SECRET POLICIES

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This Article examines secret agency policies. Clearly when the directives relate to military or national security matters, secrecy is essential. But should the public be viewers of the DACA Manual's guidance on when administrative relief will be provided to immigrants brought to the U.S. as children by their undocumented parents? What about the Department of Justice policy related to the dismissal of False Claims Act cases or the written procedures that are used by Assistant United States Attorneys in providing criminal discovery to defense counsel? Written policies veiled in secrecy can be detrimental to achieving transparency and legitimacy in government.

In focusing on these written internal policies that do not pertain to a specific legal matter, this Article looks beyond the Freedom of Information Act and its exemptions. It discusses the need to maintain an appropriate balance between government transparency and the need for some matters to be kept private, and the importance of agency expertise, accountability, and efficiency in determining a need for transparency. Factored into this equation are the ethical repercussions of secret policies when government employees leave the agency with inside information.

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I. INTRODUCTION

Transparency is a key component to assuring the legitimacy of government policy. Yet one would hardly argue for transparency of decision-making by the military of its decisions regarding when and how to engage in combat.[1] Policies immediately affecting national security do not need to be openly displayed and may adversely affect the country if made available to our enemies. But should policies such as the Department of Homeland Security's Standard Operating Procedures for the Deferred Action for Childhood Arrivals program (the "DACA Policy Manual") be kept secret?[2] The DACA Policy Manual prioritizes "who will be approved and how that approval may be rescinded" in determining "administrative relief from deportation to eligible immigrants brought to the U.S. as children by their undocumented parents."[3] What about the written procedures used by Assistant United States Attorneys ("AUSAs") to provide criminal discovery to defense counsel?[4] The Department of Justice ("DOJ") has taken a strong position in opposing the release of its Federal Criminal Discovery Blue Book (the "Blue Book"), a written manual that "contains information and advice for prosecutors about conducting discovery in their cases, including guidance about the government's various obligations to provide discovery to defendants."[5] And what about the DOJ memorandum related to the dismissal of cases alleging

1. Transparency outside the context of criminal law is also not something that is considered automatically to be positive, without any exceptions. Secrets, for example, are crucial for maintaining trade secrets and the theft of trade secrets is subject to criminal prosecution. *See* 18 U.S.C. § 1832 (2018). Agency policy, however, is not comparable to private company assets that need to be kept secret. Even in the realm of criminal justice, there are times that secrecy is important, such as maintaining the confidentiality of informants. This Article is limited to policies and does not venture into secret tools, such as stingrays, that may be used by the DOJ in investigating criminality. *See* Natalie Ram*, Innovating Criminal Justice*, 112 NW. U. L. REV. 659, 668 (2018).

2. R. Robin McDonald, *Feds Look to Bar Public Access to Immigration Policy Manual*, DAILY REPORT (June 16, 2017), https://www.law.com/dailyreportonline/sites/dailyreportonline/2017/06/16/feds-look-to-bar-public-access-to-immigration-policy-manual/.

3. *Id.*; *see also* SHOBA S. WADHIA, U.S. DEP'T OF HOMELAND SECURITY, NATIONAL STANDARD OPERATING PROCEDURE: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2012), https://works.bepress.com/shoba_wadhia/19/.

4. *See infra* Subsection III.C.2.

5. *See* Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 844 F.3d 246, 249 (D.C. Cir. 2016).

fraud against the government under the False Claims Act (the "FCA Memo"); should the "privileged and confidential" memorandum recently issued by the DOJ outlining how to "evaluat[e] a recommendation to decline intervention in a *qui tam* action" be outside the viewing of individuals considering the bringing of false claims actions?[6] These are just some examples of the recent written government policies veiled in secrecy.

The tension between transparency and secrecy in government policies raises many questions, such as *who* should be deciding whether to disclose the policy; *what* kind of policy may necessitate disclosure; *where* does the authority lie—inside or outside the agency—for determining disclosure within or outside the agency; *when* should that decision occur—should it be prior to drafting the policy to allow for public input or after it is written; *why* should transparency override secrecy in those instances necessitating disclosure; and *how* procedurally should the decision regarding secrecy or transparency be made.

There are many sub-factors to these questions that are equally important in determining whether an agency policy should be made available to the public. Factors such as which *agency* has the policy; the *content* of the specific policy; the *source* of the policy inside the agency; the *purpose* behind drafting and implementing the policy; the *breadth* and *scope* of the policy; the *form* of the policy (is it written, on the Internet or Intranet, or conveyed orally by an office administrator?); the *cost* associated with disseminating the policy; any *constitutional* requirements implicated by the policy; and any *ethical* concerns associated with current and former agency employees having insider information that is not available to non-employees. Although the Freedom of Information Act ("FOIA") provides a baseline for evaluating whether to release certain requested government information,[7] it fails to cover—either legally or in practice—many of the issues being raised in this Article.

This tension between agency secrecy and the public's interest in transparency becomes heightened when the agency develops policies that apply across the board within the agency. We are not talking about purely internal matters like human resources, agency confidentiality, or billing and spending policies. We are also not referring to decisions in individual cases before the agency. The focus here excludes individual cases in which a party to the action desires the release of information that will assist them in framing a response to their specific

6. Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section to Attorneys, Commercial Litigation Branch, Fraud Section & Assistant U.S. Attorneys Handling False Claims Act Cases (Jan. 10, 2018), https://www.fcadefenselawblog.com/wp-content/uploads/sites/561/2018/01/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf [hereinafter FCA Memo]. *Qui tam* actions under the False Claims Act are suits by private whistleblowers on behalf of the United States. If successful, the *qui tam* whistleblower, or "relator," may be entitled to share in the government's recovery. 31 U.S.C. § 3730(d)(1) (2018). The term "'*qui tam*' is taken from the Latin expression *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning 'who brings the action for the king as well as for himself.'" U.S. *ex rel.* Stinson, Lyons, Gerlin & Bustamant, P.A. v. Prudential Ins., 944 F.2d 1149, 1152 n.2 (3d Cir. 1991) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)).

7. *See* 5 U.S.C. § 552(a)(2)(B) (2018) (requiring agencies to disclose "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register"); *infra* Section III.B.

litigation. We are also not discussing agency or executive actions that are not part of a formal written policy.[8] A robust scholarship exists that discusses secrecy more broadly, with articles and books by prominent scholars such as Professors David E. Pozen,[9] Adam Samaha,[10] and Kim Lane Scheppele.[11]

Our analysis instead focuses on written agency policies that are kept hidden from public view. More specifically, we target generally applicable policies that apply broadly to matters being handled by that agency but are not specific to a designated case. Thus, this Article uses as examples policies such as the DACA Policy Manual,[12] the Blue Book,[13] and the FCA Memo[14]—policy statements that provide guidance within the agency to its employees, that are generally applicable, and that are withheld from the affected public. The secret nature of these policies challenges the accountability of agency decision-making and raises important questions of government legitimacy.

Much about these policies remains unclear precisely because they are secret policies. The examples mentioned here come from disclosures that were inadvertent, offered to a legislative body to demonstrate the existence of a policy

8. Omitted in this piece is a discussion of the action of Public Citizen, Inc. in a request to the United States Secret Service for the records of "visitor logs and other records documenting visitors to four agencies housed in the White House Complex—the Office of Management and Budget (OMB), Office of Science and Technology Policy (OSTP), Office of National Drug Control Policy (ONDCP), and Council on Environmental Quality (CEQ)." *See* Complaint for Declaratory and Injunctive Relief at 1, Public Citizen, Inc. v. U.S. Secret Service, No. 17-1669 (D.D.C. filed Aug. 17, 2017), https://www.citizen.org/our-work/litigation/cases/public-citizen-inc-v-united-states-secret-service.

9. *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260–61 (2010) (characterizing secrets as "deep" and "shallow").

10. *See* Adam M. Samaha*, Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 909 (2006) (looking at "judicial platforms in the information access context").

11. *See* KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 308 (1988) (discussing the concept of secrecy in several different contexts).

12. It is important to note that transparency may not be constant over different administrations and that whether to provide transparency may be reflective of different postures being taken by the government. For example, in an abstract of materials, Professor Shoba S. Wadhia writes in 2013:

> In Fall 2012 I filed a Freedom of Information Act (FOIA) Request with DHS seeking records pertaining to the agency's implementation of the Deferred Action for Childhood Arrivals (DACA) Program, among other items. DHS provided me with a formal response on March 4, 2013. I received roughly 406 readable pages of internal memoranda and guidance used by DHS to implement DACA. Specifically, the FOIA Request yielded: • National Standard Operating Procedures (SOP) Deferred Action for Childhood Arrivals, prepared by Service Center Operations Directorate, September 13, 2012 (p. 1-140 with Appendices) • Training Module for Immigration Officers about DACA • Training Module on Responding to DACA Related Requests through the Service Request Management Tool. The FOIA response illustrates that DHS has invested significant resources to train adjudicators responsible for processing DACA applications. Thus, the transparency that DHS has shown to the public through "FAQs," stakeholder calls, and monthly statistical updates appears to be matched by a meaningful training program that frankly, I have not seen with the general deferred action program. The response itself elaborates on many of the core eligibility requirements for DACA; sheds some light on some to-date ambiguous terms such as "national security," "exceptional circumstance," and educational and travel requirements; and provides some templates and assessment tools for scenarios such as a "rejection" or a "denial." The FOIA response also includes information about the cases which are automatically given "supervisory review" when a denial is recommended internally.

WADHIA, *supra* note 3 (abstract). *But see* McDonald, *supra* note 2.

13. *See infra* Subsection III.C.2.

14. *See infra* Subsection III.C.3.

correcting a problem, or that were leaked from an unknown source. The secret nature of these policies means that there can be only limited judicial review, as absent knowledge of the policy, there is no basis for contesting its secrecy.[15]

Equally important to note here is that some government agencies value transparency and use it to provide guidance to the public.[16] For example, the U.S. Food and Drug Administration's ("FDA") Transparency Initiative provides agency guidance documents on a website, noting that increasing openness better promotes and protects public health.[17] Likewise, the Fraud Section of the DOJ's Criminal Division provides access to *A Resource Guide to the U.S. Foreign Corrupt Practices Act*,[18] with the aim of "provid[ing] helpful information to enterprises of all shapes and sizes—from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world."[19]

The fact of both secret policies and the government's interest in transparency highlights the importance of evaluating the relationship between the two. This is especially important for generally applicable policies that impact the public. It presents additional concerns when the agency rationale for secrecy is to assure an upper hand for the government in the judicial process, especially when the policy involves a criminal matter. Should federal agencies be entitled to privileges such as the work-product doctrine,[20] for instance, when the item being secreted is an across-the-board policy that is not specific to an individual case? Questions of whether a bright-line approach is warranted or whether courts should examine the facts and circumstances of each policy remain unresolved. These and other questions are explored here.

Part II sets the stage for this discussion by presenting an overview of agency policymaking and administrative legitimacy. Part III seeks to define secret poli-

15. *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 316 (2013) (discussing how examining agencies from the inside-out can be used for unreviewable agency decisions).

16. This Article focuses on transparency in the current environment, although one can argue that transparency is not a static concept and that the political environment can change its course. *See generally* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018) (tracing "transparency's drift in the United States from a progressive to a more libertarian, or neoliberal, orientation").

17. *See FDA Transparency Initiative Overview*, U.S. FOOD & DRUG ADMINISTRATION, https://www.fda.gov/AboutFDA/Transparency/TransparencyInitiative/ucm2023681.htm (last visited Jan. 12, 2019).

