Laden's Bookshelf,"* *supra* note 222.

225. Nelly Lahoud, Stuart Caudill, Liam Collins, Gabriel Koehler-Derrick, Don Rassler & Muhammad al-'Ubaydi, *Letters from Abbottabad: Bin Ladin Sidelined?*, COMBATING TERRORISM CTR. 1-2 (May 3, 2012), https://ctc.usma.edu/app/uploads/2012/05/CTC_LtrsFromAbbottabad_WEB_v2.pdf [<https://perma.cc/JP2D-GEPL>]; *see also* Stephen F. Hayes, *Al Qaeda Wasn't 'On the Run,'* WKLY. STANDARD (Sept. 15, 2014, 12:00 AM), <https://www.weeklystandard.com/stephen-f-hayes/al-qaeda-wasnt-on-the-run> [<https://perma.cc/C4TF-EPSQ>] ("The conclusions of the study were consistent with the administration's line: Al Qaeda had been badly weakened, and in the months before his death Osama bin Laden had been marginalized.").

combating terrorism, predating the post-Hersh desire to portray Bin Laden as a necessary target.²²⁶ In 2017, Trump Administration CIA Director Mike Pompeo released documents showing Bin Laden's close ties to Iran.²²⁷ Commentators saw the release as an attempt to discredit the Iran nuclear deal²²⁸ and potentially to bring Iran under the 2001 Authorization for Use of Military Force (AUMF) that allows the use of force against the 9/11 attackers.²²⁹

Together, the three Bin Laden's Bookshelf releases marked a notable transparency effort and offered a balanced picture of an active-but-struggling Al-Qaeda. Yet the 2015 release, immediately on the heels of a controversial would-be exposé, shows how Presidents can use their declassification power to shape public narratives favorably. Without Hersh's story, declassification efforts may have continued to stall—though they may also have resulted in a more balanced portrayal of Bin Laden's status. Presidents' reliance on criticism to drive the pace and contents of disclosure endangers the public's access to timely, representative information. Fuller, earlier disclosures would have also prevented the later selective declassification of withheld documents, such as Pompeo's 2017 anti-Iran release. The documents' silence on certain points also sparks questions. It is unknown if ODNI withheld correspondence with Pakistani officials to support the public narrative that Pakistan did not know of Bin Laden's whereabouts or the raid,²³⁰ which would make the declassification even more selective.

Like President Bush's NIE releases, this selective declassification fits the larger story—from President Obama's initial address to the nation, to the CIA's

226. See Scott Wilson, *Obama Strategy of Taking Credit for Osama Bin Laden Killing Risky*, *Observers Say*, WASH. POST (Apr. 30, 2012), https://www.washingtonpost.com/politics/obama-strategy-of-taking-credit-for-osama-bin-laden-killing-risky-some-observers-say/2012/04/30/gIQApuAxrT_story.html [https://perma.cc/RUH9-MT5M].

227. *November 2017 Release of Abbottabad Compound Material*, CENT. INTELLIGENCE AGENCY (Nov. 2017), <https://www.cia.gov/library/abbottabad-compound/index.html> [https://perma.cc/4EKU-NW82]; see also Lily Hay Newman, *Inside Bin Laden's Files: GIFs, Memes, and Mr. Bean*, WIRED (Nov. 1, 2017, 6:16 PM), <https://www.wired.com/story/osama-bin-laden-cia-files-gifs-memes> [https://perma.cc/KMT6-BXCV] (describing the documents).

228. Ned Price, *Why Mike Pompeo Released More Bin Laden Files*, ATLANTIC (Nov. 8, 2017), <https://www.theatlantic.com/international/archive/2017/11/iran-mike-pompeo-bin-laden-documents-cia/545093> [https://perma.cc/6SLM-R358]. The CIA provided the only advance copies of the documents to a conservative think tank's in-house publication. *Id.*

229. Steve Vladeck & Tess Bridgeman, *About That Trial Balloon on Using 9/11 AUMF to Authorize Strikes on Iran*, JUST SECURITY (Feb. 21, 2019), <https://www.justsecurity.org/62646/washington-times-aumf-iran> [https://perma.cc/7JVU-7443].

230. See Gall, *supra* note 200; Ignatius, *supra* note 200.

cooperation with filmmakers,²³¹ to Bin Laden’s Bookshelf. While there was no specific vote or policy that the selective declassification supported (unlike with the NIE and the Iraq War), politicizing declassification hurt transparency. Releasing documents suggesting that Bin Laden was an active, dangerous mastermind allowed the Administration to fight Hersh’s counternarrative that he was a figurehead killed for political gain. It was a compelling story, both for its dramatic qualities and its ability to avenge 9/11 with a clear victory. It just might not have been the entire story.

C. *Trump and the Carter Page FISA Documents*

Fifteen years after 9/11, U.S. foreign-affairs and national-security discussions gained a new focus: Russia. In July 2016, the FBI opened an investigation into Russian interference in the 2016 election.²³² Sparked by revelations that a Trump campaign aide had inside knowledge of Russia’s anti-Hillary Clinton hacking efforts, the FBI began scrutinizing the Trump campaign’s involvement.²³³ As part of that investigation, the FBI and the Department of Justice (DOJ) applied for a court order to wiretap former Trump campaign foreign-policy advisor Carter Page.²³⁴ The Foreign Intelligence Surveillance Court (FISC)—established by FISA in 1978 to adjudicate such orders²³⁵—granted the agencies’ application two weeks before Election Day.²³⁶ To electronically surveil a U.S. person, FISA requires the government to demonstrate probable cause that they are an agent of a foreign power.²³⁷ The agencies successfully argued that Page had been communicating with senior Russian officials, including during a July 2016

231. Jason Leopold & Ky Henderson, *Tequila, Painted Pearls, and Prada—How the CIA Helped Produce ‘Zero Dark Thirty,’* VICE NEWS (Sept. 9, 2015, 11:55 AM), https://news.vice.com/en_us/article/xw3ypa/tequila-painted-pearls-and-prada-how-the-cia-helped-produce-zero-dark-thirty [https://perma.cc/3PQ9-J8JC].

232. Sharon LaFraniere, Mark Mazzetti & Matt Apuzzo, *How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html> [https://perma.cc/ZC33-V8KR].

233. *Id.*

234. *Verified Application, In re Carter W. Page, A U.S. Person*, FISA CT. (Oct. 2016) [hereinafter *Page FISA Documents*], <https://int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf> [https://perma.cc/UE6Z-KRZX].

235. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1803 (2018)).

236. Office of the Inspector Gen., *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*, U.S. DEP’T JUST. (Dec. 2019), <https://www.justice.gov/storage/120919-examination.pdf> [https://perma.cc/TK3H-2QR6].

237. 50 U.S.C. §§ 1801-1813 (2018).

visit to Moscow.²³⁸ That particular information came from a controversial, unverified Democratic Party-funded dossier on Trump's Russia ties, compiled by former British intelligence officer Christopher Steele.²³⁹ Because FISA surveillance orders are only valid for ninety days, the FBI obtained three renewals: in January, April, and June 2017.²⁴⁰ All of these documents were classified. Indeed, in FISA's forty-year history, such applications had never been publicly released.²⁴¹ Intense partisan battles, however, would make this case different.

Within days of President Trump's inauguration, the House and Senate intelligence committees launched two independent Russia investigations.²⁴² Representative Devin Nunes, a California Republican, chaired the House Permanent Select Committee on Intelligence (HPSCI) investigation. Nunes and HPSCI minority leader Representative Adam Schiff, a California Democrat, began the

238. Charlie Savage, *Carter Page FISA Documents Are Released by Justice Department*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/us/politics/carter-page-fisa.html> [<https://perma.cc/AH9E-UEC9>].

239. *Id.* The Steele dossier, which *BuzzFeed* published in January 2017, contained salacious claims about President Trump, including that he watched Russian prostitutes urinate. Ken Bensinger, Miriam Elder & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED NEWS (Jan. 10, 2017, 9:09 PM ET), <https://www.buzzfeednews.com/article/ken-bensinger/these-reports-allege-trump-has-deep-ties-to-russia> [<https://perma.cc/W2AZ-J3DU>]. Later declassifications debunked some of its claims. See Erik Wemple, *The Steele Dossier Just Sustained Another Body Blow. What Do CNN and MSNBC Have to Say?*, WASH. POST (Apr. 18, 2020, 12:01 PM EDT), <https://www.washingtonpost.com/opinions/2020/04/18/steele-dossier-just-sustained-another-body-blow-wheres-media> [<https://perma.cc/7XF9-XSSE>].

240. *Verified Application, In re Carter W. Page, A U.S. Person*, FISA CT. (Jan. 2017), <https://int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf> [<https://perma.cc/UE6Z-KRZX>]; *Verified Application, In re Carter W. Page, A U.S. Person*, FISA CT. (Apr. 2017), <https://int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf> [<https://perma.cc/UE6Z-KRZX>]; *Verified Application, In re Carter W. Page, A U.S. Person*, FISA CT. (June 2017), <https://int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf> [<https://perma.cc/UE6Z-KRZX>]; Office of the Inspector Gen., *supra* note 236, at vi.

241. Savage, *supra* note 238.

242. Karoun Demirjian, *Congressional Investigations into Alleged Russian Hacking Begin Without End in Sight*, WASH. POST (Jan. 25, 2017, 1:30 PM EST), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/25/senates-investigation-into-alleged-russian-hacking-begins-without-end-in-sight> [<https://perma.cc/G4E6-CZBV>].

investigation as a bipartisan affair.²⁴³ However, relations quickly soured due to Nunes's ties to President Trump.²⁴⁴

In early March 2017, President Trump began tweeting that President Obama had tapped his phones at Trump Tower.²⁴⁵ Nunes and Schiff soon sent a letter to the acting Attorney General requesting copies of all DOJ FISA warrants from 2016, with which DOJ complied.²⁴⁶ Nunes also secretly received access to intelligence reports from two White House sources.²⁴⁷ Armed with this information, he hosted a press conference to publicize that Obama Administration intelligence officials had incidentally collected the communications of Trump transition staff.²⁴⁸ Nunes then briefed President Trump on this without telling fellow Committee members.²⁴⁹ This led to a House Ethics Committee probe, prompting Nunes to recuse himself from the investigation in early April.²⁵⁰ Just days later, the *Washington Post* confirmed that Page had been wiretapped.²⁵¹ The HPSCI continued investigating.

The Ethics Committee cleared Nunes in December 2017, paving the way for his reinvolvement with the Russia investigation – though he had remained controversially hands-on during his recusal.²⁵² That month, Nunes led a subset of Republican HPSCI members in continuing to investigate the DOJ's and FBI's

243. Kelsey Snell, *Who Is Devin Nunes? A Look at the Man Behind the Memo*, NPR (Feb. 2, 2018, 1:36 PM ET), <https://www.npr.org/2018/02/02/582678038/who-is-devin-nunes-a-look-at-the-man-behind-the-memo> [<https://perma.cc/T35F-HDX5>].

244. Lawfare Editors, *A Timeline of the House Intelligence Committee Chairman: All the Nunes That's Fit to Print*, LAWFARE (Feb. 2, 2018, 5:05 PM), <https://www.lawfareblog.com/timeline-house-intelligence-committee-chairman-all-nunes-thats-fit-print> [<https://perma.cc/C549-FHKQ>]; Snell, *supra* note 243.