18. *See FCPA Guide*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/fcpa-guidance (last visited Jan. 12, 2019).

19. *See* CRIM. DIV. OF THE U.S. DEP'T OF JUST. & ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, Foreword, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (last visited Jan. 12, 2019).

20. Arguably, this Article could include FOIA litigation that involves requests for release of documents related to warrantless surveillance authorized by the Foreign Intelligence Surveillance Act ("FISA"). Although arguments could be entertained that documents sought to be released under FOIA relate to agency policy, the American Civil Liberties Union litigation sought records pertaining to the DOJ's policy on giving notice to criminal defendants that it intended to use evidence obtained from FISA warrants. Because the documents were not released, it is difficult to ascertain whether the alleged work product claim of the government involved specific cases or general policies. *See* Am. Civil Liberties Union v. U.S. Dep't of Justice, 750 F.3d 927 (D.C. Cir. 2014).

cies by looking at the existing agency landscape, the role of FOIA and its exemptions in maintaining an appropriate balance between government transparency and the need for some matters to be kept private, and existing practical applications that are beyond FOIA's terrain, such as the Department of Homeland Security's ("DHS") decision to conceal the DACA Policy Manual, the DOJ's refusal to disclose the Blue Book in criminal matters, and the confidential FCA Memo. Part IV takes this analysis a step further in assessing the value of agency legitimacy, particularly the importance of an open government, when faced with secret policies. Considered here is the role of agency expertise, accountability, and efficiency. Also examined are the ethical repercussions of secret policies, particularly for employees who leave the agency with this confidential, "inside" information. Absent transparency, at least when transparency is not diametrically opposed to the agency mission, agency legitimacy becomes questionable. This Article stresses the need for fostering agency legitimacy in the face of secret policies. Secreting general policies that do not impede things like national security but do affect public knowledge of our agency dynamics, diminishes the effectiveness of the administrative process and our ability to promote a transparent government.

II. AGENCIES AS POLICY-MAKERS

One of the, if not the most, important features of government is its policymaking authority. Policymaking can be broadly defined as the relevant governmental authority's exercise of judgment in pursuit of an objective or outcome with perceived public benefits.[21] As this description indicates, policymaking encompasses an extremely wide category of government activity and represents a significant amount of authority. Policy choices include everything from enacting criminal laws and prescribing sentences to setting standards for air and water quality to granting licenses to hunt or fish on public lands.[22] The power to make such choices for an entire community—or in the case of the federal government, the nation as a whole—must be allocated carefully and in such a way as to protect the public from government overreach. Our constitutional democracy derives its ultimate authority from the people themselves, and thus the sovereignty of the people to govern themselves remains paramount.[23] One way to articulate the role

21. The Pennsylvania Supreme Court has employed the following dictionary definition of policymaking as:

> [T]he act of elaborating policy . . . and "policy" is defined as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions" or "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body."

In re Stout, 559 A.2d 489, 495–96 (Pa. 1989) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 910 (1985)).

22. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 377–78 (1989) (explaining that the work of the United States Sentencing Commission includes "the need to exercise judgment on matters of policy" involving criminal sentencing).

23. As Chief Justice Marshall explained in *McCulloch v. Maryland*:

> The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic

of popular sovereignty in government is the concept of the legitimacy of government conduct. In the broadest terms, government conduct is legitimate when it displays the characteristics necessary to justify fidelity from those it governs.[24] This in turn allows legitimacy to serve as a check against government overreach by preserving connections between government and the governed.

Despite its overarching relevance in a constitutional democracy, different public actors trigger different legitimacy issues. When the courts decide cases over which they have been granted jurisdiction, they are acting legitimately because they are exercising the core "judicial power" assigned to them by the ultimate exercise of popular sovereignty in American law, the Constitution.[25] Similarly, when the President appoints a cabinet member who negotiates a treaty, the legitimacy of that action is not in question because it comes with a constitutional imprimatur.[26] Congress can pursue its policy directives through legislation enacted via the bicameralism and presentment framework laid out at the Founding.[27] This approach is unquestionably legitimate, as it is governed by rules laid out explicitly in the Constitution and is fully transparent and subject to correction through electoral politics; votes for unpopular policies can be curtailed or reversed by the electorate choosing a new member of Congress to carry out their wishes.[28]

Notwithstanding its power to legislate directly, Congress has often chosen—especially since the New Deal—to use its legislative power to set policy indirectly, by creating administrative agencies to carry out its statutory prerogatives. In fact, administrative agencies are often empowered to employ a full range of quasi-government functions—legislative, executive, and judicial—on the basis of their superior expertise, efficiency, or other institutional advantages over the traditional constitutional actors.[29]

> tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments.

17 U.S. (1 Wheat) 316, 403–04 (1819); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816) ("The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'").

24. According to Habermas, "'[l]egitimacy means that there are good arguments for a political order's claim to be recognized as right and just . . . . *Legitimacy means a political order's worthiness to be recognized*.'" Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1285 (1984) (quoting J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (T. McCarthy trans. 1979)).

25. U.S. CONST. art. III, § 1.

26. U.S. CONST. art. II, § 2, cl. 2.

27. U.S. CONST. art. I, § 7, cl. 2.

28. This is, of course, a generalization. The realities of political gerrymandering and campaign finance law unquestionably complicate the simple call and response arrangement described here between legislators and their constituents. This oversimplification of the political checks on congressional policymaking power is nevertheless useful as a point of contrast between the public's interaction and influence over its elected representatives versus its role in administrative government, which will occupy the bulk of the following discussion.

29. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . . ."); *id.* at 625–26 ("[T]he act . . . demonstrate[s] the congressional

It is no surprise that this arrangement triggers a wide array of important questions about the role of agencies in our constitutional democracy. Chief among those questions is how we reconcile agencies' policymaking function with the fact that they are inherently insulated from the electoral process, the primary constitutional check on the political branches.[30] One way to tackle that issue is to consider the legitimacy of agency policymaking. The term "legitimacy" does not necessarily lend itself to a single definition, but as Professor David Arkush has explained, although "[o]bservers have not always made clear what is meant by the term legitimacy . . . the ordinary sense of the term often suffices, with its evocation of a set of characteristics related to public perceptions of legality, propriety, and efficacy."[31] Coupling this with the fact that agencies are not neatly within the legislative, executive, and judicial branches can cause skepticism about the structure of the administrative state.[32] Professor Arkush notes that "[t]he principal reason for concern over the legitimacy of the administrative process is that it often involves the exercise of 'substantial public power by unelected agency officials.'"[33]

Questions of administrative legitimacy are of course nothing new. Legislators, courts, bureaucrats, and commentators have been concerned with promoting and preserving the legitimacy of agency activity since the inception of the administrative state.[34] Yet as our administrative structures change, or as we discover more about them, it is important to measure them against the standards of legitimate government to promote compliance and avoid overreach.

III. WHAT ARE SECRET AGENCY POLICIES?

A. Landscape

An examination of "secret" government policies first raises the question of which forms of policymaking we are talking about.[35] While there may be lots of

intent to create a body of experts . . . which shall be independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.").

30. This topic has, not surprisingly, been a frequent and well-covered topic in administrative law scholarship. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (contending that administrative government is incompatible with American constitutionalism); ADRIAN VERMEULE, LAW'S ABNEGATION (2016) (arguing that the administrative state has been developed within the framework of American constitutional law); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the structure of the administrative state is inconsistent with the constitutional concept of separation of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (maintaining that agencies are compatible with our constitutional regime).

31. David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012) (footnote omitted).

32. *Id.* ("The lack of public accountability, as well as agencies' poor fit within the constitutional scheme that separates legislative, executive, and judicial powers, means that agency decisions run a higher risk than other government actions of being viewed as unlawful, unsound, or undemocratic.").

33. *Id.* (quoting Thomas O. Sargentich, *The Reform of the Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 393 (1984)).

34. *See, e.g.*, *id.*

35. Our discussion of secret policies of course occurs within the broader landscape of the literature on secret law. *See generally* ELIZABETH GOITEIN, BRENNAN CTR. FOR JUSTICE, THE NEW ERA OF SECRET LAW

strategic or other reasons for the government to desire secrecy in its policy determinations, not all policy choices are created equal. This is literally as well as figuratively true—policy determinations are made in a wide range of procedural regimes, some of which are more public than others. Judicial review of agency procedure can help ensure that certain conduct is made known outside of the government, but this again depends on both the ability of interested parties to discover when such conduct has in fact occurred as well as the procedures the agency must follow to engage in that conduct. In order to identify the universe of agency action that is most likely to raise concerns about secret policies, it is first necessary to examine the full range of choices an agency has in deciding how to advance a specific policy position. We must then evaluate which of those choices present agencies with the greatest opportunity and motivation to shield their decisions from public view.

Administrative policymaking occurs in countless forms and over the entire range of government action. Some agency policymaking vehicles are inherently incompatible with government secrecy. The most common of these vehicles is informal ("notice and comment") rulemaking. Agencies employ notice and comment rulemaking to issue legally binding regulations.[36] Agency regulations carry the force of law and are defined by the governing procedural statute, the Administrative Procedure Act ("APA"), as "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[37] Regulations most often apply to a wide range of affected individuals or entities and are designed to achieve a policy goal on an ongoing basis. The APA sets several criteria for their promulgation. It requires agencies to provide public notice of the proposed rule and to give those interested an opportunity to comment on the proposal.[38] After opportunity for public comment, the complete

(2016) (surveying examples of secret law and offering reform proposals); Christopher Kutz, *Secret Law and the Value of Publicity*, 22 RATIO JURIS 197 (2009) (describing secret law as theoretically and practically incongruent with a legitimate legal system); Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803 (2018) (identifying the nature of, and problems associated with, secret law and proposing reforms); Pozen, *supra* note 9 (distinguishing between "deep" and "shallow" secrets in the law and addressing the corresponding constitutional issues raised by those secrets); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241 (2016) (focusing on secret law in the national security context). This literature makes enormous contributions to our understanding of the existence and consequences of secret government conduct in general, and in the national security context more specifically. It does not, however, focus to the same degree as the current project on agency—as opposed to presidential or congressional—policymaking vehicles and the impact that secrecy may or may not have on their administrative legitimacy. Although the present definition of a secret policy may overlap with some of the conduct deemed secret law in the literature, the current discussion moves away from seeking to define or otherwise characterize certain non-public government conduct as "law" and instead addresses whether the agency's secret policy position affects that agency's legitimate—and complex—claim to authority in our representative democracy.

36. 5 U.S.C. § 553(b)–(c) (2018).

37. *Id.* § 551(4).

38. *Id.* § 553(b)–(c) ("(b) General notice of proposed rule making shall be published in the Federal Register . . . . (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .").

text of the rule must be published at least thirty days prior to it becoming effective.[39] The validity of the final rule also depends on the promulgating agency's public, written justification of it, including the agency's responses to any important issues raised during the public comment stage.[40] In short, if a regulation promulgated through the APA's notice and comment process were in any way kept secret, it would not just be subject to invalidation on multiple procedural grounds, it would not be a regulation at all.

Other examples of policy choices that are inherently not secretive are formal rulemaking and formal adjudication under the APA.[41] Although the statutory definitions of rulemaking and adjudication differ,[42] the procedural rules governing formal rulemaking and adjudication are, in all relevant ways here, identical.[43] Both require presentations of evidence on the record before a neutral arbiter, most often an administrative law judge ("ALJ").[44] Any decision by either the ALJ or the agency itself, which has power to review the ALJ's decision de novo, must also be made publicly and supported by the record in the proceeding.[45] Any procedural defects in the promulgation of agency decisions under formal rulemaking or adjudication are reviewable de novo by Article III judges, who owe no deference to the agency's interpretation of the APA's requirements.[46] Like regulations promulgated through the APA's notice and comment procedure, the results of formal rulemaking and adjudication are required by law to be made and disseminated publicly.[47] Any attempt by the government to keep

39. *Id.* § 553(d) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . . .").

40. This justification appears primarily in the "concise general statement of their basis and purpose" that is required to accompany the publication of a final rule. *Id.* § 553(c). Despite its name, and due to the rigors of judicial review, the required justification is rarely either "concise" or "general."

> We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that . . . the "concise general statement of . . . basis and purpose" . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); CHARLES H. KOCH, JR. ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 221 (7th ed. 2015) (explaining that the agency's concise general statement under § 553(c) of the APA "is rarely what we would think of as 'concise.' The agency must explain itself fully").

41. 5 U.S.C. §§ 554, 556, 557 (describing the APA requirements for formal and informal rulemaking).

42. The definitions provision of the APA defines adjudication as the "agency process for formulation of an order," and an "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* § 551(6)–(7).

43. Both formal rulemaking and formal adjudication are governed by the same sections of the APA. *Id.* §§ 556–557.

44. *Id.* § 3105 (governing the appointment of Administrative Law Judges); 29 C.F.R. § 102.35 (2018) (describing the duties and powers of Administrative Law Judges).

45. 5 U.S.C. §§ 552(a)(2)(A), 557(b)–(c).

46. This is by contrast to the deference given to agency determinations by federal courts on judicial review. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (outlining the two-step process by which courts review legally binding agency interpretations of the statutes they administer). Because the agency is a policymaking entity, its internal review remains entirely within its own purview until it is either confirmed by the agency head—the official, publicly accountable policymaker within the agency—or the agency head expressly forgoes the opportunity to review the decision.

47. 5 U.S.C. §§ 552(a)(2)(A), 557(c)(3).

those results secret would be judicially reversible, thereby making it unnecessary—and indeed nonsensical—to consider whether such secrecy would be legitimate. Moreover, since both formal rulemaking and adjudication are designed to communicate legally binding rules and standards to the regulated public, it would not only defeat the purpose of engaging in those processes if the regulated public were never made aware of them but also could raise constitutional due process issues if enforcement of those rules or standards were not accompanied by adequate notice.[48]

The broadest category of legally binding administrative policy determinations is informal adjudication.[49] By contrast with informal rulemaking, which is a structured, relatively uniform procedure for promulgating binding regulations under the APA,[50] informal adjudication is a catch-all of sorts for agency activities that have the force of law but do not fit under the umbrella of either notice and comment rulemaking or formal rulemaking or adjudication. For example, agency determinations about where to locate a federal highway or whether to allow an individual to hunt or fish on federal land are both informal adjudications.[51] They involve a final agency decision that is legally binding but is not a regulation because it is not a "statement of general . . . applicability and future effect."[52] By contrast, informal adjudications—and in fact all administrative adjudications—deal with the rights and obligations of specific actors, as determined by reference to facts particular to them and their circumstances.[53] Informal adjudications are different from formal adjudication under the APA because they include far fewer procedural requirements.[54] Whereas formal adjudications are often described as "trial-like,"[55] informal adjudications are far less structured

48. A major distinction between rulemaking and adjudication is that adjudication triggers due process protections for the affected parties. *Compare* Londoner v. City and Cty. of Denver, 210 U.S. 373, 378 (1908) (holding that individualized property tax assessments for road repairs were adjudications requiring due process protections), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that a city-wide increase in property taxes was a legislative act that did not trigger due process protections for those impacted). Whether an adjudication violates due process depends on the scope of the notice and opportunity to be heard available to the affected party. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (articulating the balancing test for determining if the government has provided adequate procedural protections under the Due Process Clause).

49. Informal adjudication is not a statutory term in the sense that the APA does not mention it explicitly. The Supreme Court has read § 555 of the APA as the relevant procedural guidelines for agency action that is not associated with rulemaking and that is not statutorily required to be treated as formal under §§ 556 and 557. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) (describing "informal adjudication, the minimal requirements for which are set forth in the APA, 5 U.S.C. § 555").

50. 5 U.S.C. § 553(c) (outlining the notice and comment process for informal rulemaking).

51. *See, e.g.*, Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 415 (1971) (treating a decision by the Secretary of Transportation to approve federal funds to route a highway through a municipal park in Memphis, Tennessee as an informal adjudication).

52. 5 U.S.C. § 551(4) (defining "rule").

53. The rule-order distinction is a common issue in administrative law and is often articulated by reference to the *Londoner-BiMetallic* distinction. *See* cases cited *supra* note 48.

54. 5 U.S.C. §§ 555–557 (providing statutory guidance for informal and formal adjudication, respectively).

55. KOCH, JR. ET AL., *supra* note 40, at 269 (describing the difference between "trial like" formal adjudication and informal adjudication under the APA, which "would bear little relationship to formal trial-type process").

and consistent.[56] They can take on a staggering array of forms and can cover a huge range of policy determinations.

Nevertheless, because informal adjudications result in legally binding determinations of the rights and obligations of specific individuals, it would be wholly counterproductive to withhold those determinations from the participants. Moreover, the parties to agency adjudications—informal as well as formal—are entitled to statutory and due process protections, including notice of the government's conduct.[57] As a result, the outcome of informal agency adjudications must be disclosed to at least the participants directly involved, rendering any agency attempts at secrecy in its informal adjudications prohibited by both law and common sense.[58]

In addition to the four traditional methods of agency action—formal and informal adjudications and formal and informal rulemaking—there are several other ways for agencies to exercise their policymaking authority that do not come with such explicit procedural requirements. Agencies very often issue what are called "interpretive rules."[59] Interpretive rules look and act much like regulations promulgated through notice and comment or formal rulemaking (otherwise known as "legislative rules");[60] they represent the agency's official position on an issue delegated to it by statute.[61] Unlike legislative rules, however, interpretive rules are not required to go through the same processes—they can be issued

56. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 123 (2003) (noting disdainfully that "informal adjudication is the APA's residual category, the undefined artifact of the statute's simultaneous distinctions between rulemaking and adjudication on one hand, and between formal and informal action on the other").

57. 5 U.S.C. § 552(a)(2)(A) (requiring agencies to make "orders, made in the adjudication of cases" publicly available); *see also* cases cited *supra* note 48 (discussing due process requirements for administrative orders).

58. 5 U.S.C. § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. . . . [T]he notice shall be accompanied by a brief statement of the grounds for denial.").

59. *Id.* § 553(b)(3)(A).

60. *See, e.g.*, Mendoza v. Perez, 754 F.3d 1002, 1021 (D.C. Cir. 2014) ("This court has generally referred to the category of rules to which the notice and comment requirements do apply as 'legislative rules' or, sometimes, 'substantive rules.'").

61. Interpretive rules can be thought of as an agency's "official" position despite the fact that they are not legally binding because any deviation by the agency from a position in an interpretive rule would presumably require more justification on judicial review. Application of an existing interpretive rule would have to be justified as either a reasonable application of an ambiguous statute under *Chevron* or as not arbitrary or capricious under the judicial review provisions of the APA. *See* 5 U.S.C. § 706(2)–(2)(A) (2018) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (instructing courts to defer to reasonable agency interpretations of ambiguous statutory provision). If an agency were to reach a conclusion that was inconsistent with an existing interpretive rule, however, it would not only be required to demonstrate that its *substantive* position was neither unreasonable nor arbitrary, it would likely also be required to explain why its *change* in position was neither of those. As the Supreme Court recently explained in *Perez v. Mortgage Bankers Ass'n*:

> The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations,* and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters."

directly from the agency without any third-party involvement.[62] The trade-off for agencies choosing to issue interpretive rules is that interpretive rules are not directly enforceable because they do not carry the force of law.[63] That is not to say that interpretive rules have no legal consequences. The presence of an interpretive rule can support an agency's claim to judicial deference in its interpretation of the underlying statute as well as serve as notice to affected parties of the agency's likely application of that statutory provision in particular circumstances.[64] As a practical matter, because interpretive rules are not legally enforceable, their primary utility for agencies is to provide the regulated community with notice as to how the agency will interpret a statute going forward without having to go through the costly procedural steps required of a legislative rule. Put another way, the value of interpretive rules lies in their ability to provide notice to those outside of the agency about an agency's policy position. Thus, there is no incentive for an agency to keep an interpretive rule secret; quite the opposite in fact. If agencies want to experience the benefits of their interpretation, both in terms of influencing private conduct and positioning themselves favorably for judicial review, it is imperative that interpretive rules be made public. A secret interpretive rule is neither usefully interpretive nor rule-like.

Another policymaking approach available to agencies is "general statements of policy."[65] Like interpretive rules, general policy statements are explicitly exempted from the APA's notice and comment requirements on the theory that they are not legally binding and therefore do not require the same fulsome public participation as obligatory regulations.[66] Also like interpretive rules, general policy statements have limited utility unless they are made public. They are designed to inform the public of a particular agency policy position and are thus useful as a more efficient source of agency communication to the public. To keep those policy statements secret would thus entirely defeat their purpose. The drafters of the APA clearly agreed. The Attorney General's Manual on the Administrative Procedure Act—perhaps the most authoritative and revealing piece of legislative history surrounding the APA—clearly anticipates that general statements

135 S. Ct. 1199, 1209 (2015) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). So while interpretive rules are not legally binding, they provide enough additional constraints on the issuing agency that the agency and everyone affected by the interpretive rule must take them seriously.

62. Interpretive rules are explicitly exempted from the notice and comment process by the APA. 5 U.S.C. § 553(b)(3)(A).

63. Enforcement of an agency's position in an interpretive rule would instead by styled as enforcement of a statutory provision, with the agency's view on the meaning of the statute being represented by the interpretive rule.

64. *Perez*, 135 S. Ct. at 1204 ("[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" (quoting Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 99 (1995))); U.S. v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that interpretive rules get *Skidmore* deference). *See also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 552 (2000) ("[I]interpretative rules have value primarily as a means of communicating to the agency's staff and affected members of the public the agency's current views with respect to the proper interpretation of its statutes and legislative rules." (citing Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944)).

65. 5 U.S.C. § 553(b)(3)(A).

66. *See id.*

of policy will be publicly disclosed. It describes such policy statements as early as 1947 as those "issued by an agency *to advise the public* prospectively of the manner in which the agency proposes to exercise a discretionary power."[67]

So where does this leave our discussion of secret policies? If the four traditional methods of agency policymaking all require public disclosure, and two primary sources of agency policy statements are likewise designed to inform the public of the agency's position, when does the prospect of secret policymaking even come up? The answer is at the boundaries of interpretive rules and guidance documents. Legally binding policy determinations cannot be kept secret. Legally binding adjudications of any sort must be made—at least with regard to the parties—public for constitutional and statutory reasons.[68] Similarly, legally binding rules occur within a procedural regime that requires disclosure. Interpretive rules and guidance documents are not subject to either due process constraints or statutory disclosure requirements, but each is motivated by a purpose—to inform the public of the agency's position—that is inherently inconsistent with government secrecy.

What is left is a variation on interpretive rules and guidance documents: agency policy decisions that are generally applicable and prospective, yet are not designed to inform the *public* of the agency's views. These internal government policies do not have the imprimatur of law because they do not meet the APA criteria for rulemaking, and they are meant only to communicate an agency's policy views within government. They do, however, have the goal of creating uniformity across a wide range of geographically and professionally diverse agency actors in order to advance the agency's position more effectively.