245. Lawfare Editors, *supra* note 244.

246. *Id.*

247. Matthew Rosenberg, Maggie Haberman & Adam Goldman, *2 White House Officials Helped Give Nunes Intelligence Reports*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/devin-nunes-intelligence-reports.html> [<https://perma.cc/ZG2P-NRZT>].

248. Lawfare Editors, *supra* note 244.

249. *Id.*

250. *Id.*

251. Ellen Nakashima, Devlin Barrett & Adam Entous, *FBI Obtained FISA Warrant to Monitor Former Trump Adviser Carter Page*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/world/national-security/fbi-obtained-fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7_story.html [<https://perma.cc/LG95-8RUZ>]. Reports of the wiretap date to November 2016. See Louise Mensch, *Exclusive: FBI 'Granted FISA Warrant' Covering Trump Camp's Ties to Russia*, HEAT ST. (Nov. 7, 2016, 10:18 PM EST), <https://web.archive.org/web/20170111022206/https://heatst.com/world/exclusive-fbi-granted-fisa-warrant-covering-trump-camps-ties-to-russia> [<https://perma.cc/3T2K-MPS8>].

252. Lawfare Editors, *supra* note 244.

surveillance methods, including their use of the Steele dossier in the Page FISA application.²⁵³ Nunes announced in early January 2018 that he had reached an agreement with the DOJ to view relevant documents.²⁵⁴

On January 18, Nunes and his staff wrote a four-page memo to the Republican majority on what he called FISA “abuses” at the DOJ and FBI.²⁵⁵ It questioned the “legitimacy and legality” of the Page FISA application, from which it says “material and relevant information was omitted.”²⁵⁶ The memo says the Steele dossier formed an “essential part” of the application and that the agencies did not disclose Steele’s Democratic funding.²⁵⁷ Throughout, it disparages Steele’s credibility, saying he “was desperate that Donald Trump not get elected and was passionate about him not being president.”²⁵⁸ It also says FBI Deputy Director Andrew McCabe testified before the HPSCI that “no surveillance warrant would have been sought from the FISC without the Steele dossier information,” though it does not quote McCabe.²⁵⁹ The memo named the five officials who signed the FISA applications, only one of whom was still in office.²⁶⁰

The one-sided Nunes memo immediately sparked controversy among the Committee’s Democrats. The day it was finished, the HPSCI voted along party lines to let the full House see it.²⁶¹ Schiff and the Democratic minority argued the memo was “meant only to give Republican House members a distorted view of the FBI” and “help carry White House water.”²⁶² President Trump immediately supported its release, hoping it would undermine the Russia

253. Kyle Cheney & John Bresnahan, *House Republicans Quietly Investigate Perceived Corruption at DOJ, FBI*, POLITICO (Dec. 20, 2017, 6:34 PM EST), <https://www.politico.com/story/2017/12/20/house-republicans-quietly-investigate-doj-fbi-310121> [<https://perma.cc/73MX-3WCN>].

254. Lawfare Editors, *supra* note 244.

255. Memorandum from HPSCI Majority Staff to HPSCI Majority Members 1 (Jan. 18, 2018) [hereinafter Nunes Memo], https://republicans-intelligence.house.gov/uploadedfiles/memo_and_white_house_letter.pdf [<https://perma.cc/ZA7H-F7A9>].

256. *Id.* at 1-2.

257. *Id.* at 2.

258. *Id.* at 3 (emphasis omitted).

259. *Id.*

260. *Id.* at 1.

261. Lawfare Editors, *supra* note 244.

262. *Id.*

investigation.²⁶³ Meanwhile, Nunes denied the DOJ's and FBI's requests to view the memo.²⁶⁴

On January 29, HPSCI Republicans voted to declassify and release publicly the Nunes memo, and to keep classified a ten-page countermemo that Schiff and the Democrats finished that day.²⁶⁵ To release the Nunes memo, the Committee invoked a rule for the first time since its 1977 creation: House Rule X(11)(g), which allows the HPSCI to vote to declassify documents in the public interest.²⁶⁶ After voting, the Committee must notify the President, who has five days to object.²⁶⁷ If the President objects, the Committee can declassify with House approval.²⁶⁸ During the five-day window, the FBI and DOJ fought declassification, with the FBI making a rare public statement objecting to “material omissions of fact that fundamentally impact the memo’s accuracy.”²⁶⁹ Nevertheless, the DOJ and ODNI participated in reviewing the memo.²⁷⁰ Schiff also stirred controversy by reporting that Nunes had edited the as-approved memo before sending it to the President.²⁷¹ On February 2, President Trump agreed to declassify the

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263. Kevin Liptak, Kaitlan Collins, Sara Murray & Dan Merica, *Trump Moves Toward Releasing Memo He Hopes Will Undermine Russia Probe*, CNN (Feb. 2, 2018, 10:31 AM ET), <https://www.cnn.com/2018/02/01/politics/nunes-memo-donald-trump/index.html> [<https://perma.cc/VS98-MYQN>]; Philip Rucker, Ashley Parker & Josh Dawsey, ‘*Never Any Hesitation*’: *Trump Was Quickly Persuaded to Support Memo’s Release*, WASH. POST (Feb. 2, 2018, 12:41 PM EST), https://www.washingtonpost.com/politics/never-any-hesitation-trump-was-quickly-convinced-to-support-memos-release/2018/02/01/b67a0246-076d-11e8-8777-2a059f168dd2_story.html [<https://perma.cc/2KP7-MXCK>].
264. Lawfare Editors, *supra* note 244.
265. *Id.*; Memorandum from HPSCI Minority to All Members of the House of Representatives 1 (Jan. 29, 2018) [hereinafter Schiff Memo], https://intelligence.house.gov/uploadedfiles/re-dacted_minority_memo_2.24.18.pdf [<https://perma.cc/5GH6-WK4Z>].
266. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 114-192, Rule X(11)(g), at 545-49 (2017); *see also* Levine & Brewer, *supra* note 81 (describing its history).
267. H.R. DOC. NO. 114-192, Rule X(11)(g)(2)(A)-(B), at 546.
268. H.R. DOC. NO. 114-192, Rule X(11)(g)(2)(C), at 546.
269. Josh Dawsey, Devlin Barrett & Karoun Demirjian, *Trump-FBI Feud over Classified Memo Erupts into Open Conflict*, WASH. POST (Jan. 31, 2018, 11:45 PM EST), https://www.washingtonpost.com/politics/trump-fbi-feud-over-classified-memo-erupts-into-open-conflict/2018/01/31/64362038-06c2-11e8-b48c-b07fea957bd5_story.html [<https://perma.cc/9XGM-M7W7>].
270. Letter from Donald F. McGahn II, Counsel to the President, to Hon. Devin Nunes, Chairman of the House Permanent Select Comm. on Intelligence 1 (Feb. 9, 2018), <https://assets.documentcloud.org/documents/4375762/White-House-Letter-On-Democratic-Memo-Feb-9-2018.pdf> [<https://perma.cc/JVN3-QWEV>].
271. Lawfare Editors, *supra* note 244.

memo.²⁷² Reactions to the memo ranged from “transparently political”²⁷³ to “of great importance for the country”²⁷⁴ to a “nothingburger.”²⁷⁵

The Schiff memo, which representatives could read in a classified setting,²⁷⁶ was a point-by-point rebuttal.²⁷⁷ Schiff noted that the Page FISA application – which Nunes had not read²⁷⁸ – extensively disclosed Steele’s motives and background.²⁷⁹ The application said Steele was hired by people “likely looking for information that could be used to discredit [Trump’s] campaign.”²⁸⁰ It rooted Steele’s credibility in his history as an FBI source but noted that the FBI fired him for unauthorized media disclosures.²⁸¹ Schiff also wrote that while Nunes said the FBI “separately authorized payment” to Steele, this payment was never made.²⁸² Schiff details how, to meet the FISC’s rigorous standards, the application drew on an independent “multi-pronged rationale” beyond the dossier.²⁸³ It relied on Page’s past dealings with Russian companies and operatives, the fact that Page had been a Russian recruitment target, and the FBI’s March 2016 interview with Page about his Russian intelligence contacts.²⁸⁴ Schiff added that all four FISC judges who signed the FISA warrants were Republican appointees.²⁸⁵

272. *Id.*

273. Devlin Barrett, Karoun Demirjian & Philip Rucker, *Release of Disputed GOP Memo on FBI Surveillance Unleashes Waves of Recrimination*, WASH. POST (Feb. 2, 2018, 7:51 PM ET), https://www.washingtonpost.com/world/national-security/president-approves-release-of-gop-memo-criticizing-fbi-surveillance/2018/02/02/699eb988-06cf-11e8-b48c-b07fea957bd5_story.html [<https://perma.cc/WYC7-DJJ5>].

274. *Id.*

275. Bret Stephens, Opinion, *Devin Nunes’s Nothingburger*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/opinion/devin-nunes-memo.html> [<https://perma.cc/NLA4-TKUD>].

276. Manu Raju & Jeremy Herb, *House Intelligence Committee Unanimously Votes to Release Democratic Memo*, CNN (Feb. 6, 2018, 7:32 AM ET), <https://www.cnn.com/2018/02/05/politics/democratic-memo-release-house-intelligence/index.html> [<https://perma.cc/AWK6-M9M4>].

277. Schiff Memo, *supra* note 265.

278. Avery Anapol, *Nunes: I Did Not Read Material Summarized in the Memo*, HILL (Feb. 2, 2018, 8:30 PM ET), <https://thehill.com/homenews/house/372119-nunes-admits-he-did-not-view-the-surveillance-warrant-applications-that-form> [<https://perma.cc/S6JK-QFFD>].

279. Schiff Memo, *supra* note 265, at 5-6.

280. *Id.* at 5 (emphasis omitted) (quoting Page FISA Documents, *supra* note 234, at 16 n.8).

281. *Id.* at 6.

282. *Id.* (citing Nunes Memo, *supra* note 255, at 2).

283. *Id.* at 1 (emphasis omitted).

284. *Id.* at 3-4.

285. *Id.* at 3.

The public would not see Schiff's memo for another three weeks. The HPSCI voted unanimously on February 5 to release it, invoking the same Rule X(11)(g) procedure used for the Nunes memo.²⁸⁶ But the White House blocked its release on February 9, citing intelligence agencies' concerns with revealing classified information²⁸⁷—the same concerns it overlooked in releasing the Nunes memo. Instead of attempting to vote to override the President's objections, Democrats worked with intelligence officials to redact the document.²⁸⁸ This was the process Congress had envisioned when enacting the declassification rule, and it helped avoid the constitutional gray area of a direct clash between the executive and legislative branches over declassification.²⁸⁹ It worked. After weeks of “haggling,” the Schiff memo was released on February 24.²⁹⁰

Carter Page soon faded from the headlines. Meanwhile, a flurry of FOIA suits seeking the underlying FISA documents worked their way through the courts.²⁹¹ Following a settlement with the *New York Times* in one case, the DOJ released 412 pages of the Page FISA application, order, and renewals on July 21, 2018.²⁹² Commentators said the documents proved how off-base Nunes was, as they showed that the government disclosed Steele's motives and used evidence beyond his dossier.²⁹³ While the documents helped reveal the full story, they were

286. Raju & Herb, *supra* note 276.

287. Letter from Donald F. McGahn II to Hon. Devin Nunes, *supra* note 270, at 1.

288. See Nicholas Fandos, *2 Weeks After Trump Blocked It, Democrats' Rebuttal of G.O.P. Memo Is Released*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/us/politics/democratic-memo-released-fbi-surveillance-carter-page.html> [<https://perma.cc/8K46-CFEC>].