In order to do that, they must possess several defining characteristics. The policy statement under consideration must be *authoritative*—it must originate from a source within the agency that has sufficient power to issue policy statements that will compel compliance throughout the agency. The policy statement must be *definitive*—it must represent the agency's current, established position on the matter. This is not to say that the policy statement must meet the criteria for "final agency action" most commonly used in administrative law,[69] but rather that it must reflect the more pragmatic sense that agency positions that are still internally in the developmental stages have far greater reasons for remaining secret than those that are fully formed. The easiest, even if potentially underinclusive, way to ensure that agency conduct meets the definitiveness requirement is

67. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

68. U.S. CONST. amend. V; 5 U.S.C. § 552(a)(2)(A) (2018) (requiring agencies to make public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases").

69. In *Bennett v. Spear*, the Supreme Court defined "final agency action" under the APA in response to an inquiry about whether an agency action was judicially reviewable:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

520 U.S. 154, 177–78 (1997) (citations omitted).

to limit our inquiry to more formalized, written policy statements like internal agency memoranda and manuals. This has the dual benefit of excluding agency communications that are not meant to be as wide-ranging and influential as the type we mean to focus on as secret, as well as making relevant examples easier to identify, as policy positions that were intended to remain secret are more likely to surface if committed to writing.

Finally, in order to qualify as a secret policy for present purposes, an agency statement must be *consequential*—it must be sufficiently well developed and widely disseminated to achieve its agency-wide policy objective. This requirement excludes many agency determinations in specific cases or among only a subset of administrators. Personal conversations or meetings among agency leaders, for example, without more, are not likely to be communicated broadly enough within the agency to qualify as consequential. More formalized, yet narrower, directives about specific enforcement decisions or adjudications are likewise unlikely to come within the present inquiry. Whether committed to writing or not, it is simply too burdensome and unreasonable to expect agencies to disclose every policy position they take in every case they encounter.

As a larger proportion of the agencies' policymaking apparatus is brought to bear on a particular issue, however, the analysis begins to shift. Exchanges between local supervisors and their immediate reports, for instance, are closer calls. Consider a supervisor in a regional office instructing employees on how to interpret a particular regulatory requirement. Whether this amounts to a consequential policy determination depends on the relative number of agency personnel impacted and the potential for the policy directive to affect the agency's overall policy position on a particular issue. If that regional office processes thousands of adjudications using that regulatory provision annually, or is the office primarily responsible for applying that provision, then concerns about its secrecy become more apparent. Alternatively, if a single regional supervisor has taken a position that is inconsistent with the agency's practice nationally, that position looks more like a deviation from agency policy that can be dealt with internally or on judicial review, rather than treating it as a separate category of agency action.

It is unrealistic to presume that an agency will make publicly available all of its policy conclusions. An agency memorandum or internal directive, however, circulated among a range of actors empowered to act on it and motivated to follow it by virtue of their job description, is another matter. Imagine a (hypothetical) scenario in which the FDA determined that obesity is the biggest health threat facing the country. Consistent with that determination, the Administrator circulated a policy memorandum throughout the agency instructing all relevant personnel to prioritize the testing and approval of obesity-related drugs for at least the next two years. The memorandum was not made public, however, because of feared political backlash from drug manufacturers and other interest groups. The memorandum is not a legally binding rule because it is not intended to be, and thus it need not comport with APA procedures for making it such. It

may qualify as an interpretive rule or guidance document because it is an articulation of an agency policy position regarding drug approvals, but the agency does not have the usual incentives to publicize it because it is not trying to influence industry conduct or inform the public; it is trying instead to change the nature of work within the agency to achieve a specific policy goal. It is authoritative, definitive, consequential, and undisclosed. It is a "secret policy."

But do such secret policies really exist? The answer is, at least on one level, relative. We of course cannot evaluate policies we do not know about, so the real issue is whether an agency developed a policy position in secret and intended, or successfully managed, to keep it a secret. There are several current examples of such policies within the federal bureaucracy,[70] but the larger point is that such policies are not only possible within the current disclosure regime but also are within agencies' institutional interest to promulgate. This combination of opportunity and incentive, when combined with the examples we already have, makes the issue of secret policies critical to understanding the modern administrative state.

Not all undisclosed agency positions constitute secret policies. Agencies and the individuals who lead them of course have their own perspectives on policy questions that are not only appropriate but desirable. We would not expect people within the agency to be personally indifferent to the issues affecting that agency's mission, nor would we want them to approach their work as if each issue were completely new to them. As Justice Scalia said with regard to judges:

> Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[71]

Having an agency comprised of people who have thought and formed opinions about their institutional mission—regardless of whether they have expressed those opinions publicly—is a sign of an effective policymaking body and is not something we want to discourage or deter through overly broad disclosure requirements.

But having an agency staffed with informed, opinionated policymakers is a far cry from the circulation of a private policy document setting standards throughout that agency. An agency will be incentivized to take the next step of memorializing a policy position that it nonetheless does not want to be made public because it is necessary to ensure the effective and uniform application of the position. In the modern administrative state, agency actors are spread out over wide geographic areas and in complex organizational structures.[72] Guaranteeing

70. *See* discussion *infra* Section III.C.

71. Republican Party of Minn. v. White, 536 U.S. 765, 778 (2002) (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

72. For a complete guide to the full range of federal administrative agencies, see the sourcebook published by the Administrative Conference of the United States. DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF

that every relevant actor will be aware of and comply with a single policy initiative requires clear and effective communication. The most obvious and cost-effective way of achieving that communication is through broadly circulated policy statements. So while informal, personal conversations and interactions may be the better way to keep a secret—and thus may be far more difficult to identify and evaluate from an administrative law perspective—modern agencies are likely to consistently find themselves in need of a way to convey policy positions to a large number of widely dispersed personnel quickly and efficiently. Internal, written policy statements are thus likely here to stay as the most effective way of achieving the desired policy outcome within the agency.

Even given agencies' theoretical use for secret policies, it may still seem at first glance that secret policies are likely to be infrequent, unimportant, or even more likely, justified as secret on other grounds. The remainder of this Article will address precisely that question—why, if at all, should we care about secret policies and how do they fit into our expectations and understandings of the administrative state?

B. Freedom of Information Act

The mere existence of secret policies does not necessarily trigger any concern. There are several grounds on which agencies may justify withholding even the type of broadly applicable, authoritative, definitive, and consequential policy directives described above. Most if not all of these justifications are represented in the exemptions outlined in the federal Freedom of Information Act ("FOIA").[73] While FOIA requests and disputes over government disclosure under the Act are only one context in which secret policies may arise,[74] FOIA's exemptions are a good starting point for mapping the range of agency reasons for withholding policy information. In fact, in its FOIA litigation with the National Association of Criminal Defense Lawyers ("NACDL") over the disclosure of the Blue Book, the DOJ advanced several arguments that, although based on

UNITED STATES EXECUTIVE AGENCIES (2013), https://www.acus.gov/publication/sourcebook-united-states-executive-agencies.

73. 5 U.S.C. § 552. It should be noted that FOIA requires agency disclosure of "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." *Id.* § 552(a)(2)(B). Despite its broad language, § 552(a)(2)(B)—which has been said "represents a strong congressional aversion to 'secret [agency] law,'" NLRB v. Sears Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967))—has in fact been interpreted by the Supreme Court and the Justice Department as excluding agency actions that have "no precedential value and do not constitute the working law of the agency." U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 16 (2009), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf (citing *Sears*, 421 U.S. at 153–54). This limited understanding of FOIA's disclosure requirements for statements of policy perpetuates the potential for, and existence of, secret policies. *See infra* Part III (outlining known examples of "secret policies").

74. Otherwise, secret agency policies could also be sought, for example, in litigation, in the notice and comment process, and as explanations for agency determinations such as licensing, just to name a few.

specific FOIA exemptions, have broader applicability in a theoretical discussion of the wisdom and permissibility of secret policies.[75]

FOIA lists nine categories of information that are exempted from disclosure.[76] They are roughly described as: (1) classified information pertaining to national security or foreign policy; (2) agency rules regarding its own personnel; (3) exemptions required by other statutes; (4) confidential trade secrets; (5) inter- or intra-agency memoranda or letters that would not be available in litigation (hereafter "privileged information"); (6) personnel and medical files; (7) information compiled for law enforcement purposes; (8) reports relating to the regulation or supervision of financial institutions; and (9) geological and geophysical information concerning wells.[77]

Several of these categories can be dismissed offhand as either not substantive (other statutory exemptions) or not particularly relevant to secret policies. Specific trade secrets, personnel or medical files, and geological or geophysical information are not likely to be included in agency policy statements. Administrators seeking to normalize agency activity going forward should not find themselves needing to share such information with staff members in order to achieve that purpose. To the extent it is relevant, third-party privacy interests may well justify withholding policy documents that include individuals' proprietary or personal information. The legislative history of the geophysical information exemption, for instance, explains that it is designed to prevent natural resource speculators from benefitting from the work of "the oil and gas exploration and extraction industry."[78] Like the trade secret and medical record exemptions, this exemption seeks to protect third-party information from disclosure to the public.[79] In the unlikely event that such information would find itself in an agency policy statement, its presence could be a valid basis for keeping that statement a secret, at least to the extent that redaction was not a viable alternative.

The exemptions that more directly implicate secret policies are those related to national security, agency personnel, law enforcement purposes, privileged information, and financial institutions. The arguments for withholding these categories of information vary depending on the scope of, and justification for, each category. National security, for instance, is a relatively easy case. Information that triggers concerns about the nation's safety or relations with other countries—including information relating to the military—is inherently sensitive and thus merits, by virtue of its substantive content, a conservative approach to its disclosure. This substantive sensitivity encompasses all forms of the covered material; national security information is equally sensitive when communicated between two individuals as it is when published in an agency-wide document

75. S*ee infra* notes 113–19 and accompanying text (discussing the government's litigation position in the Blue Book litigation).

76. 5 U.S.C. § 552(b).

77. *Id.* § 552(b)(1)–(9).

78. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 9, at 1 (2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption9.pdf.

79. *Id.*

setting a general policy position. Secret policies involving such information have a strong argument for remaining secret on the basis of their subject matter alone, regardless of form.

The closest analog to national security information under FOIA is information collected for law enforcement purposes. Like national security information, the law enforcement exemption is based on the material's specific subject matter. Unlike national security information, however, FOIA delineates the specific types of law-enforcement-related information that it protects. Much of that information is designed to protect individual rights and the viability of specific enforcement proceedings, but one subset includes information that could disclose techniques and procedures for law enforcement investigations. This category could be—and in fact has been—used to protect from disclosure agency action that also qualifies as a secret policy.[80] Parsing the meaning of information relating to law enforcement investigations reveals the importance of considering where secret policies fit into our administrative landscape. There is certainly a strong argument for protecting information that is specific to a particular investigation. Revealing law enforcement techniques in a single case or group of cases could compromise the agency's ability to fulfill its mission by giving investigated parties additional insight into how to frustrate the investigation. It could also put pressure on agencies to accelerate their investigative or prosecutorial efforts before their investigative choices could be revealed to the public. This attempt to avoid having their efforts disrupted could in turn lead to hasty decisions by the agency and reputational damage to those investigated that could have been avoided with more a deliberate process, potentially burdening law enforcement without providing any information about the agency's long-term policy positions or goals. Where an agency policy statement or position does reflect generally applicable, longer-term goals and originates from a sufficiently authoritative source to influence a wide range of agency conduct, the question of whether secrecy is merited becomes a much closer one. When does an agency decision about its investigative priorities, for instance, or its views of best practices for vetting information provided by the public become broadly applicable enough that it represents not only a secret policy, but one whose secrecy can no longer be defended? The line drawing exercise is admittedly difficult and context-specific; for present purposes, it is enough to conclude that the question is worth asking.

A similar, but less compelling for agency secrecy purposes, category of protected information is that relating to internal agency personnel matters.[81] Like with law enforcement materials, the agency personnel category likely includes information that is specific to individuals or that is of little to no consequence to the governed public. Requiring agencies to go to the trouble of producing this material on demand could lead to unnecessary burden and expense at best or, at

80. *See infra* notes 113–19 and accompanying text (discussing the Blue Book Litigation).

81. 5 U.S.C. § 552(b)(2) (protecting records "related solely to the internal personnel rules and practices of an agency").

worst, divulging sensitive information about individuals that is of little or no public interest.[82]

On the other hand, personnel information at the level of a secret policy could very well have public relevance and could trigger a set of issues that make disclosure much more desirable, even necessary. Even such a narrow view of proper withholding of personal records could have implications for administrative legitimacy. Imagine a hiring policy that reflects the agency's views on incentivizing early retirement to cut costs. If promulgated widely enough that it had a broad impact across government, it could impact agency readiness and expertise as more experienced employees were lost to attrition and replaced, if at all, with cheaper, less experienced staff. While this position may be completely justifiable, the fact that it is articulated by agency leadership and is meant to be applied widely makes it far more relevant to the regulated public than a more focused or less far-reaching personnel policy.

The privileged materials exception can be viewed the same way. Litigation privilege is meant to encourage candor between witnesses and people with whom they should feel secure, like their lawyer, clergy, or spouse.[83] It is targeted at specific communications that meet specific conditions regarding subject matter and confidentiality.[84] The work-product doctrine, which functions similarly to a traditional privilege,[85] protects the thought processes and strategic choices made by a party in anticipation of litigation, much like the law enforcement materials exemption that protects the investigative techniques and prosecutorial choices made in a given proceeding.[86] In the broader agency policymaking context, these litigation privileges capture agency decisions that are likewise targeted at particular parties and disputes. The fact that an agency may fairly "anticipate" litigation in response to nearly every final action it takes cannot exempt every communication associated with those actions from disclosure. Nor should it. Unlike parties to a lawsuit, agencies are public servants. Their determination to keep

82. Dep't of the Air Force v. Rose, 425 U.S. 352, 369–70 (1976) (interpreting FOIA exemption 2 as protecting "matter[s] in which the public could not reasonably be expected to have an interest"). Since the Court's decision in *Rose*, it responded to lower court attempts to expand exemption 2 by interpreting it even more narrowly, only permitting the government to withhold information that is internal and relates solely to agency personnel practices, or as the DOJ puts it, "human resource matters"—records that "concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits." U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 2, at 10, 12–13 (2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption2.pdf (quoting Milner v. Dep't of the Navy, 562 U.S. 562, 570 (2011)).

83. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (describing the purpose of attorney-client privilege "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); Trammel v. United States, 445 U.S. 40 (1980) (applying spousal privilege); *In re* Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990) (recognizing communicant-clergy privilege).

84. *Upjohn*, 449 U.S. at 389.

85. The work-product doctrine does not fit within the definition of common law privileges protected by FED. R. EVID. 501 but has been codified separately in FED. R. CIV. P. 26(b)(3) and cross-referenced in FED. R. EVID. 502.

86. 5 U.S.C. § 552(b)(7).

information from the public must be held to a higher standard than the same determination by private actors. The machinations within agencies are not taken solely to advance the agencies' own interest, but ostensibly for a broader public benefit. This is why agencies face broader disclosure requirements than their private counterparts, and in turn why their ability to assert litigation privileges like the attorney-client privilege or work-product doctrine should be looked at more conservatively than with traditional parties to a suit.

But even if we do not treat agencies differently than private parties with regard to litigation privileges, it is not hard to imagine an agency policy document that could impact agency litigation and yet still fall outside of the exemption. A simple internal guidance document regarding the agency's views on how to interpret a particular regulatory provision could qualify as work product if requested as part of a litigation, but would be a non-exempt secret policy without the prospect of a pending suit.[87] A general counsel's office internal training document on deposition techniques and civil discovery practice for new attorneys could qualify under our definition of secret policies and, although it may seem like a close case, there is a powerful argument that those training materials are neither in anticipation of litigation under the work-product doctrine, nor are they for the purpose of giving legal advice under the attorney-client privilege.

The litigation privilege most directly aimed at secret policies is the deliberative process privilege. The deliberative process privilege protects the confidentiality of internal agency communications done in the process of formulating policy conclusions.[88] The deliberative process privilege is designed to protect agencies from disclosing their internal positions until they are ready for public consumption.[89] This promotes candor and the exchange of ideas within the agency; the alternative would be a chilling effect that could badly hamper agencies' ability to exercise their collective wisdom and expertise.[90] While it may seem like the deliberative process privilege is precisely the vehicle to answer the question of whether internal, generally applicable policy statements must be made public, it is important to remember that final agency actions are not protected by the privilege.[91] So, under our working definition of secret policies—final, generally applicable, widely disseminated, and prospective statements of

87. The work-product calculation, in particular what constitutes a document produced "in anticipation of litigation," is of course more complex. 27 C.J.S. *Discovery* § 124 (2018) ("The determination of whether a document was prepared in anticipation of litigation or in the ordinary course of business is a factual one, which is examined on a case-by-case basis."). The operative point here is that there exists a class of secret policies that may be relevant to agency litigation, yet do not fall under any litigation privilege.

88. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 5, at 13 (2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf.

89. The Supreme Court described as the purpose of the deliberative process privilege to "prevent injury to the quality of agency decisions." *Id.* (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).

90. *Id.* Listing the three purposes of the deliberative process privilege as:

> (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies . . . and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

Id.

91. *Id.* at 55.

agency policy positions—deliberative process protections, while conceptually relevant, do not apply.

The final category of FOIA protections deal explicitly with government records pertaining to "evaluations of financial institutions" by agencies "responsible for the regulation or supervision of [those] institutions."[92] The purpose of the exemption is "to safeguard public confidence . . . which could be undermined by candid evaluations of financial institutions" and "to ensure that [banks] continue to cooperate" with the relevant agencies "without fear that their confidential information will be disclosed."[93] The purpose and language of this exemption is aimed directly at ex post agency reviews of the performance and health of financial institutions. Those reviews are likely to be specific to the circumstances surrounding a specific institution and will be largely backward-looking. They do not include—at least directly—agency records reflecting the type of generally applicable, prospective policy judgments that are of interest here. Although such policy determinations may result from the reports covered by this exemption, those policy decisions are not likely to satisfy the same goals as the exemption. An agency's policy determinations about the financial industry should not be as likely to trigger a run on a specific bank or to dissuade a specific bank from cooperating with regulators as disclosing an agency evaluation of that institution's past performance would. In any event, to the extent that a policy determination based on such a report would potentially trigger drastic public response, that is grounds for either a different secrecy rationale or for disclosure, if the issue is broad and serious enough to require disclosure so the public can protect itself.

C. Practical Application

Examples of secret policies are by definition elusive. If an agency is not inclined to divulge a policy position, how are we to confirm that it has engaged in internal decision-making that is sufficiently authoritative, definitive, and consequential to qualify as a secret policy under our current analysis? The theoretical answer, discussed in the previous Section, is that because agencies can derive benefits from setting internal policies that remain concealed from the public, they are likely to do so.[94] The descriptive response is that we have some real-life examples that show, in varying degrees, that such policies are in fact present and in force within federal agencies.

92. 5 U.S.C. § 552(b)(8) (2018); Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135–36 (D.D.C. 2003).

93. *Nat'l Cmty.*, 290 F. Supp. 2d at 136.

94. *See* discussion *supra* Section III.A, B.

1. The DACA Policy Manual

The least-developed example of a secret policy in operation is the ongoing dispute over the DHS's DACA Policy Manual. DACA is described by the current administration as an "administrative program that permitted certain individuals who came to the United States as juveniles and meet several criteria—including lacking any current lawful immigration status—to request consideration of deferred action [from deportation] for a period of two years, subject to renewal, and eligibility for work authorization."[95] It was initiated by DHS Secretary Janet Napolitano in response to congressional failure to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act.[96] In her June 2012 memo initiating the program, Secretary Napolitano laid out the criteria necessary to be granted deferred action and explained that the program was designed to "ensure that our [immigration] enforcement resources are not expended on these low priority cases" such as "certain young people who were brought to this country as children and know only this country as home."[97] By September 13, 2012, DHS had promulgated a confidential "Standard Operating Procedures" manual—referred to here as the DACA Policy Manual—to guide agency discretion in implementing the program.[98] The Manual meets our criteria for a secret policy. It was authoritative in that it carried the imprimatur of the Secretary. It was definitive because it included no indication that it was a work in progress or the subject of ongoing agency deliberations. Finally, it was consequential because it clearly intended to set procedures for how and when DHS would employ the DACA program to defer immigration enforcement against eligible individuals.

Moreover, the agency clearly identified the document as confidential and not for public consumption.[99] Although the 2012 and 2013 versions of the Manual were ultimately made public, the document itself made clear that the agency

95. *Deferred Action for Childhood Arrivals (DACA)*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/topic/deferred-action-childhood-arrivals-daca (last visited Jan. 12, 2019).

96. DREAM Act of 2011, S. 952, 112th Cong. (2011).

97. Memorandum from Janet Napolitano, Sec'y of Homeland Sec. to David V. Aguilar, Acting Comm'r U.S. Customs and Border Prot., Alejandro Mavorkas, Dir. U.S. Citizenship and Immigration Serv., and John Morton, Dir. U.S. Immigration and Serv., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

98. WADHIA, *supra* note 3.

99. *See id.* (making available the 2012 DHS DACA Manual). The 2012 version of the Manual included the following instructions:

> This document is FOR OFFICIAL USE ONLY. It contains information that may be exempt from public release under the Freedom of Information Act (5 U.S.C. § 552). This document is to be controlled, handled, transmitted, distributed, and disposed of in accordance with DHS policy relating to Sensitive But Unclassified (SBU) information, and is not to be released to the public or other personnel who do not have a valid "need-to-know" basis without prior approval from the originator.