289. See Levine & Brewer, *supra* note 81 (citing H.R. REP. NO. 95-498, at 3 (1977) (Conference Report)). For a discussion of the constitutionality of congressional-declassification efforts given separation-of-powers concerns, see *infra* Section IV.A.

290. Fandos, *supra* note 288.

291. See, e.g., Complaint at 1, 5-6, James Madison Project v. Dep't of Justice, No. 1:17-cv-00597-APM, 2020 WL 1033301 (D.D.C. Mar. 3, 2020); Complaint at 1-2, N.Y. Times Co. v. Dep't of Justice, No. 1:18-cv-02054-AT (S.D.N.Y. Mar. 7, 2018); Complaint at 1-2, Judicial Watch, Inc. v. Dep't of Justice, No. 1:18-cv-00245-CRC (D.D.C. Feb. 2, 2018).

292. Page FISA Documents, *supra* note 234; see Savage, *supra* note 238.

293. See, e.g., Philip Bump, *With the Release of New Documents, Devin Nunes's Memo on Carter Page Has Gotten Even Less Credible*, WASH. POST (July 22, 2018, 7:00 AM EDT), <https://www.washingtonpost.com/news/politics/wp/2018/07/22/with-the-release-of-new-documents-devin-nunes-memo-on-carter-page-has-gotten-even-less-credible> [<https://perma.cc/SM3Q-QVWE>] (arguing that the documents showed “just how far from the mark the Nunes memo actually was”); April Doss, *The FISA Fiasco's Silver Lining*, ATLANTIC (July 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-fisa-fiasco-silver-lining/566207> [<https://perma.cc/NJ9U-D88Y>] (“[C]ontrary to the assertions in the Nunes memo, the FISC was kept fully informed in each application of all of the relevant context

also used as a partisan talking point. President Trump quickly tweeted that they were “ridiculously heavily redacted” and proved that the Russia investigation was a “Witch Hunt.”²⁹⁴

On September 17, 2018, President Trump acted on his dissatisfaction and on requests from Republican lawmakers and Fox News anchors that he more fully declassify the FISA documents.²⁹⁵ He ordered the DOJ and ODNI to begin “immediate declassification” of twenty-one pages of the June 2017 FISA warrant renewal, FBI memos on related interviews, and text messages from five people working on the Russia investigation, including those of former FBI Director James Comey.²⁹⁶ The selected FISA application pages were from sections on Russian election interference and the Steele dossier.²⁹⁷ Instead of unilaterally releasing the documents, the President ordered an interagency declassification review process.²⁹⁸ Congressional allies lauded the move, while Representative Nancy Pelosi called the “selective release . . . desperate, dangerous and deliberately misleading.”²⁹⁹ Four days later, President Trump abandoned his attempts at selective declassification in response to strong DOJ pushback over national-security risks.³⁰⁰

about the source . . .”); Savage, *supra* note 238 (“Democrats noted that the application also contained evidence against Mr. Page unrelated to the dossier . . .”).

294. Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2018, 6:28 AM), <https://twitter.com/realDonaldTrump/status/1020978929736265729> [<https://perma.cc/D9M5-FMEW>].
295. Karoun Demirjian, *Conservative GOP Members Ask Trump to Declassify Documents Related to Russia Probe*, WASH. POST (Sept. 6, 2018, 3:27 PM EDT), https://www.washingtonpost.com/powerpost/conservative-gop-members-ask-trump-to-declassify-documents-related-to-russia-probe/2018/09/06/a2332e82-b1f6-11e8-a20b-5f4f84429666_story.html [<https://perma.cc/RYP6-6AU6>]; Zapotosky et al., *supra* note 18; *President Trump’s Exclusive Interview with Hill.TV*, HILL (Sept. 19, 2018), <https://thehill.com/hilltv/rising/407440-read-president-trumps-exclusive-interview-with-hilltv> [<https://perma.cc/KLL7-SU4V>].
296. Zapotosky et al., *supra* note 18; Press Release, White House, Statement from the Press Secretary (Sept. 17, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-34> [<https://perma.cc/QR9U-WTCT>].
297. See Press Release, White House, *supra* note 296; Page FISA Documents, *supra* note 234.
298. Press Release, White House, *supra* note 296; see Zapotosky et al., *supra* note 18 (“When the President issues such an order, it triggers a declassification review process that is conducted by various agencies within the intelligence community, in conjunction with the White House Counsel.” (quoting the Department of Justice)).
299. Press Release, Congresswoman Nancy Pelosi, Pelosi Statement on Trump’s Selective Declassification of Carter Page Surveillance Application and Other Classified, Highly Sensitive Materials (Sept. 17, 2018), <https://pelosi.house.gov/news/press-releases/pelosi-statement-on-trump-s-selective-declassification-of-carter-page> [<https://perma.cc/M2E4-GRFR>].
300. Dilanian, *supra* note 91; Chris Strohm, *FBI, DOJ Plan Redactions Despite Trump’s Document Order*, BLOOMBERG (Sept. 19, 2018, 11:43 PM), <https://www.bloombergquint.com/politics/fbi-doj-said-to-plan-redactions-despite-trump-s-document-order> [<https://perma.cc/5LER-8AUT>].

No other Page FISA documents were released. However, the episode of the warring HPSCI memos raised serious concerns about the Executive's selective-declassification power. President Trump weaponized his declassification authority by releasing the misleadingly supportive Nunes memo while delaying the Democratic counterpart—and later attempted to fully declassify the FISA document to prove he faced a “witch hunt.” Accompanied by consistent attempts to discredit the media and intelligence community, acts like these further allowed him to distort public perceptions for years to come. While Republican lawmakers continued to praise the Nunes memo and later declassifications as protransparency, Schiff and congressional Democrats decried the President's “selective release of materials he believes are helpful to his defense team and thinks will advance a false narrative.”³⁰¹ Intelligence officials were concerned with the politicization of the declassification power.³⁰² Others observed that the “politically motivated and self-serving” decision was openly aimed at discrediting the Russia investigation.³⁰³ It worked. Even after the investigation's conclusion, 83% of Republicans continued to endorse President Trump's “witch hunt” narrative.³⁰⁴ Nor did the disclosures fueling this narrative stop, as President Trump continued selectively declassifying Russia-probe-related documents in the run-up to the 2020 election.³⁰⁵

* * *

The case studies demonstrate that each of the past three Presidents used selective declassification to advance core political goals. The Iraq War dominated President Bush's time in office and his legacy, as was true to a lesser extent of President Obama and the assassination of Bin Laden, and President Trump with Russian interference in the 2016 election. In each case, one-sided disclosures advanced the Presidents' chosen narratives, with lasting effects. As the next Part

301. Karoun Demirjian, *Trump's Declassification Order Rewards Allies' Strategy of Sidestepping Congressional Leaders*, WASH. POST (Sept. 18, 2018, 11:07 PM EDT), https://www.washingtonpost.com/powerpost/trumps-declassification-order-rewards-allies-strategy-of-sidestepping-congress/2018/09/18/7655c196-b839-11e8-a2c5-3187f427e253_story.html [https://perma.cc/2HQD-SN66].

302. Ken Dilanian & Mike Memoli, *Are Intel Officials Trying to Slow Trump Order to Declassify Russia Probe Documents?*, NBC NEWS (Sept. 18, 2018, 3:46 PM EDT), <https://www.nbcnews.com/politics/national-security/are-intel-officials-trying-slow-trump-order-declassify-russia-probe-n910796> [https://perma.cc/EA67-WFNV].

303. Michael McGough, Opinion, *Trump's Self-Serving Declassification*, NEWSDAY (Sept. 21, 2018, 6:00 AM), <https://www.newsday.com/opinion/commentary/trump-s-selective-declassification-1.21177446> [https://perma.cc/X5J9-7JXA].

304. QUINNIPIAC U. POLL, *supra* note 21, at 10; Trump, *supra* note 294.

305. See Natasha Bertrand, Andrew Desiderio & Kyle Cheney, *Trump Rewrites the Russia Probe from the Hospital*, POLITICO (Oct. 6, 2020, 6:55 PM EDT), <https://www.politico.com/news/2020/10/06/trump-russia-ratcliffe-426868> [https://perma.cc/7JMU-N5CN].

discusses, these three case studies help reveal when Presidents are likely to use selective declassification and what harms it will cause.

III. USES AND DANGERS OF SELECTIVE DECLASSIFICATION

As the case studies illustrate, selective declassification is a powerful tool for advancing political agendas and can have lasting effects. The precise conditions in which selective declassification occurs vary, yet common themes emerge. This Part explores those themes. While all parts of the definition of selective declassification are key,³⁰⁶ the case studies in Part II show that the last characteristic—intentionally misleading the audience—is most important to understanding both the uses and harms of selective declassification.

Section III.A predicts that Presidents are most likely to turn to selective declassification when seeking to shape the political narrative around a hot-button topic about which little is public. Drawing on First Amendment doctrine and cognitive-science literature, Section III.B examines selective declassification's dangers. It distorts the marketplace of ideas (as described in First Amendment theory) by favoring certain viewpoints, which creates political misconceptions that cognitive science shows are long-lasting. Section III.C steps back and asks whether selective declassification *always* is dangerous, concluding that its manipulation of public discourse is inevitably threatening, but that its harms vary in degree and redressability. This analysis helps clarify how selective declassification has shaped our politics, and informs the solutions proposed in Part IV.

A. *Uses of Selective Declassification*

Three trends emerge from the case studies and literature on when Presidents are likely to use selective declassification: when disclosure relates to a strategically important political goal, when it forms part of a larger public-relations campaign, and when little information about the subject is publicly available.

1. *Advance Strategically Important Goals*

Between the President's broad authority over the classification system and the system's scope, Presidents have seemingly limitless opportunities to selectively disclose information to advance political goals. Nevertheless, selective declassification is relatively infrequent. When the public hears once-classified information, it is usually the result of a regular declassification procedure, like the automatic declassification of twenty-five-year-old documents, or another

306. See *supra* Part I.

disclosure method, such as leaks. This is in part because selective declassification is typically the result of a high-level political calculation wherein the President finds it strategically important.

One reason selective declassification is used sparingly is that it tends to involve complicated interagency coordination. The NIE, Bin Laden's Bookshelf, and Page FISA document releases all entailed multiple agencies undertaking declassification review, at the President's direction, to avoid releasing truly damaging information. Interbranch coordination can also occur, as when President Trump heeded congressional Republicans' request to further declassify the Page FISA documents.³⁰⁷ And, to launch these processes, Presidents must invoke executive authority to depart from approved declassification procedures.³⁰⁸

Second, selective declassification requires weighing its attention-grabbing benefits against the potential costs of disclosure, which include security risks and outcry over a declassification's selectivity. The 2004 Senate Intelligence report on the Iraq War pilloried the Bush Administration for "selectively declassif[ying] information in a way that kept from the public important judgments central to the debate at the time."³⁰⁹ Reporters immediately connected the timing of the Bin Laden documents' release to Hersh's controversial article.³¹⁰ A former Justice Department official called President Trump's efforts to fully declassify the Page FISA documents "an unprecedented misuse of the President's declassification authority for purely political reasons."³¹¹ Although these critiques did not prevent the disclosures from having their intended effects, they may deter Presidents from using selective declassification to further all but the most important political goals. Though these goals vary in scope and focus—from influencing Congress's vote, as with the NIE,³¹² to building goodwill abroad, as with President

307. Demirjian, *supra* note 295.

308. Letter from Donald F. McGahn II to Hon. Devin Nunes, *supra* note 270, at 1 (describing the release of the Nunes and Schiff memos as "declassification pursuant to the President's constitutional authority").