Id. at 2. Those same instructions also appeared in the 2013 version of the same DHS document. *See* U.S. DEP'T OF HOMELAND SEC., NATIONAL STANDARD OPERATING PROCEDURES (SOP): DEFERRED ACTION FOR CHILDHOOD ARRIVALS *passim* (DACA) (2013), https://cliniclegal.org/sites/default/files/attachments/daca_sop_4-4-13.pdf.

planned, at least initially, to keep it from public view.[100] This position has become even more entrenched under the current administration. In the summer of 2017, as part of ongoing litigation resulting from the "government's May decisions to summarily and without notice revoke the DACA status" of Jessica Colotl, a paralegal and college graduate whose detention by campus police in 2010 "prompted federal immigration authorities to incarcerate [her] . . . and initiate deportation proceedings," federal authorities refused to make public the current—and, presumably, amended—version of the Manual.[101]

Regardless of how the dispute over whether the current incarnation of the DACA Policy Manual should be made public turns out, its history reveals some important truths about secret policies. First, absent outside pressures, agencies may default to a conservative approach to transparency. Even though the Obama Administration ultimately published multiple versions of the DACA Policy Manual, the document was clearly marked as confidential.[102] This could be the product of agency lawyers being overly zealous in wanting to protect the possibility of confidentiality by marking the document in advance, but at minimum still suggests that, absent a FOIA request or other public interest in finding out about the policy (a tough task given that it was secret to begin with), the agency will approach the issue as if the policy should remain secret. Second, even though one administration may be comfortable publicizing a policy document, new leadership may choose to reinstate confidentiality. This is what appears to have happened in the ongoing dispute over the DACA Policy Manual,[103] and confirms the general attractiveness of secret policies to agencies, even when the public is already aware that some version of a policy statement exists. Lastly, while the government's current reasons for protecting the DACA Policy Manual are not clear, whatever reasons there are appear to stretch beyond the adjudication of individual cases. In the most recent conflict over disclosure of the Manual, the document's contents were made at least partially available to the potential deportee.[104] The more active dispute is over whether the general public is entitled to see the Manual. This broader issue, which includes considerations beyond any specific immigration case, reflects the agency's interest in maintaining confidentiality for reasons outside of individual prosecutions. All three of these lessons help confirm the existence and continuing relevance of secret policies. The greatest weakness of the DACA Policy Manual example is that it does not offer any judicial guidance on the matter. The next example addresses that problem.

100. *See id.*

101. McDonald, *supra* note 2. Jessica Colotl's legal battle to remain in the country after her detention is said to have "inspired President Barack Obama's creation of the DACA program." *Id.*

102. WADHIA, *supra* note 3; *see also* discussion *supra* note 99.

103. McDonald, *supra* note 2.

104. *Id.*

2. Criminal Discovery Policy—DOJ Blue Book Litigation

An example of a secret policy that has been largely exposed as existing, although the policy itself remains secret, is the Blue Book—an internal agency publication pertaining to discovery practices at the DOJ. The recent litigation seeking disclosure of the Blue Book provides significant insight into the government's choices not to reveal a secret policy.

Senator Theodore "Ted" Stevens, a sitting Senator in the height of a re-election campaign, was tried on charges of public corruption. Following the trial, it was revealed that exculpatory evidence had not been provided to the defense.[105] The judge presiding over the trial, Emmet G. Sullivan, ordered an investigation pertaining to discovery violations.[106] Judge Sullivan appointed attorney Henry F. Schuelke III as Special Counsel for the investigation.[107] Schuelke provided the court with a 525-page report ("Schuelke Report") finding that the DOJ had failed to provide "significant exculpatory evidence" to the defense.[108] The government eventually moved to dismiss the *Stevens* case, and the district court set aside the verdict.[109] This finding set the stage for proposed Senate legislation to statutorily require the DOJ to provide discovery to those accused of crimes.[110]

The DOJ's response to this proposed legislation was that existing, internal DOJ policy rectified the problems in the *Stevens* case.[111] In a statement to the Senate Judiciary Committee, the DOJ outlined the steps that it had taken to correct past deficiencies.[112] These steps included a host of reforms such as a New Prosecutor Boot Camp to educate new attorneys on their obligations under the Supreme Court's decisions in *Brady v. Maryland*[113] and *Giglio v. United States*.[114] The DOJ also stated that the Blue Book was electronically available on the desktop of prosecutors nationwide and that the Blue Book "comprehensively

105. "The investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Steven's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order dated April 7, 2009, *In re* Special Proceedings, Misc. No. 09-0198 (D.D.C. March 15, 2012), http://legaltimes.typepad.com/files/stevens_report.pdf (commonly known as the "Schuelke Report").

106. *Id.* at 1.

107. *Id.*

108. *Id.* at 1.

109. United States v. Stevens, No. 08-cr-231, 2009 WL 6525926, at *1–2 (D.D.C. Apr. 7, 2009). *See generally* ROB CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS (2014) (providing a detailed account by Senator Steven's attorney of the pre-trial, trial, and post-trial occurrences in this case).

110. *See* Opening Brief of Appellant at 3–4, Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 844 F.3d 246 (D.C. Cir. 2016) (No. 15-5051) [hereinafter Opening Brief] (discussing the introduction of the Fairness in Disclosure of Evidence Act).

111. *Id.* at 4.

112. *See Statement for the Record: Hearing on the Special Counsel's Report on the Prosecution of Sen. Ted Stevens Before the S. Comm. on the Judiciary*, 112th Cong. 3–5 (2012) [hereinafter *Special Counsel's Report Hearing*], https://www.judiciary.senate.gov/imo/media/doc/12-3-28SchuelkeTestimony.pdf (statement of the DOJ).

113. 373 U.S. 83 (1963).

114. 405 U.S. 150 (1972); *Special Counsel's Report Hearing*, *supra* note 112, at 3.

covers the law, policy, and practice of prosecutors' disclosure obligations."[115] It is this mention of the Blue Book that alerted the NACDL to the DOJ's new, secret discovery policy.[116] And it was shortly thereafter that the NACDL filed its FOIA request for a copy of the Blue Book.[117] The DOJ denied the FOIA request, resulting in NACDL filing a lawsuit to compel access to the Blue Book.

In *National Association of Criminal Defense Lawyers v. United States DOJ Executive Office for United States Attorneys* (the "Blue Book Litigation"),[118] the issue was whether criminal defense attorneys and the public generally should be granted access to the Blue Book.[119] The Blue Book, according to the court, "contains information and advice for prosecutors about conducting discovery in their cases, including guidance about the government's various obligations to provide discovery to defendants."[120] The DOJ's opposition was initially premised on the Blue Book being protected work product within FOIA's exemption 5, "which exempts from disclosure certain agency records that would be privileged from discovery in a lawsuit with the agency,"[121] and "as a document compiled for law enforcement purposes" under FOIA exemption 7(E).[122]

The district court found that the Blue Book was exempt work product.[123] The D.C. Circuit affirmed, but in an amended decision remanded the case to the district court to assess "whether the Blue Book also contains non-exempt policy statements amenable to reasonable segregation from the privileged work product."[124] The district court conducted an in camera review to determine if there

115. *See Special Counsel's Report Hearing*, *supra* note 112, at 4.

116. The proposed bill, Fairness in Disclosure of Evidence Act, failed in Congress. *See* Opening Brief, *supra* note 110, at 4. The National Association of Criminal Defense Lawyers (NACDL) is a criminal defense organization with "10,000 direct members and 40,000 state, local, and international affiliate members" including public, private, and active-duty military defense counsel, judges, and law professors. Complaint for Declaratory & Injunctive Relief at 4, Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 75 F. Supp. 3d 552 (D.D.C. 2014) (No. 14-CV-269), *aff'd*, 844 F.3d 246 (D.C. Cir. 2016).

117. *See id.* at 2.

118. 844 F.3d 246 (D.C. Cir. 2016).

119. *Id.* at 249.

120. *Id.*

121. *Id.*; 5 U.S.C. § 552(b)(5) (2018).

122. 5 U.S.C. § 552(b)(7); Brief for Appellees at 25, Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 844 F.3d 246 (D.C. Cir. 2016) (No. 15-5051). More specifically, FOIA exemption 7(E) exempts:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information …(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7), (7)(E).

123. The district court reviewed the Blue Book in camera and granted DOJ's Summary Judgment Motion. Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 75 F. Supp. 3d 552, 556 (D.D.C. 2014), *aff'd*, 844 F.3d 246 (D.C. Cir. 2016).

124. *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 249. Judge Srinivasan's initial opinion focused on FOIA, rejecting the NACDL's arguments that "(i) the Blue Book was not prepared in anticipation of litigating a specific claim or case; (ii) the Blue Book principally serves a non-adversarial function; and (iii) the Blue Book's content resembles that of a neutral treatise." *Id.* at 252. In an amended opinion, however, the court remanded the case to consider whether the Blue Book also contained nonexempt policy statements that could be separated from the protected attorney work product and therefore produced to the NACDL. The court distinguished this case

are nonprivileged materials in the Blue Book that can be disclosed to the NACDL.[125] Eventually, the district court did unseal select pages of the Blue Book, but the pages contained "broad statements of the government's public criminal discovery policies."[126] The disclosed material basically replicated material already available in the publicly available U.S. Attorneys' Manual and Criminal Resource Manual.[127]

Although the Blue Book litigation raises many FOIA issues, the concern here pertains to the agency decision to resist the release of this information to the public and its effect on agency legitimacy. Both the DOJ and the D.C. Circuit distinguished the Blue Book from the U.S. Attorneys' Manual, which is available to the public.[128] The court's opinion recognized that the DOJ currently provides "general policy statements about federal prosecutors' discovery obligations,"[129] contrasting this with the Blue Book, which the court claimed "imparts litigation strategy to government lawyers."[130] In focusing on FOIA, the Court of Appeals failed to consider the reason for creation of the Blue Book or the extensive discovery violations occurring in United States courts.

In deference to the government's arguments, it is important to consider whether the Blue Book is merely superfluous and whether the fact that other sources of DOJ policy which are accessible to the public provides sufficient transparency and legitimacy. Currently accessible to the public are the U.S. Attorneys' Manual,[131] the Criminal Resource Manual,[132] as well as select memoranda issued by the Attorney General, the Deputy Attorney General, or other

from existing cases such as *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854 (D.C. Cir. 1980), which involved a memorandum that the court believed was not in anticipation of litigation. *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 253. The D.C. Circuit also distinguished the Blue Book Litigation case from *Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998), which had found that a specific claim was not required for implicating the privilege. A concurring opinion was less content with the results in the case. Senior Circuit Judge Sentelle, joined by Senior Circuit Judge Edwards, expressed dismay with having to follow the precedent that mandated this decision. They believed that the limited interpretation of FOIA, specifically Exemption 5, was necessitated by *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992), a case they believed "was wrongly decided in the first instance." *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 258–59 (Sentelle, J., concurring).

125. *See* Memorandum Regarding Segregability at 13, Nat'l Assoc. of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 75 F. Supp. 3d 552 (D.D.C. 2017) (No. 14-269); Defendants' Reply to Plaintiff's Response to Defendants' March 14, 2017 Supplemental Declaration at 2, Nat'l Assoc. of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 75 F. Supp. 3d 552 (D.D.C. 2017) (No. 14-269). Upon remand the DOJ did release Chapter One of the Blue Book.

126. Mike Scarcella, *Part of DOJ's Criminal Discovery 'Blue Book' Unsealed for the First Time*, NAT'L L.J. (Jan. 17, 2018), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/17/part-of-dojs-criminal-discovery-blue-book-unsealed-for-first-time/.

127. *Id.*

128. *Id.*

129. *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 257.

130. *Id.* at 256.

131. *See Justice Manual*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usam/united-states-attorneys-manual (last visited Jan. 12, 2019) (previously known as the United States Attorneys' Manual) [hereinafter *U.S. Attorneys' Manual*].

132. *See Criminal Resource Manual*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usam/criminal-resource-manual (last visited Jan. 12, 2019) [hereinafter *Criminal Resource Manual*].

officials within the DOJ.[133] These publicly accessible documents provide guidance regarding discovery matters within the DOJ.

The U.S. Attorneys' Manual includes the DOJ's main policy related to discovery, its "Policy Regarding Disclosure of Exculpatory and Impeachment Information."[134] This internal policy makes clear the importance of disclosing both exculpatory and impeachment evidence, the constitutional obligations necessitating this disclosure, and the need for disclosures beyond the constitutional requirements. For example, the U.S. Attorneys' Manual states that:

> Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence.[135]

The U.S. Attorneys' Manual's "Policy Regarding Disclosure of Exculpatory and Impeachment Information" also provides instruction for the timing of the disclosure, noting that "[e]xculpatory information must be disclosed reasonably promptly after it is discovered,"[136] and "[i]mpeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently."[137] Throughout this section of the U.S. Attorneys' Manual, one finds the laudatory goal of providing the defense with discovery balanced against concerns about witness safety and national security.[138] In addition to providing the framework for release of discovery material, the publicly accessible manual also calls for training of both new[139] and established prosecutors.[140]

Other policies in the U.S. Attorneys' Manual implicate the decision-making process by DOJ employees regarding the release to the defense of discovery material. For example, the "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("*Giglio* Policy"),"[141] advises Treasury investigative agencies on *Giglio*

133. *See, e.g.*, Memorandum from David W. Ogden, Deputy Att'y Gen., to the Heads of Department Litigating Components Handling Criminal Matters, Requirements for Office Discovery Policies in Criminal Matters (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-heads-department-litigating-components-handling-criminal-matters-all-united-states.

134. *See U.S. Attorneys' Manual*, *supra* note 131, § 9-5.001 – Policy Regarding Disclosure of Exculpatory and Impeachment Information.

135. *Id.* § 9-5.001(C).

136. *Id.* § 9-5.001(D)(1).

137. *Id.* § 9-5.001(D)(2).

138. *Id.* § 9-5.001(A).

139. "All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio*, and general disclosure obligations and policies." *Id.* § 9-5.001(E).

140. "All federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government's disclosure obligations and policies. This annual training shall be provided by the Office of Legal Education or, alternatively, any United States Attorney's Office or DOJ component." *Id.*

141. *See id.* § 9-5.100 – Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy").

witness impeachment policy.[142] Likewise, the U.S. Attorneys' Manual's policy on "Presentation of Exculpatory Evidence"[143] exceeds the relevant legal requirements by recognizing the Supreme Court's decision in *United States v. Williams* that found dismissal of a case unwarranted when the government failed to present exculpatory material to a grand jury.[144] The U.S. Attorneys' Manual, after noting this Supreme Court decision, states:

> It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment [against them].[145]

Although the U.S. Attorneys' Manual is publicly available, it is clearly noted that it is internal policy and that "[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[146] Cases that have attempted to use provisions in the Manual to demonstrate noncompliance with government policy are seldom successful.[147]

More detailed information regarding the discovery process is provided in the Criminal Resource Manual, which can be easily accessed online.[148] Section 165 of the Criminal Resource Manual is the memorandum of former Deputy Attorney General David W. Ogden on the subject of "Guidance for Prosecutors Regarding Criminal Discovery" ("Ogden Memo").[149] The Ogden Memo offers the discovery obligations of prosecutors under Supreme Court doctrine in *Brady*,[150] *Giglio*,[151] as well as the federal rules of criminal procedure and the Jencks Act.[152] The Criminal Resource Manual goes beyond the U.S. Attorneys' Manual in describing where prosecutors should look for discovery materials, what to review, how to conduct the review, and how to make and record disclosures.[153] The Criminal Resource Manual's inclusion of the Ogden Memo in full also allows prosecutors to see the rationales for why discovery is important.[154]

142. *Id.*

143. *Id.* § 9-11.233–Presentation of Exculpatory Evidence.

144. 504 U.S. 36 (1992).

145. *U.S. Attorney's Manual*, *supra* note 131, § 9-11.233–Presentation of Exculpatory Evidence.

146. *Id.* § 1-1.200 – Authority.

147. Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice*,*"* 13 CORNELL J. L. & PUB. POL'Y 167 (2004) (discussing the role of DOJ guidelines).

148. *See Criminal Resource Manual*, *supra* note 132.

149. *See id.* § 165–Guidance for Prosecutors Regarding Criminal Discovery.

150. Brady v. Maryland, 373 U.S. 83, 87 (1963).

151. Giglio v. United States, 405 U.S. 150, 154 (1972).

152. *See Criminal Resource Manual*, *supra* note 132, § 165 – Guidance for Prosecutors Regarding Criminal Discovery ("The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).").

153. *Id.*

154. The Ogden Memo states in the conclusion, "[b]y evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources,

The openness of the U.S. Attorneys' Manual and Criminal Resource Manual supports the government's claim that it has in fact provided discovery policy to the public. But if the government is saying there is no need to disclose additional items because of these existing web materials, one has to wonder the motivation of their persistence in hiding the Blue Book and whether the Blue Book matches the materials already currently available. If it in fact replicates the existing materials, then disclosure would not present problems. If it in fact offers new materials, then transparency necessitates the public seeing the materials in order to evaluate discrepancies and additions.[155]

3. FCA Memo

Another example of a secret policy that was recently revealed—albeit through less formal methods—is a memorandum of January 10, 2018, concerning the factors to be used by AUSAs in the FCA Memo.[156] In contrast to the Blue Book, the entire FCA Memo was revealed to, and printed by, the press.[157]

The FCA Memo is addressed to attorneys in the Civil Division of the DOJ and the AUSAs handling FCA cases. It articulates the DOJ's policy for evaluating the dismissal of FCA cases.[158] The FCA Memo commences by noting the "record increases in *qui tam* actions filed," "with annual totals approaching or exceeding 600 new matters."[159] It looks to re-evaluate the government's posture in these cases, specifically an effort to reduce its costs in cases that "lack substantial merit" or those that "might generate adverse decisions that affect the government's ability to enforce the FCA."[160] The FCA Memo notes that it is "intended to provide a general framework for evaluating when to seek dismissal under" the statutory provisions in order to "ensure a consistent approach to this issue across the Department."[161]

prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution." *Id.*

155. It is worth noting here that there was never a claim that the Blue Book includes material specific to an individual case. Although a court in a 2014 Oregon case is said to have released the Blue Book to defense counsel in a specific case, it limited counsel's use of the Blue Book, prohibited counsel from copying it, and kept it sealed from future examination. Scarcella, *supra* note 126, at 4. Rather, the Blue Book Litigation appears to support an argument that the Blue Book, although a generally applicable policy, is protected under the work-product doctrine. *Id.* We contend that as general policy offered to government agents for their review and adherence, the public has a claim to its disclosure. Further, the constitutional implications of this particular policy—a discovery policy that has due process implications—emphasize the importance of disclosure.

156. "The False Claims Act (FCA), 31 U.S.C. §§ 3729–33 was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army." U.S. DEP'T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER 1 (2011), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf. The FCA provides a cause of action for fraud by the government and includes a *qui tam* provision that empowers private whistleblowers—called "relators"—to bring suits on behalf of the United States in exchange for a portion of any damages recovered for the government. 31 U.S.C. § 3730(b)–(d) (2018).

157. Scarcella, *supra* note 126.

158. *See* FCA Memo, *supra* note 6.

159. *Id.* at 1.

160. *Id.*

161. *Id.* at 2.

The FCA Memo then outlines several factors for agency attorneys to consider in deciding whether to dismiss an FCA claim, including: (1) "curbing meritless qui tams,"[162] (2) "preventing parasitic or opportunistic qui tam actions,"[163] (3) "preventing interference with agency policies and programs,"[164] (4) "controlling litigation brought on behalf of the United States,"[165] (5) "safeguarding classified information and national security interests,"[166] (6) "preserving government resources,"[167] and (7) "addressing egregious procedural errors."[168] In all, the listed factors represent a generally applicable, written agency policy. The guidance offered internally is not specific to any individual case and refrains from directly addressing any pending matter within the DOJ. It is authoritative, in that it originated from the Director of the office with primary enforcement responsibility for the FCA.[169] It is definitive, as by its own terms it seeks "to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(C) and to ensure a consistent approach to this issue across the Department."[170] Finally, it is likely to be consequential to the extent that it clearly articulates the factors to be considered before seeking dismissal and was addressed to all of the government attorneys likely to face such a decision. The FCA Memo is, therefore, a secret policy.

Unlike the Blue Book, the failure to disclose the FCA Memo does not raise any constitutional issues. There are also several good faith reasons why the agency would want to protect its position from public scrutiny. The process of deciding whether certain cases are good candidates for involuntary dismissal is

162. "The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous." *Id.* at 3. The FCA Memo then provides case examples of when such circumstances have occurred. *Id.* at 3–4.

163. "The Department should consider moving to dismiss a *qui tam* action that duplicates a pre-existing government investigation and adds no useful information to the investigation." *Id.* at 4.

164. "Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects." *Id.*

165. "[T]he Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives." *Id.* at 5.

166. "In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information." *Id.* at 6.

167. "The Department should also consider dismissal under section 3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain." *Id.* at 6.

168. "The Department may also seek dismissal of a *qui tam* action pursuant to section 3730(c)(2)(A) based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation." *Id.* at 7. The Memo is not exclusive to these factors and provides additional considerations that can be used for dismissal. It also provides a procedure to use in advising relators of declinations, including telling them of "perceived deficiencies in their cases." *Id.* at 7–8.

169. *See About the Civil Division, Commercial Litigation Branch, Fraud Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/civil/fraud-section (last visited Jan. 12, 2019) ("The Commercial Litigation Branch, Fraud Section works with United States Attorneys' Offices (USAOs) nation-wide to litigate cases involving financial fraud against the Federal Government . . . . Typically, the Fraud Section files its suits under the False Claims Act . . . .").

170. *See* Cogan Schneier, *DOJ Memo Urges Government Lawyers to Dismiss 'Meritless' FCA Cases*, NAT'L. L.J. (Jan. 24, 2018), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/24/new-doj-memo-urges-govt-lawyers-to-dismiss-meritless-fca-cases/.

necessarily fact-specific, such that announcing a list of relevant factors could be misleading to the regulated community. The agency should also be rightly concerned about the prospect of having its own words used against it in individual litigation, for instance by defendants seeking to have their own cases dismissed based on their own interpretation of the stated factors. There could be an additional concern about appearing to bind the agency going forward. While changing legal, social, and economic circumstances in the country could—and arguably should—cause the agency to change its views on dismissal in the future, the existence of a public statement like the FCA Memo could make it more difficult for the agency to make the necessary adjustments.[171]

On the other hand, there are some potential concerns with keeping such a wide-ranging and potentially impactful policy position secret. Although the FCA Memo has received mixed reviews in the legal community, and some have described it as a departure from past practices, it is at minimum an expression of an important agency position that was not meant to be revealed to the public.[172] Equally noticeable is that the costs to companies facing these actions would likely decrease if dismissals increase.[173] One law firm commenting on the Memo noted that it "demonstrates the need for defense counsel to interact with DOJ prosecutors as soon as a defendant becomes aware of an FCA case, and if possible, during the government's investigation before the case is made public."[174]

In short, the mere existence of the FCA Memo does not necessarily require its publication as a policy statement, and the agency's decision to treat it as "privileged and confidential" does not necessarily suggest maladministration or even a lapse in judgment. The FCA Memo's existence does, however, offer a powerful and current example of both the fact and importance of secret policies. Given that secret policies exist, we are thus faced with the question of what to do with them. Transparency is a hallmark of democratic government and a key legitimizing principle in administrative law. Where agencies' exercise of their decision-making authority is shrouded from view, the political checks on agency conduct that our system relies on to maintain balance among the constitutional branches and the legitimacy of our administrative institutions are threatened. The decision to keep the FCA Memo confidential is one example of how secret policies implicate questions of administrative legitimacy.