309. 2004 SENATE INTELLIGENCE REPORT, *supra* note 123, at 457.

310. See Elias Groll, *Newly Released Bin Laden Files Include Trove of Letters, Books—and Issues of FP*, FOREIGN POL'Y (May 20, 2015, 11:25 AM), <https://foreignpolicy.com/2015/05/20/newly-released-bin-laden-files-include-trove-of-letters-books-and-issues-of-fp> [https://perma.cc/V8KZ-K7D7] ("On the heels of a Seymour Hersh report . . . American intelligence officials on Wednesday released a number of documents . . ."); Rosenberg, *supra* note 17 ("The timing of the release also gave the administration a chance to push back indirectly on Seymour M. Hersh's recent article . . .").

311. Zapotosky et al., *supra* note 18 (quoting David Laufman).

312. See Gompert et al., *supra* note 32, at 170.

Obama's release of documents on Argentina's Dirty War before his visit³¹³ — each is seen as mission-critical.

2. *Support Public-Relations Campaigns*

Presidents typically use selective declassification as part of broader public-relations campaigns to advance strategically important political goals. Selective declassification is one tool among others, including speeches, interviews, social-media campaigns, plants, lobbying Congress, and even, in the Bin Laden case, helping make a movie.³¹⁴ An integrated strategy can more comprehensively alter public discourse and political outcomes.

There are different ways to control a narrative. There's the old-fashioned way: classify documents that you don't want seen and, as Gates said, "keep mum on the details." But there's also the more modern, social-media-savvy approach: tell the story you want them to believe.³¹⁵

Presidents use selective declassification as a way of storytelling that complements their other public-relations efforts, with a uniquely powerful effect. For instance, President Bush used the NIE summary to bolster the 935 misleading public statements he and top officials made about WMD.³¹⁶ For President Obama, as a *New York Times Magazine* feature wrote, "[T]he killing of bin Laden was not only a victory for the U.S. military but also for the American storytelling machine . . ."³¹⁷ President Trump took selective declassification into the social-media age, using the Page FISA probe to fuel his years-long Twitter campaign against the Russia investigation, which he repeatedly called a "witch hunt."³¹⁸

Presidents do not typically admit that declassification is part of their public-relations campaign. Instead, they cite transparency goals, which helps conceal ulterior motives and lend credibility to the story told by the documents. President Bush said he declassified the NIE findings in 2003 because "I wanted people to see the truth."³¹⁹ The ODNI said Bin Laden's Bookshelf "align[ed] with the

313. See *supra* note 113 and accompanying text.

314. Leopold & Henderson, *supra* note 231.

315. Mahler, *supra* note 20.

316. Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY (June 30, 2014), <https://publicintegrity.org/federal-politics/false-pretenses> [<https://perma.cc/QRV2-9CKX>].

317. Mahler, *supra* note 20.

318. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 23, 2018, 7:09 AM), <https://twitter.com/realDonaldTrump/status/1021351630648815616> [<https://perma.cc/QFN3-JGRY>]; Trump, *supra* note 294; *Witch Hunt*, FACTBA.SE, <https://factba.se/search/%22witch%2Bhunt%22> [<https://perma.cc/CB5H-JEW5>].

319. *Bush Acknowledges Declassifying Intelligence*, *supra* note 46.

President’s call for increased transparency”³²⁰ President Trump, though openly aiming to discredit the Russia investigation, also said declassifying the Page FISA documents would achieve “total transparency.”³²¹ But attributing selective declassifications to transparency goals is just more spin, used to increase the President’s transparency bona fides and convince the public that they have the full story – when they don’t.

3. *Manipulate Information Scarcity*

Third, Presidents use selective declassifications in scarce information environments. The President cannot effectively control a narrative with strategic disclosure if the public knows the whole story. For example, if the public already knew top nuclear scientists said Iraq was not developing nuclear weapons, releasing an unclassified summary saying the opposite would likely be ineffective. This third element is easy to satisfy. In national security, secrecy is the norm, as seen in each case study. Adversaries’ weapons capabilities, terrorists’ hideouts, and election-interference efforts are paradigmatic top-secret issues. As long as there are secrets, there is opportunity to spin them.

While their effects can range from a decade-long war to a short-term domestic political fight, all selective declassifications have common traits, and, as the next Section shows, common dangers.

B. *Dangers of Selective Declassification*

As Glenn Greenwald put it, “Manipulating presidential secrecy powers in this way is . . . the very definition of state propaganda.”³²² Like propaganda, the danger of selective declassification is that it works. The press writes headlines announcing it. The public latches onto the story, especially if it aligns with their partisan beliefs. Because the President frames the disclosure as an apolitical pro-transparency move, and cites the documents as evidence of the chosen narrative, the public may think it has a full, accurate picture. Because regular declassification procedures are so slow and overcautious, conflicting documents are unlikely to surface. As a *New York Times Magazine* piece observed in 2015, “It’s not that the truth about bin Laden’s death is unknowable; it’s that we don’t know it.”³²³

320. OFF. DIRECTOR NAT’L INTELLIGENCE, *supra* note 217.

321. Zapotosky et al., *supra* note 18; see also Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 3, 2018, 9:40 AM), <https://twitter.com/realDonaldTrump/status/959798743842349056> [<https://perma.cc/4BEB-QY3L>] (calling the Russia investigation “an American disgrace”).

322. Greenwald, *supra* note 200.

323. Mahler, *supra* note 20.

Even when the documents are released in full, many have already made up their minds. People may have decided, for instance, that Iraq had WMD or that the Russia investigation was a “witch hunt” before the full NIE and Page FISA documents – which few likely read – came out. Selective declassification is not just a subversion of the traditional declassification process, which is meant to consider only whether disclosure would harm national security, but also a dangerously powerful way to conceal truths and manipulate public opinion. As a former CIA official said about President Trump’s selective declassification, “It’s dangerous . . . because the power to declassify is also the power to selectively declassify, and selective declassification is one of the ways the Trump White House can spin a narrative about the origins of the Russia investigation to their point of view.”³²⁴ The same goes for any President and any narrative advanced by a one-sided disclosure.

As perceptions shift, poll numbers and policy choices align accordingly. The results are lasting, such as the long military engagement in Iraq and the longer-term misperception that WMD were found. Yet the shifts represent skewed preferences: if the President had declassified all available information, politicians and the public would have been less likely to support the Iraq War, endorse the official narrative on Bin Laden’s death, or distrust the Russia investigation. While some would support the President’s narrative regardless, the credibility lent by selectively declassified documents inflates poll numbers and votes. To explain *why* selective declassification works in this way, this Section draws from two literatures: First Amendment theory and doctrine and cognitive science.

1. *Applying a First Amendment Lens*

First Amendment theory and doctrine can help illuminate selective declassification’s harms to public decisionmaking. The First Amendment’s core supporting theory is that it upholds the marketplace of ideas. Justice Holmes wrote the classic formulation for a “free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”³²⁵ When all ideas can freely circulate, the theory goes, the best ones will prevail. While speech does not necessarily converge on truth – just look at the recesses of Twitter – intentionally distorting the marketplace *ensures* truth remains out of reach. Each of the case studies shows these market failures. People had different opinions on invading Iraq, but President Bush’s release of only the one-sided NIE summary and key judgments made sure people accepted only *his* prowar ideas. President Obama used the Bin Laden’s Bookshelf disclosures to detract

324. Haberman & Schmidt, *supra* note 34.

325. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

attention and credibility from Hersh's controversial article, portraying Bin Laden as an operationally important target. President Trump manipulated the marketplace by using his classification powers to release the favorable Nunes memo and block the contradictory Schiff one. As these examples show, the combination of Presidents' outsized power in the marketplace of ideas and strong classification authority allows them to use selective declassification to ensure their one-sided story is the one to "get itself accepted," in Justice Holmes's words.³²⁶

Further, First Amendment doctrine offers a useful framework for understanding selective declassification's harms. When confronted with a speech regulation, the Supreme Court slots it into one of three categories, from least to most harmful. First, a regulation might be a content-neutral restriction on the time, place, and manner of speech.³²⁷ For example, a town might prohibit protests after 9:00 PM. These laws receive fairly deferential review.³²⁸ Considering the marketplace of ideas, they do not distort the thoughts circulating in the speech market. Second, a regulation might be content-based, which would trigger strict scrutiny.³²⁹ For instance, the town might ban abortion protests.³³⁰ When it allows only certain topics in the speech marketplace, the government distorts citizen speech and self-government.³³¹ Third, a regulation might be viewpoint-based. The town might only allow pro-life abortion protests. This kind of restriction is the most "egregious form" of speech regulation, and receives the strictest scrutiny.³³² It not only limits the speech marketplace to certain topics, but also tilts the scales to ensure the market accepts the government's views on those topics instead of those a free market would prefer.³³³

326. *Id.*

327. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

328. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

329. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972).

330. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Mosley*, 408 U.S. at 98-99.

331. *See, e.g., Mosley*, 408 U.S. at 96 ("The essence of this forbidden censorship is content control.").

332. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

333. *Id.* Genuinely damaging national-security information falls outside this framework, and its disclosure can constitutionally be restricted. *See, e.g., N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (rejecting a prior restraint on publishing the Pentagon Papers as unconstitutional but noting that "the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (rejecting a prior restraint but stating that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops"). That said, with selective declassification, the decision to release a document turns not on national security but on documents' ability to distort the

Similarly, declassifications can be understood as falling into these categories.³³⁴ Some are content-neutral, like the automatic declassification of twenty-five-year-old documents. These declassifications are desirable and do not skew the marketplace of ideas, since the information released covers various topics and viewpoints. Content-based declassification occurs, too – for example, Congress ordered the declassification of the John F. Kennedy assassination documents in 1992.³³⁵ While prioritizing one topic omits others, the public still gets the full story on that subject.

By contrast, selective declassification advances a preferred viewpoint. Presidents release documents that support their goals and withhold those that do not. Selective declassification is an “egregious form” of disclosure, tilting the marketplace of ideas toward a predetermined narrative.³³⁶ Compared to leaks and plants, which may also endorse a chosen viewpoint, selective declassification has greater market-shaping power because it masquerades as full disclosure and allows the President to stand publicly behind it. The selective disclosures in the case studies all advanced the President’s viewpoint over conflicting ones. The full NIE disclosure revealed how skewed the summary and key judgments were. The later Bin Laden’s Bookshelf releases exposed a narrative closer to Hersh’s, which the first release refuted. The Schiff memo and Page FISA documents release countered President Trump’s claims of a partisan “witch hunt.” Identifying viewpoint-based disclosures – which can be difficult if a disclosure’s misleading effects are not yet known – reveals their harmful effects, leads the press and others to counter those effects by seeking accurate information, and puts people on notice that future declassifications on the subject may also be one-sided.

2. *Applying a Cognitive Political-Science Lens*

As a First Amendment lens shows, selective declassification manipulates the marketplace of ideas by publicly endorsing preselected viewpoints. But to understand why these narratives stick despite later contradictory revelations – why 42% of respondents in 2014 still thought Iraq had WMD³³⁷ – cognitive political

marketplace of ideas, making the generalized framework a helpful way to understand its harms.

334. This Section does *not* claim that the First Amendment bars selective declassification. The government may make its own viewpoint-based speech. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015).

335. President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443. For President Obama’s content-based disclosures, see Aftergood, *supra* note 113, at 513-21.

336. *Rosenberger*, 515 U.S. at 829.

337. FAIRLEIGH DICKINSON U., *supra* note 180.

science proves useful.³³⁸ This field explains why our brains latch onto the misleading picture painted by selective declassifications. Researchers have found that being *misinformed*—actively believing false claims—is different, and worse, than being *uninformed*. Such individuals are “not just in the dark, but wrong-headed.”³³⁹ When Presidents selectively declassify information to advance one side of the story, like the 2002 and 2003 NIE disclosures, they take people from uninformed—people did not know classified information on Iraq—to misinformed—people now mistakenly believe Iraq has WMD. These misperceptions are especially sticky when they align with preexisting partisan views. People eagerly accept information that aligns with their beliefs and reject information that contradicts them, a phenomenon called “motivated reasoning.”³⁴⁰ As a result, when selective declassifications occur, the President’s supporters believe them and ignore contradictory facts. This phenomenon explains why 51% of Republicans but just 32% of Democrats still thought the military found WMD in 2014.³⁴¹

Correcting misinformation is difficult. Declining trust in media hurts, especially given what *New York Times* lawyer David McCraw calls the “fake fake news problem—the deployment of the term ‘fake news’ to undermine and delegitimize” the press.³⁴² This distrust in news and objectivity led President Trump’s base to continue supporting the “witch hunt” narrative behind his FISA declassification efforts even after it was reported that the actual documents disproved it.³⁴³ In such an environment, selective declassification becomes even more potent. Further, misinformed discourse produces misinformed decisionmaking. The vote totals for authorizing force in Iraq may have looked different if the whole Congress had read the full NIE instead of relying on a misleading unclassified summary.³⁴⁴ Selective declassification can have more diffuse political

338. See generally D.J. Flynn, Brendan Nyhan & Jason Reifler, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 *ADVANCES POL. PSYCHOL.* 127 (2017) (explaining the utility of cognitive political science).

339. James H. Kuklinski, Paul J. Quirk, Jennifer Jerit, David Schwieder & Robert F. Rich, *Misinformation and the Currency of Democratic Citizenship*, 62 *J. POL.* 790, 792–93 (2000).

340. Flynn et al., *supra* note 338, at 132; see also *id.* at 135 (noting that corrections may backfire).

341. FAIRLEIGH DICKINSON U., *supra* note 180.

342. MCCRAW, *supra* note 40, at 157. Trump has used the term “fake news” over 2,000 times. “Fake News,” FACTBA.SE, <https://factba.se/search#%22fake%2Bnews%22> [<https://perma.cc/Y3PA-5L3Z>]. Nyhan’s studies have found actual “fake news” is often ineffective and that “[t]he most worrisome misinformation in U.S. politics remains the old-fashioned kind: false and misleading statements made by elected officials who dominate news coverage and wield the powers of government.” Brendan Nyhan, *Why Fears of Fake News Are Overhyped*, *MEDIUM* (Feb. 4, 2019), <https://gen.medium.com/why-fears-of-fake-news-are-overhyped-2ed9ca0a52c9> [<https://perma.cc/7TCS-Y6AG>].

343. See *supra* notes 293–294 and accompanying text.

344. Gompert et al., *supra* note 32, at 170.

effects as well: the Bin Laden raid remains a cornerstone of President Obama's legacy, and the Page FISA debacle generated distrust of the Mueller report.

C. *Benefits of Selective Declassification?*

Still, one might argue, isn't all declassification selective? Government personnel conducting automatic declassification reviews do not release every twenty-five-year-old document, and Congress passes laws like the Kennedy Assassination Records Collection Act³⁴⁵ that leave other subjects behind—so why is selective declassification different? Selective declassification's key distinction is its ability to mislead the public with its one-sidedness. Regular declassification procedures do withhold certain documents, but those decisions turn on national-security harms as adjudicated by nonpartisan agency officials. Subject-specific declassifications like the JFK assassination records contain a range of facts and opinions. On the other hand, selective declassification occurs only when the chosen documents fit a political argument and can reshape policy preferences accordingly.

Second, one could say, isn't any disclosure better than none? The topics selected for disclosure are often highly important. The public was clamoring for information about Iraq's WMD capabilities, the Bin Laden raid, and the Russia investigation. But cherry-picking documents about hot-button subjects is not a helpful, protransparency move. Selective declassification subverts the classification system's national-security focus, politicizing it in dangerous ways. Intelligence officials agree that “[d]eclassification decisions should be considered outside the zone of politics, so any suggestion that they are tainted by political considerations is a pretty disturbing precedent.”³⁴⁶ Beyond undermining declassification norms, politicized disclosure causes long-term harms to public conversations and key policy decisions. Selective declassification can be worse than other ad hoc disclosure methods, such as leaks and plants, because it captures outsized public interest and allows Presidents to stand publicly behind the documents. It represents “state propaganda,” as Greenwald says, not transparency.³⁴⁷ Indeed, it is antitransparency, giving people the impression that they have the full picture when they only have the President's version. As Sissela Bok

345. President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443.

346. Dilanian & Memoli, *supra* note 302 (quoting former senior counterterrorism official Nick Rasmussen).

347. Greenwald, *supra* note 200.

writes in *Secrecy*, these “public relations’ . . . [are] therefore in no sense opposed to secrecy, and often make[] a mockery” of real transparency.³⁴⁸

Third, even if selective declassification is uniquely harmful, isn’t it fixable? Narrow disclosure on a topic often leads to additional information in what Seth Kreimer has called “[c]ascades of [t]ransparency.”³⁴⁹ The full NIE eventually came to light,³⁵⁰ as did thousands more Bin Laden documents,³⁵¹ the Schiff memo,³⁵² and most of the Page FISA documents.³⁵³ The issue, however, is that these releases came too late to stop the selective declassifications from having their intended effects. As the cognitive political-science literature shows, selective declassification creates influential and long-lasting misperceptions, especially among a President’s supporters.³⁵⁴ Many still hold misperceptions about the Iraq War. The official narrative of the Bin Laden raid persists. Distrust in the Russia investigation worsened as President Trump continued citing the Page FISA documents as evidence of an illicit “Witch Hunt.”³⁵⁵ Later disclosures can only partially mitigate selective declassification’s harms to public discourse and choices.

IV. SOLUTIONS

To address the dangers of selective declassification, this Part suggests potential solutions for the executive branch, Congress, and the press.

A. *Expand Congressional Involvement in Executive-Branch Declassification*

Of course, the best solution would be for the President to refrain from selectively declassifying documents. Executive Order 13,526 is of little help since, like preceding executive orders, it is within the President’s power to undo and does

348. SISSELA BOK, *SECRECY: ON THE ETHICS OF CONCEALMENT AND REVELATION* 114-15 (1983).

349. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1056 (2008); see *id.* at 1056-59; see also Pozen, *supra* note 22, at 624 (noting that leaks can trigger “transparency cascades”).

350. See *NIE 2004 Release*, *supra* note 1; *NIE 2015 Release*, *supra* note 168; *NIE 2018 Release*, *supra* note 3.

351. See *Closing the Book on Bin Laden: Intelligence Community Releases Final Abbottabad Documents*, *supra* note 223; *Newly Declassified Documents from “Bin Laden’s Bookshelf,”* *supra* note 222.

352. See Fandos, *supra* note 288.

353. See Savage, *supra* note 238.

354. See *supra* notes 337-344 and accompanying text.

355. Trump, *supra* note 294.

not address selective declassification.³⁵⁶ If a President wanted to attempt to constrain their own and successors' actions, they could amend the executive order to prevent intentionally misleading declassifications. A helpful precedent is the provision President Nixon added to his classification executive order saying classification could not be used to conceal embarrassing information.³⁵⁷ However, Presidents are unlikely to curtail voluntarily a central – and effective, as the case studies show – part of their national-security powers.

Other executive-branch actors might provide more hope. Future administrations might react to the Trump Administration's disregard of declassification norms by depoliticizing declassification. Because selective declassifications typically involve the President starting an interagency process, intelligence-community backlash against nakedly political disclosure requests could also prove effective (as eventually happened with the Page FISA documents).³⁵⁸ Intelligence officials could also work with Congress to release more documents, including those contradicting the President's claims (as happened with the Schiff memo).³⁵⁹ Additionally, executive-branch employees who oppose a declassification's selectivity – or who seek to advance their own goals – might leak documents to reveal a more accurate picture.³⁶⁰

Ultimately, however, the President heads the executive branch and has strong declassification authority, so intrabranched reforms are of limited value in preventing selective declassifications. Therefore, the rest of this Section looks at how Congress can best improve the situation by promoting more, and more accurate, declassification. While this might spark separation-of-powers concerns, Congress has a constitutionally derived oversight role that includes oversight of national-security secrecy. Further, some actions (like improving funding for declassification) are on more solid ground than others (like a direct clash with the President over declassifying a particular document).

1. *Increase Declassification Funding*

First, Congress should increase funding for declassification technologies and personnel. If more documents are public, the President has fewer available to selectively release. Currently, agencies “cannot adequately fund the development

356. See ELSEA, *supra* note 25, at 16–17; Pozen, *supra* note 22, at 566–67.

357. Exec. Order No. 11,652, § 4, 37 Fed. Reg. 5209, 5212–13 (Mar. 10, 1972).

358. See Dilanian, *supra* note 91.

359. See Fandos, *supra* note 288.

360. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 87 (2014) (“Is leaking confidential information to the press, for example, a recognized form of intra-executive self-help?”).

and adoption of available technologies” to improve declassification processes,³⁶¹ leaving them unprepared for the “tsunami” of digital files they will soon be tasked with reviewing.³⁶² Agencies are also willing but unable to fund a switch from pass-fail review to a review system that allows documents to be released with redactions instead of withheld entirely.³⁶³ To secure much-needed funding, ISOO recommends having agencies include declassification costs as a line item in their budget requests.³⁶⁴ Congress should be willing to assist. Congressional reports on the classification system have long recognized the problem, and relief is overdue.³⁶⁵ This solution does not present separation-of-powers concerns, as it falls comfortably within Congress’s appropriations authority. Nor would it require identifying when a given declassification is selective, which can be difficult.

2. *Set Declassification Procedures*

Congress can not only fund, but also shape executive-branch declassification procedures. One such avenue would be for Congress to bar selective declassifications. While this would require difficult line-drawing, it would send an important signal. Congress could also strengthen the Public Interest Declassification Board (PIDB), an advisory board aimed at promoting transparency. As amended, the PIDB’s enabling statute allows the President or Congress to request the PIDB’s recommendation on whether documents should be declassified.³⁶⁶ Congress could give the PIDB authority to conduct such reviews sua sponte for public-interest reasons. Staffed by experts and located within the National Archives, the PIDB is well positioned to make these decisions impartially.

While such measures may face separation-of-powers objections, these are surmountable. Scholars have persuasively argued that the text and structure of the Constitution create an active role for Congress in national-security oversight, one which has room to expand.³⁶⁷ The courts have not fully explored Congress’s ability to shape the classification system, as Congress has not sought to alter the executive orders that govern it. However, the Supreme Court in *EPA v. Mink* found that “Congress could certainly have provided that the Executive Branch

361. 2017 Report to the President, *supra* note 28, at 15.

362. *A Vision for the Digital Age: Modernization of the U.S. National Security Classification and Declassification System*, *supra* note 107, at 6.

363. *Improving the Intelligence Community’s Declassification Process and the Community’s Support to the National Declassification Center*, *supra* note 109, at 4.

364. 2017 Report to the President, *supra* note 28, at 30.

365. MOYNIHAN COMMISSION REPORT, *supra* note 105, at 60-61.

366. 50 U.S.C. § 3355(b) (2018).

367. See, e.g., Kitrosser, *supra* note 23, at 493; Note, *supra* note 23, at 919-24.

adopt new [classification] procedures or it could have established its own procedures” as long as they did not unduly interfere with executive authority.³⁶⁸ Indeed, Congress has unproblematically passed various classification-related measures. While these often limit disclosure, such as the 1946 Atomic Energy Act’s prohibitions on disseminating “Restricted Data,”³⁶⁹ there have been information-sharing measures, such as the 2013 requirement that executive officials report authorized disclosures of classified information to the intelligence committees.³⁷⁰ The executive branch has accepted these measures. In fuzzy constitutional areas like the separation of powers, past practice is an important guidepost.³⁷¹ These broader procedural measures also present less opportunity for conflict than do disagreements over access to specific documents.

3. *Declassify Specific Documents*

Beyond setting generally applicable procedures, Congress could also counter specific selective declassifications. Congress could pass laws calling for declassification on particular subjects, as it did when it ordered the declassification of documents from the Bin Laden raid.³⁷² While the ODNI did not release documents until the Hersh article, six months after Congress’s November 2014 deadline, it began the declassification review earlier at Congress’s direction.³⁷³ Subject-specific laws place declassification in the intelligence community’s hands,

368. 410 U.S. 73, 83 (1973); *see also* *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (recognizing executive privilege but stating that the decision is not concerned with “the confidentiality interest and congressional demands for information, nor with the President’s interest in preserving state secrets”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (“Undoubtedly Congress has the power to enact specific and appropriate criminal laws to . . . preserve government secrets.”).

369. 42 U.S.C. § 2162 (2018).

370. 50 U.S.C. § 3349 (2018); *see also* *Presidential Authority to Permit Access to National Security Information*, CONG. RES. SERV. 2 (May 17, 2017), <https://fas.org/sgp/crs/secretcy/access.pdf> [<https://perma.cc/6L7G-N377>] (rooting the measure in “[c]oncern[s] that the Obama Administration may have permitted the selective authorized disclosure of classified information using an informal process”). For additional congressional measures setting declassification procedures, *see* *Classified Information Procedures Act*, 18 U.S.C. app. §§ 1-11 (2018); and *ELSEA*, *supra* note 25, at 2-3.

371. *See* *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (“[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012).

372. *Intelligence Authorization Act for Fiscal Year 2014*, Pub. L. No. 113-126, § 313, 128 Stat. 1390, 1399. For more examples, *see* *ELSEA*, *supra* note 25, at 3-5.

373. Rosenberg, *supra* note 17.

leaving room for stalling and perhaps one-sided disclosures. However, this is a less conflict-prone declassification method, since the intelligence community retains control, and the President can participate in the process. The Executive's historic cooperation with – or at least acquiescence to – such laws further negates separation-of-powers concerns.³⁷⁴

In addition, the House and Senate intelligence committees' rules allow them to declassify documents in their possession. House Rule X(11)(g) and Section 8 of the 1976 Senate Resolution 400 authorize the committees to vote to declassify in the public interest.³⁷⁵ The HPSCI used this procedure for the first time to declassify the Nunes memo.³⁷⁶ While using these rules risks further politicizing declassification (and committees cannot declassify documents they do not have), they are a useful counterweight to presidential declassifications. If Congress reveals the other side of the President's story, the public can see the full picture. Further, even when Congress does not follow the entire procedure, threatening or beginning to do so could bolster its position in negotiations with the executive branch. Neutrality in declassifications from both branches would be ideal, but this proposal acknowledges and leverages the system's partisan nature. While the executive branch has indicated it might claim these rules unconstitutionally intrude on its authority,³⁷⁷ the intelligence community has worked with Congress to obtain and declassify information many times.³⁷⁸ Greater use of these provisions may not require a clash between branches. Further, there are strong

374. See, e.g., *id.*; George Bush, *Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992*, AM. PRESIDENCY PROJECT (Oct. 26, 1992), <https://www.presidency.ucsb.edu/documents/statement-signing-the-president-john-f-kennedy-assassination-records-collection-act-1992> [<https://perma.cc/8ASA-ACFN>] (approving a bill ordering the declassification of Kennedy assassination records, but citing separation-of-powers concerns).

375. S. Res. 400, 94th Cong. § 8(a) (1976) (enacted); THOMAS J. WICKHAM, *CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 115-177, r. X, cl. 11(g)(1), at 548-49 (2019). For details on the procedure, see *supra* notes 265-272 and accompanying text.

376. Levine & Brewer, *supra* note 81.

377. See Memorandum from Acting Legislative Counsel, Cent. Intelligence Agency, to John O. Marsh, Jr., Counsellor to the President 3-4 (May 28, 1976), <https://www.cia.gov/library/readingroom/docs/CIA-RDP85-00759R000100160008-1.pdf> [<https://perma.cc/A7R2-WXYL>].

378. See *id.* at 4; see also 2008 SENATE INTELLIGENCE REPORT, *supra* note 9, at 114 (“Congress can also request declassification and usually gets what it wants unless the Executive branch can establish a sources-and-methods reason not to disclose it.”).

arguments that declassification falls within Congress's authority as a coequal branch of government.³⁷⁹

Additionally, members of Congress could rely on the Speech or Debate Clause to read classified information into the public record.³⁸⁰ Aimed at protecting congressional independence, the Clause immunizes representatives for on-the-job speech.³⁸¹ Senator Mike Gravel invoked the Clause's protections when facing a grand-jury investigation after reading the Pentagon Papers into the congressional record.³⁸² The Supreme Court held that the Clause granted him and his aide civil and criminal immunity for this legislative act.³⁸³ However, the Clause does not prohibit the House and Senate from imposing their own consequences, and unauthorized disclosures of classified information are against both bodies' rules.³⁸⁴ Still, while members do not frequently invoke this constitutional protection, it could be an important tool in addressing selective declassification.³⁸⁵

B. Strengthen FOIA in the National-Security Context

Next, FOIA reforms could help counter selective declassification. As the Iraq War and Page FISA case studies show, FOIA suits have helped reveal additional documents after a selective declassification. Yet under FOIA's national-security exemption, Exemption 1, the government almost always prevails in withholding classified documents.³⁸⁶ Courts reviewing FOIA cases often defer to the

379. See Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, CONST. PROJECT 46-55 (2017), <https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf> [<https://perma.cc/3UH5-D2PZ>]; Note, *supra* note 23, at 919-24; Levine & Brewer, *supra* note 81.

380. U.S. CONST. art. I, § 6 (“[F]or any Speech or Debate in either House, [representatives] shall not be questioned in any other Place.”).

381. See Rosenberg, *supra* note 379, at 115-23.

382. See Gravel v. United States, 408 U.S. 606, 608-10 (1972).

383. *Id.* at 615-16.

384. S. Res. 400, 94th Cong. § 8(c)(1) (1976) (enacted); THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 115-177, r. X, cl. 11(g)(3)(A), at 551 (2019).

385. See Bruce Ackerman, Argument, *Breach or Debate*, FOREIGN POL'Y (Aug. 1, 2013, 4:08 PM), <https://foreignpolicy.com/2013/08/01/breach-or-debate> [<https://perma.cc/6S5Q-DKG3>].

386. See Fuchs, *supra* note 96, at 159-63; Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 212-16 (2013); Susan Nevelow Mart & Tom Ginsburg, *[Di]s-informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 726 (2014); Paulina Perlin, *Defense and Deference: Empirically Assessing Judicial Review of Freedom of Information Act's National Security Exemption*, HARV. NAT'L

government on national-security matters.³⁸⁷ This deference has increased over time, particularly since 9/11.³⁸⁸ Requesters win full disclosure in just 5% of such cases and partial disclosure in 14%, according to one study.³⁸⁹ Congress, the judiciary, and the press can all help strengthen FOIA's ability to shed light on one-sided disclosures.

1. *Limit Exemption 1's Scope*

FOIA's Exemption 1 allows the government to withhold "properly classified" documents, but requires no real analysis of whether a classification is actually proper—that is, if disclosure would harm national security.³⁹⁰ Even a judge acknowledged review of such withholdings can be "perfunctory" and undertaken "too timidly."³⁹¹ In addition to general national-security deference, this timidity comes from courts' finding that "the text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified."³⁹² Amending FOIA to require courts to scrutinize a classification's propriety would help, particularly when withholding seems politically motivated. Congress should revive a 1991 proposed amendment limiting the exemption's reach to "matters in which the need to protect the information outweighs the public interest in disclosure" and allowing withholding only if disclosure would cause "identifiable damage."³⁹³

SECURITY J. 257, 258 (2020); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 714-15 (2002); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 666-68 (2005).

387. See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("[B]oth the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of [Freedom of Information Act (FOIA)] claims which implicate national security.").

388. See *id.* at 928-30; Verkuil, *supra* note 386, at 716; Pozen, *supra* note 386, at 646-49.

389. Mart & Ginsburg, *supra* note 386, at 764-67 (analyzing cases in the D.C. federal courts from 1974 to 2012).

390. 5 U.S.C. § 552(b)(1) (2018).

391. Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760, 764 (1988).

392. *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

393. Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 68 n.6 (1992) (emphasis omitted) (quoting Freedom of Information Improvement Act of 1991, S. 1939, 102d Cong. § 4 (1991)).

One point in favor of this amendment is that selective declassification harms national security. It prevents beneficial public feedback,³⁹⁴ politicizes the intelligence community's work, and risks sources' willingness to speak if their identity may be disclosed for political gain.³⁹⁵ And, selective declassifications can be offset without damaging national security, since documents are withheld for political advantage, not security reasons. Amending FOIA to facilitate fuller disclosure would serve both transparency and national-security aims.

Legislation limiting Exemption 1 withholdings may spark debate about separation-of-powers concerns. However, it would not impermissibly intrude on the judiciary's independence or the Executive's national-security powers.³⁹⁶ The Supreme Court has recognized that Congress can increase judicial review in the national-security space.³⁹⁷ This proposed amendment would direct the Executive to comply with its *own* classification directives.³⁹⁸ And, it would direct the judiciary to reclaim its rightful role instead of "convert[ing] deference into acquiescence."³⁹⁹

Although similar separation-of-powers concerns have arisen with past efforts to limit Exemption 1,⁴⁰⁰ Congress successfully did so in 1974. Responding to abuses of government secrecy powers after the Vietnam War and Watergate, as well as the Supreme Court's gutting of Exemption 1 in *EPA v. Mink*, Congress directed courts to scrutinize the propriety of agencies' withholdings.⁴⁰¹ The bill added the "properly classified" language, directed courts to review agencies' claims *de novo*, and authorized judges to inspect disputed documents in

394. See Murphy, *supra* note 23, at 507 (finding the "selective flow of information has dangerously limited the quality of information available to the executive branch in its determination of foreign policy," preventing officials from receiving needed "observations, opinions, or criticisms of current or proposed policy").

395. See Maggie Haberman & Michael S. Schmidt, *Trump Gives Attorney General Sweeping Power in Review of 2016 Campaign Inquiry*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/trump-barr-intelligence.html> [<https://perma.cc/Q5KS-BEBX>] (quoting former CIA Chief of Staff Jeremy Bash).

396. See Perlin, *supra* note 386, at 295 (arguing that Exemption 1 withholdings that go against FOIA requirements fall into the third category under *Youngstown Sheet & Tube Co. v. Sawyer*, where executive power "ebb[s]" to its lowest when Congress has expressly or impliedly disapproved" (quoting 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

397. *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

398. See Note, *supra* note 23, at 924.

399. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 940 (D.C. Cir. 2003).

400. See, e.g., H.R. DOC. NO. 93-383 (1974) (containing President Ford's veto message on the 1974 FOIA amendments, which Congress overrode); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 14.

401. Mart & Ginsburg, *supra* note 386, at 738-43.

camera.⁴⁰² Congress saw this change as directing courts to balance disclosure and security, with the help of expert testimony from both parties.⁴⁰³ As the Senate report said, “abuse of security rationales to forestall or prevent disclosure was not the intent of the authors of the FOIA in 1966, and [the amendment] makes it clear that such is not the intent now.”⁴⁰⁴ It is time for Congress to reaffirm that more transparency is needed under Exemption 1.

2. *Improve Judicial Review in Exemption 1 Cases*

Imposing a greater evidentiary burden on agencies defending their withholdings in court, and empowering plaintiffs to introduce their own evidence, would help rebalance the scales in Exemption 1 cases. First, Congress should require in camera inspection of Exemption 1 withholdings upon plaintiffs’ request, or at least create a presumption in favor of in camera review. Instead of reviewing the withheld documents, judges currently defer to the government’s affidavits describing the national-security harms that would stem from disclosure,⁴⁰⁵ even though these affidavits often provide little detail.⁴⁰⁶ Studies confirm that in camera review improves disclosure.⁴⁰⁷

To alleviate the added burden of reviewing documents in camera, courts should use more special masters, a tactic that has facilitated disclosure in the past. In *Washington Post v. United States Department of Defense*, the D.C. district court appointed an experienced special master to review 2,000 documents on failed U.S. efforts to rescue hostages in Iran.⁴⁰⁸ The special master’s guidance led the Defense Department to reconsider its withholdings and release around 85% of the documents,⁴⁰⁹ including clearly nonsensitive documents such as an

402. S. REP. NO. 93-854, at 181 (1974), as reprinted in 1974 U.S.C.C.A.N. 6285, 6290.

403. Mart & Ginsburg, *supra* note 386, at 742-44.

404. S. REP. NO. 93-854, at 182.

405. See, e.g., *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011).

406. See Perlin, *supra* note 386, at 287 (finding that courts upheld the government’s withholding based on substandard affidavits 76.2% of the time).

407. Mart & Ginsburg, *supra* note 386, at 771-72 (showing that in camera review correlates to increased disclosure at the appellate level). FISA has a similar measure requiring in camera review on request. See 50 U.S.C. § 1806(f) (2018); *Fazaga v. FBI*, 916 F.3d 1202, 1232 (9th Cir. 2019) (requiring in camera review under FISA).

408. See Fuchs, *supra* note 96, at 174 (citing *Wash. Post v. U.S. Dep’t of Def.*, 766 F. Supp. 1 (D.D.C. 1991)). The government objected, but the D.C. Circuit upheld the special master’s appointment. *In re U.S. Dep’t of Def.*, 848 F.2d 232, 239 (D.C. Cir. 1988).

409. Fuchs, *supra* note 96, at 175.

Associated Press report and a request to stop including milk in pilots' lunches because it spoiled.⁴¹⁰

Additionally, Congress should direct courts to consider expert testimony from plaintiffs. Courts could also do this on their own. While the drafters of the amended Exemption 1 thought this would happen, courts often reject requests for expert testimony, including from an ambassador who had prepared the withheld records and a former CIA agent.⁴¹¹ The lack of expert commentary renders agency affidavits "non-falsifiable."⁴¹² Allowing more plaintiff-side expert testimony would help even the playing field and assuage courts' concerns that they lack the expertise to order release.

Even in the absence of such legislation, courts should better scrutinize the government's Exemption 1 claims. Allowing in camera review and plaintiffs' experts are helpful steps. A more fundamental change would be to undertake genuine de novo review of agencies' withholdings, as the statute directs.⁴¹³ If facing a selective declassification, courts should acknowledge that documents left behind in a one-sided disclosure are not withheld for security reasons and can often be released safely, as in the case studies.⁴¹⁴

C. *Legislate to Protect Journalists*

Beyond FOIA amendments, Congress should pass legislation that supports transparency by strengthening journalists' ability to investigate selective declassifications and related national-security events.

1. *Enact a Federal Shield Law*

Congress should create a statutory reporter's privilege—a federal shield law—to protect reporters from having to name their sources in federal proceedings. This protection would aid reporters who investigate selective declassifications by speaking to anonymous sources and receiving leaks. Currently, reporters can face jail time if they refuse to identify a confidential source in a federal leak

410. Deyling, *supra* note 393, at 93, 101.

411. Mart & Ginsburg, *supra* note 386, at 742-43.

412. Fuchs, *supra* note 96, at 164.

413. See, e.g., CNN, Inc. v. FBI, 384 F. Supp. 3d 19, 35 (D.D.C. 2019) ("What Defendant seems to be asking for here is more than deference; it wants acquiescence. Such an approach would relegate the Court to the role of the Bureau's loyal sidekick, offering only affirmation of its decisions. That, plainly, is not how judicial review works.").

414. See, e.g., NIE 2004 Release, *supra* note 1; NIE 2015 Release, *supra* note 168; NIE 2018 Release, *supra* note 3; *Closing the Book on Bin Laden*, *supra* note 223; Fandos, *supra* note 288; Savage, *supra* note 238; *Newly Declassified Documents From "Bin Laden's Bookshelf,"* *supra* note 222.

investigation. Judith Miller, for example, went to jail rather than name her source as Scooter Libby during a case investigating his leak of covert CIA operative Valerie Plame's identity.⁴¹⁵ The Reporters Committee for Freedom of the Press counts thirty instances of journalists going to jail rather than naming sources.⁴¹⁶ While the Court held in *Branzburg v. Hayes* that the Constitution does not contain a reporter's privilege, it acknowledged that forcing reporters to identify sources could chill reporting "to the detriment of the free flow of information protected by the First Amendment."⁴¹⁷ Recognizing this danger, forty states and the District of Columbia have enacted shield laws.⁴¹⁸ Congress has considered numerous shield law bills, but has yet to pass one.⁴¹⁹

Helpfully, courts do recognize a "de facto" reporter's privilege rooted in First Amendment concerns,⁴²⁰ and the government takes a more permissive approach to journalists than to leakers.⁴²¹ Still, enshrining the reporter's privilege in federal law would better protect sources' confidentiality and willingness to speak, journalists' freedom, and the public's right to know. The shield law would directly improve reporters' efforts to respond to selective declassifications by seeking more comprehensive, accurate information from confidential sources. Past shield law efforts have received bipartisan support, including from executive-

415. See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES 3-4 (2011); *Timeline: The CIA Leak Case*, *supra* note 152. Plame was married to Joseph Wilson, whose op-ed sparked the NIE's selective declassification in 2003. *Timeline: The CIA Leak Case*, *supra*. Miller spent eighty-five days in jail, speaking only after Libby granted her permission. RUANE, *supra*; see also MULLIGAN & ELSEA, *supra* note 43, at 29-30 (describing additional cases).

416. *Journalists Jailed or Fined for Refusing to Identify Confidential Sources, as of 2019*, REPORTERS COMMITTEE FOR FREEDOM PRESS (2019), <https://www.rcfp.org/jailed-fined-journalists-confidential-sources> [<https://perma.cc/VBJ5-6TKG>].

417. 408 U.S. 665, 679-80 (1972); see also Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 561-64 & nn.256-69 (2007) (collecting other courts' similar discussions).

418. See *Reporter's Privilege Compendium*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/reporters-privilege> [<https://perma.cc/D8V2-C56D>].

419. See Paul Fletcher, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017, 8:45 AM EST), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists> [<https://perma.cc/S5GV-HV6K>]; Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES (May 15, 2013), <https://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html> [<https://perma.cc/DLQ4-MHKF>].

420. Christina Koningsisor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176, 1182 (2018) (concluding, based on a historical survey, that "judges, legislators, and prosecutors have long sought to protect reporters through more informal measures" and "[t]aken together, these protections create a 'de facto' reporter's privilege").

421. See Pozen, *supra* note 22 (describing this divide and the reasons motivating it).

branch officials,⁴²² so this legislation would likely not engender much controversy.

2. *Revisit the Espionage Act*

Amending the Espionage Act to protect journalists and whistleblowers would also help the public discover the information withheld in Presidents' selective declassifications. The government currently relies on a patchwork of statutes to criminalize the disclosure of classified information, including the problematic Espionage Act.⁴²³ Passed in 1917 to criminalize spying during World War I, the government has turned the Act into its main tool for prosecuting media leaks. The Act punishes the unauthorized disclosure and receipt of "information relating to the national defense," a vague term that typically means classified documents.⁴²⁴ The government prosecuted just four leaks under the Espionage Act from 1917 to 2008.⁴²⁵ The numbers shot up under the Obama and Trump Administrations, with eighteen prosecutions since 2009.⁴²⁶ Past indictments of American Israel Public Affairs Committee lobbyists and Wikileaks's Julian Assange for their receipt of information sparked fears that the government could use the Act to prosecute journalists,⁴²⁷ making sources reluctant to come forward.⁴²⁸

To improve this situation, Congress should pass a pending bill that would amend the Espionage Act to prohibit the punishment of journalists solely for

422. See Savage, *supra* note 419.

423. 18 U.S.C. § 793 (2018); see MULLIGAN & ELSEA, *supra* note 43, at 3-5.

424. 18 U.S.C. § 793 (2018).

425. *Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/resources/leak-investigations-chart> [<https://perma.cc/4K53-5WVW>]; see Gabe Rottman, *A Typology of Federal News Media Leak Cases*, 93 TUL. L. REV. 1147, 1151-53 (2019) (describing the chart's methodology); see also MULLIGAN & ELSEA, *supra* note 43, at 17-25 (reviewing cases).

426. *Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present*, *supra* note 425. Expanding the scope to include prosecutions and investigations under other laws across branches of government brings the tally to fifty-six. Punishments have increased over time and are more severe for low-level officials. Rottman, *supra* note 425, at 1161, 1176-78.

427. See Charlie Savage, *Assange Indicted Under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html> [<https://perma.cc/L8LL-2YQ9>]. While *Bartnicki v. Vopper*, 532 U.S. 514 (2001), held that the First Amendment prohibits punishing reporters for their sources' illegal activity, it did not address classified information.

428. *The Trump Administration and the Media*, COMMITTEE PROTECT JOURNALISTS (Apr. 16, 2020), <https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks> [<https://perma.cc/8EYE-LDPZ>].

publishing classified information.⁴²⁹ Congress should also impose higher intent requirements throughout the Act. Currently, they vary from simply knowing a disclosure was unlawful to intending to harm national security.⁴³⁰ Requiring a showing of actual harm from disclosure and more clearly defining terms like “information relating to the national defense” would further help narrow the Act’s scope.⁴³¹ Aligning leakers’ sentences with the public value of their disclosures would also serve free-speech and transparency goals.⁴³² These reforms would better protect leakers disclosing information for public-interest reasons rather than espionage, including those seeking to counteract selective declassifications.

3. *Protect Whistleblowers*

Next, Congress should improve federal whistleblower-protection statutes. Currently, these statutes are largely unhelpful to those seeking to disclose classified information.⁴³³ They do not protect against the loss of a security clearance and are hard to navigate, so whistleblowers “are either uninterested in availing themselves of the prescribed whistleblower channels or do not trust that they will prove safe or effective.”⁴³⁴ However, while a more protective, usable framework could help those seeking to reveal a President’s selective declassification, other reforms may prove more useful. Whistleblower-protection laws require disclosers to use internal procedures instead of contacting the press, so whistleblowing takes a long time and does not guarantee public disclosure. Meanwhile, a selective declassification will have already taken hold in the public imagination.

D. *Bolster the Press Response*

Finally, and perhaps most important given that partisan gridlock could slow congressional efforts, the press has a critical role to play. Just as uncritical news coverage can exacerbate selective declassifications – as occurred, for example,

429. Espionage Act Reform Act of 2020, H.R. 6114, 116th Cong. (2020).

430. MULLIGAN & ELSEA, *supra* note 43, at 12-13.

431. 18 U.S.C. § 793(d)-(e) (2018).

432. See Mailyn Fidler, *First Amendment Sentence Mitigation: Beyond a Public Accountability Defense for Whistleblowers*, 11 HARV. NAT’L SECURITY J. 214, 224-25 (2020); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT’L SECURITY L. & POL’Y 409, 440-43 (2013).

433. Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 491-96 (2014).

434. Pozen, *supra* note 22, at 527 n.64 (describing statements by secrecy expert Steven Aftergood).

with the media's credulity of WMD claims in the run-up to the Iraq War⁴³⁵ — an active and critical press can reduce its effects — like in Charlie Savage's successful FOIA suit for the Page FISA documents.⁴³⁶ While many newsrooms' funding for investigative journalism and access litigation has declined since the 2008 recession, journalists who are able should actively investigate selective declassifications with all the tools at their disposal.⁴³⁷

1. *Request the Undisclosed Documents*

Indeed, the first solution is for journalists and watchdog groups to file FOIA and MDR requests, which have helped in the context of each of the case studies. The NIE was released in response to FOIA and MDR requests.⁴³⁸ A FOIA suit from *VICE News* won documents on the CIA's relationship with the filmmakers behind *Zero Dark Thirty*, revealing the Obama Administration's efforts to spin the story.⁴³⁹ Charlie Savage obtained the Page FISA documents in settlement with the DOJ in a FOIA case.⁴⁴⁰ In such cases, to counter the government's inevitable arguments that FOIA's Exemption 1 prevents disclosure of classified documents, journalists should seek in camera review to show they do not meet the exemption because they are not "properly classified" and would cause no harm if disclosed.⁴⁴¹ Though rarely, courts *do* require the government to disclose information if it has not shown that release would harm national security or foreign relations.⁴⁴² Even if some information requires redaction, the government must release the information that does not.⁴⁴³ And, as with Savage's suit for the

435. See Kurtz, *supra* note 156; Editorial, *supra* note 157; *From the Editors: The Times and Iraq*, *supra* note 157.

436. Page FISA Documents, *supra* note 234; Savage, *supra* note 238.

437. Compare *Losing the News: The Decimation of Local Journalism and the Search for Solutions*, PEN AM. 29 (2019), <https://pen.org/wp-content/uploads/2019/11/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> [<https://perma.cc/5S8X-A8LX>] (reporting closures of local news outlets and a drop in their FOIA requests), with *News Reporters Drive Growth in Media FOIA Litigation*, FOIA PROJECT (Aug. 2, 2018), <http://foiaproject.org/2018/08/02/media-foia-lawsuits-jump-under-trump> [<https://perma.cc/N5QP-UMR6>] (finding individual reporters and large media companies are driving recent increases in FOIA requests).

438. See *NIE 2004 Release*, *supra* note 1; *NIE 2015 Release*, *supra* note 168; *NIE 2018 Release*, *supra* note 3.

439. Leopold & Henderson, *supra* note 231.

440. Page FISA Documents, *supra* note 234; Savage, *supra* note 238.

441. 5 U.S.C. § 552(b)(1)(A) (2018).

442. See, e.g., *CNN, Inc. v. FBI*, 384 F. Supp. 3d 19, 38 (D.D.C. 2019) (finding the FBI "failed to substantiate" its Exemption 1 claim in CNN's case seeking the Comey Memos).

443. See 5 U.S.C. § 552(b).

Page FISA documents, negotiations and settlements with agencies can win disclosure without needing a court order.⁴⁴⁴

2. Investigate Selective Declassifications

Second, reporters should work to uncover more information about selective declassifications and their subjects. Leaks are an important tool, though reporters should remain alert for hidden agendas. Quoting anonymous intelligence officials can be helpful, as it was in reporting on Iraq.⁴⁴⁵ Reporters' jobs at the time were difficult as many government sources *and* reporters believed the official narrative on WMD, and editors killed stories relying only on former officials.⁴⁴⁶ Even reporters who maintained a skeptical eye found themselves questioning if they were the mistaken ones.⁴⁴⁷ Editors also rushed to scoop their competition and did not sufficiently scrutinize articles.⁴⁴⁸ Timing concerns do present a difficult issue, as delays have their own downsides. Selective declassifications that long go uncorrected leave lasting misimpressions.⁴⁴⁹ However, then and since, leaks and anonymous quotes can provide balance that named officials may not. Indeed, they have been called the "lifeblood" of American democracy.⁴⁵⁰ Continuing to publish these reports – with due diligence and an attention to leakers' motives – is essential to informing the public of Presidents' acts.

444. Page FISA Documents, *supra* note 234; Savage, *supra* note 238.

445. See, e.g., James Risen & David E. Sanger, *After the War: Weapons Intelligence; in Sketchy Data, Trying to Gauge Iraq Threat*, N.Y. TIMES (July 20, 2003), <https://www.nytimes.com/2003/07/20/world/after-the-war-weapons-intelligence-in-sketchy-data-trying-to-gauge-iraq-threat.html> [<https://perma.cc/N6MG-A8RC>] ("Several current and former intelligence officials have said analysts at the C.I.A. felt pressure to tailor reports to conform to the administration's views . . .").

446. See John B. Judis, *Eve of Destruction: What It Was Like to Oppose the Iraq War in 2003*, NEW REPUBLIC (Mar. 18, 2013), <https://newrepublic.com/article/112673/iraq-war-10-year-anniversary-what-it-was-oppose-it-2003> [<https://perma.cc/7E3X-P55V>]; Kurtz, *supra* note 156.

447. Warren P. Strobel & Jonathan S. Landay, "The Vice President Is Lying" and Other Things the Deep Throats Said, in FEET TO THE FIRE: THE MEDIA AFTER 9/11, at 366 (Kristina Borjesson ed., 2005).

448. See Kurtz, *supra* note 156; Editorial, *supra* note 157; *From the Editors: The Times and Iraq*, *supra* note 157.

449. See *supra* Section III.B.2.

450. Sanford J. Ungar, Opinion, *Leaks Are Actually the Lifeblood of American Democracy*, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/opinions/leaks-are-actually-the-life-blood-of-american-democracy/2017/08/28/7780aefa-8982-11e7-a50f-e0d4e6eco70a_story.html [<https://perma.cc/2PJS-YTCV>].

3. *Acknowledge Declassifications' Selectivity*

Third, even without countervailing leaks, coverage of selective declassifications should describe their motives. This context provides the relevant framework with which to process the information. A *Washington Post* article on President Trump's request to declassify the Page FISA documents offers a good example.⁴⁵¹ It gives context on the request's timing and goals: "For months, conservative lawmakers have been calling on the [Justice] [D]epartment to release Russia-related and other materials, many of them accusing law enforcement of hiding information that might discredit the investigation now led by special counsel Robert S. Mueller III."⁴⁵² It notes procedural irregularities: "[P]ublic announcement of the order came before the Justice Department received instructions about what specific material it was supposed to cover."⁴⁵³ And it uses quotes from politicians and intelligence officials to frame the controversy in terms reporters could not, with one former official calling it "an unprecedented misuse of the President's declassification authority for purely political reasons."⁴⁵⁴ While not every instance of selective declassification is as clear cut, reporting without this nuance risks becoming part of the problem, not the solution. Although some have suggested not reporting on selective declassifications at all,⁴⁵⁵ public discourse is best strengthened by reporting on the disclosure in context, alerting the public to both the substantive revelations and the President's self-serving motives.

CONCLUSION

Although selective declassifications have received little attention in the secrecy literature, they are a unique phenomenon with unique dangers. The "ability of the Executive Branch to unilaterally declassify and divulge intelligence information at a time, place, and in a manner of its choosing" – as the Senate Select Intelligence Committee bemoaned in its 2008 Iraq War report – leads to lasting harms.⁴⁵⁶ Across administrations, Presidents have used their declassification

451. Zapotosky et al., *supra* note 18.

452. *Id.*

453. *Id.*

454. *Id.*

455. See, e.g., David Atkins, *News Outlets Can and Should Ignore Barr's Selectively Declassified Materials*, WASH. MONTHLY (May 25, 2019), <https://washingtonmonthly.com/2019/05/25/media-orgs-can-and-should-ignore-barrs-selectively-declassified-materials> [https://perma.cc/99RW-UEKS].

456. 2008 SENATE INTELLIGENCE REPORT, *supra* note 9, at 3.

authority to spin self-serving stories on key issues, from wars to political battles. These one-sided narratives create misperceptions that shape conversations and decisions for years. They manipulate the marketplace of ideas so that the public converges on a chosen viewpoint, and votes accordingly. When these declassification efforts align with partisan biases, they remain hard to counter even when the full story later comes to light. Still, using the proposed solutions, the Executive, Congress, judiciary, media, and others should seek to mitigate their harms by uncovering related documents. In what many have called a “post-truth” era,⁴⁵⁷ recognizing and counteracting the distorting effects of selective declassification are increasingly critical. However, it is also increasingly difficult. Not only does correcting misperceptions resulting from selective declassification require people to accept the truth over their preexisting beliefs; they also need to accept that there *is* objective truth – not “alternative facts.” While selective declassification may remain the President’s prerogative, studying its dangers might heighten skepticism when it happens next – as it inevitably will.

457. Katy Steinmetz, *Oxford’s Word of the Year for 2016 Is ‘Post-Truth,’* TIME (Nov. 15, 2016, 8:07 PM EST), <http://time.com/4572592/oxford-word-of-the-year-2016-post-truth> [<https://perma.cc/5EZ8-9F8F>]; see also *In 1,316 Days, President Trump Has Made 22,247 False or Misleading Claims*, WASH. POST (Aug. 27, 2020), <https://www.washingtonpost.com/graphics/politics/trump-claims-database> [<https://perma.cc/EW6E-X57B>] (tracking “the false or misleading claims made by President Trump”).