IV. VALUING LEGITIMACY

A. Expertise, Efficiency, and Accountability

The legitimacy of secret policies depends in large measure on how they impact agency expertise, efficiency, and accountability. Using the DACA Policy

171. A similar idea was expressed in the FCA Memo with regard to decisions to dismiss.

172. Schneier, *supra* note 170.

173. *Id.*

174. *See Leaked DOJ Memo Indicates New Government Focus on Dismissing Meritless False Claims Act Cases*, FOLEY & LARDNER LLP (Jan. 29, 2018), https://www.foley.com/leaked-doj-memo-indicates-new-government-focus-on-dismissing-meritless-false-claims-act-cases-01-29-20181/.

Manual, Blue Book, and FCA Memo as examples, one needs to consider these three questions: (1) does an agency decision to maintain a secret policy result from, or otherwise, promote, their *expertise*; (2) will the failure to disclose these policies offer added *efficiency*; and (3) will keeping secret policies provide sufficient *accountability*?

With regard to the Blue Book, federal prosecutors are required by statutes,[175] rules of procedure,[176] ethical mandates,[177] and Court precedent to provide discovery to the defense, including all favorable evidence that would assist the defendant's case. In *Brady v. Maryland*,[178] the Supreme Court held that "suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[179] This landmark opinion was extended to include impeachment evidence in *Giglio v. United States*.[180] A three-prong test is used by appellate courts in reviewing whether there has been a *Brady* violation, a test that examines whether the evidence was "favorable to the accused," whether the government had suppressed that evidence, and whether there was resulting prejudice.[181]

Disclosing its discovery policies would not inhibit the government's ability to utilize its *expertise* in enforcing federal law through litigation. This is especially true when the secret policies at issue are necessarily constrained by constitutional and statutory requirements. To the extent the agency is an expert in the prosecution of cases, that competency is just as easily—if not better—demonstrated by making their views on criminal discovery publicly available. On the other hand, failure to disclose could be seen as a way of projecting a degree of

175. *See* 18 U.S.C. § 3500 (2018) (commonly referred to as the Jencks Act). This emanates from the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957), and is also replicated in Rule 26.2 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 26.2. Federal statutes also mandate discovery obligations, such as the government's requirement to "preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is sentenced to imprisonment for such offense." 18 U.S.C. § 3600A(a).

176. Federal Rules of Criminal Procedure, Rule 16, provides the mechanics of providing discovery and Rule 26.2 requires disclosure of witness statements. FED. R. CRIM. P. 16, 26.2. *See also* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 653–54 (1999) (discussing a survey of when Jencks materials are provided by the government to the defense).

177. ABA Model Rules of Professional Conduct Rule 3.8 requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 1983). It also includes obligations related to disclosure for sentencing. The only exemption provided in the ethical rule rests on when "the prosecutor is relieved of this responsibility by a protective order of the tribunal." *Id.*

178. 373 U.S. 83 (1963).

179. *Id.* at 87.

180. 405 U.S. 150, 155 (1972) (holding that "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it").

181. Strickler v. Green, 527 U.S. 263, 281–82 (1999). *See also* PETER J. HENNING, ANDREW TASLITZ, MARGARET PARRIS, CYNTHIA JONES & ELLEN S. PODGOR, MASTERING CRIMINAL PROCEDURE, VOL. 2: THE ADJUDICATORY STAGE 136–44 (Russell Weaver et al. eds., 2015) (discussing *Brady* and its progeny, which includes issues of materiality, inadmissible evidence, discovery obligations when the accused is entering a plea, and destruction of evidence by the government).

expertise that the agency in fact does not have. The agency's track record in fulfilling its discovery obligations is questionable, as seen by the many reported violations of prosecutors failing to adhere to their *Brady* obligations. For example, in *United States v. Olsen*,[182] Judge Kozinski, in a dissenting opinion, stated that "*Brady* violations have reached epidemic proportions in recent years."[183] A recent NACDL Report that investigated discovery violations across the United States notes that "[i]n courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense."[184] Thus, even if one were to accept the DOJ's expertise in providing discovery to the defense in criminal cases, it would have to be qualified with a statement that deficiencies occur in their performance of their obligations. These deficiencies, and thus the agency's understanding of its obligations, are better addressed through disclosure than secrecy. Subjecting its policy to public scrutiny could allow the agency to gather information from other constituencies with relevant expertise, like the judiciary or other law enforcement bodies, in a way that maintaining the policy's secrecy cannot.

The relationship between secrecy and expertise with regard to the DACA Policy Manual and the FCA Memo is less problematic, as there is no evidence in either case that the agency has had difficulty complying with its legal obligations (if any) involving the granting of deferred action status or the dismissal of cases, and the constitutional rights of litigants are not impacted by either secret policy. So, unlike the Blue Book, the two policies' secrecy does not hinder agency expertise. That does not mean, however, that the agencies' expertise is a justification for keeping the policies hidden from the public. The question becomes what the relevant brand of expertise is. If it is simply the ability to evaluate the merits of individual cases, then whether the policy is public is likely irrelevant. The agency's competence to determine if specific cases should proceed on the merits is largely unaffected by whether their self-imposed criteria are public.

If the relevant expertise is in judging the allocation of resources in a way best calculated to achieve the public purpose of DACA or the False Claims Act, however, then having the policy remain secret may be harder to defend. While the agency unquestionably has important experience and knowledge as steward of its programs, the value judgments about how to enforce those programs—in particular the higher-level judgements about the operation of the program in general terms—are also within the competencies of constituencies outside the agency. A decision to focus more on immigration raids and deportations than denials of DACA renewals, or to dismiss more FCA cases involving small businesses, are topics that lie within both the agencies' respective expertise and that of the public more generally. That is not to say that the relative knowledge bases

182. 737 F.3d 625 (9th Cir. 2013) (Kozinski, J., dissenting) (dissenting from denial of petition for rehearing *en banc*).

183. *Id.* at 631. He emphasized that a "robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence." *Id.* at 630.

184. KATHLEEN "COOKIE" RIDOLFI ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES: EXECUTIVE SUMMARY x (2014), https://www.nacdl.org/discoveryreform/materialindifference/.

are equivalent or interchangeable, but only to point out that value judgements involving enforcement call on a type of institutional expertise that may not be as unique to the agency as decisions involving more technical or specific matters. This is precisely why an inquiry into administrative expertise—and, in turn, legitimacy—is important with regard to secret policies. To the extent there are issues about whether agency decisions are better placed outside of public view, they need to be considered in the context of how those decisions fit with our expectations of administrative government.

In terms of administrative efficiency, a cursory look may suggest that secrecy always promotes more efficient government; agencies could be concerned that the process and consequences of disclosure may bog down their decision-making. In many instances, this may well be true. It stands to reason that a secret policy would require less vetting and deliberation in terms of its precise wording than something available to the public. The sheer procedural burdens of disclosure may be another source of inefficiency. Moreover, revealing a policy position will almost always trigger a response from some disaffected party, such that even the most carefully crafted policy positions could be subject to long and costly judicial review proceedings before they can ever be applied. All of those considerations apply to the three examples of secret policies introduced above.

There is more to the efficiency analysis, however. Under DACA, familiarity with the government's views on how best to administer the program will allow the full range of stakeholders in the immigration debate—such as employers, interest groups, and law enforcement agencies—to offer input in hopes of more fully informing the government's decision of how to best or most effectively allocate its resources. Disclosure may also empower potential deportees to try to tailor their behavior to make them less of a priority in the agency's enforcement scheme. Rather than simply allow for avoidance, disclosure could conceivably help make the program a deterrent against what the agency considers problematic in deferred action cases. This assumes, of course, that the program is in existence and administered consistent with stated priorities. Recent federal court decisions enjoining rescission of the program based on a lack of clear government reasons for changing its position regarding deferred action suggest that such standards will be required and thus that disclosure could have a positive effect without necessarily increasing the number of deportations under the program.[185]

With respect to the Blue Book, the claim that *efficiency* is promoted when the defense is unaware of the procedure being used by prosecutors in determining what materials should be released to the defendant is short-sighted, as it fails to recognize that a failure to provide sufficient evidence can result in protracted litigation and possible dismissal, as was seen in the *Stevens* case.[186] One does not need to look far to find the many cases where the government failed to disclose

185. *See* Vidal v. Neilsen, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018) (enjoining Trump Administration's rescission of DACA); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018) (same).

186. *See* United States v. Stevens, No. 08-CR-231, 2009 WL 6525926, at *1 (D.D.C. Apr. 7, 2009).

favorable FBI notes,[187] DEA reports,[188] or other exculpatory evidence to the defense.[189] Some cases with *Brady* violations have resulted in convictions being overturned.[190] The costs of a wasted trial, as well as the costs of a possible retrial, do not bode well for providing an efficient justice system. Likewise, the incarceration of innocent individuals who were later exonerated[191] can result in substantial payments by the government in resulting civil actions. Further, diminishing due process rights in the name of efficiency is antithetical to the very foundation of our criminal justice process.

The FCA Memo also has at least some instances in which efficiency could be furthered by the release of the Memo. Those handling *qui tam* actions are now on notice of the agency policy. Attorneys may be less likely to expend time and effort in cases with a minimal chance of succeeding. Likewise, attorneys handling *qui tam* actions may now provide a streamlined approach to the government, knowing that "preserving government resources" is a factor for consideration by the government in accepting a case.[192] Likewise, those representing companies can approach the government with stronger arguments to assist the government in dismissing or declining a case.

Finally, *accountability* supports the release of all three secret policy examples. Disclosing the DACA Policy Manual will allow the public to be better informed about its leaders' views on a highly controversial and socially relevant immigration question. It will also provide information on general law enforcement attitudes in terms of aggressiveness, the use of technology in enforcement, and the agency's relative focus of its enforcement efforts on different communities.

As for the Blue Book, the very fact that it was created in response to a government misstep with its discovery obligations merits oversight. This cannot be achieved when the policy is considered secret and the methodology being used by the government with respect to its discovery violations remains internal to the DOJ. Accountability would allow scrutiny by the defense of what constitutes

187. *See, e.g.*, United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 161–62 (2d Cir. 2008) (finding *Brady* violation for failure to disclose investigating agent's notes).

188. *See, e.g.*, United States v. Avilés-Colón, 536 F.3d 1, 20 (1st Cir. 2008) (finding *Brady* violation for failure to disclose DEA reports, or evidence developed on the basis of the DEA reports, which could have been used for impeachment).

189. *See* Brief of Amici Curiae the Constitution Project and the Innocence Project in Support of Appellant National Association of Criminal Defense Lawyers at 8, Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 844 F.3d 246 (D.C. Cir. 2016) (No. 15-5051).

190. *See, e.g.*, United States v. Mahaffy, 693 F.3d 113, 134 (2d Cir. 2012) (vacating a property fraud conviction after "mishandling of material exculpatory and impeaching material" by the government).

191. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 54 (2011) (noting the suppression of a lab report); *see also* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence,* 100 J. CRIM. LAW & CRIMINOLOGY 415, 420 (2010) (noting the under-enforcement of *Brady* violations); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 (noting prosecutorial misconduct that led to wrongful convictions).

192. FCA Memo, *supra* note 6, at 6–7.

Brady material, when prosecutors are being told to release the information,[193] and the format of discovery being provided to the defense. Transparency would allow the defense and the public to hold the government accountable for their compliance with the due process rights afforded to accused individuals.

So too with respect to the FCA Memo. Accountability will provide relators and others with assurance that the government is not bypassing its obligations merely to reduce costs. It could also give a voice to those who may contest aspects of the Memo and offer the public perspective on issues like the efficacy and role of whistleblowers in the process, as well as larger questions such as the scope and level of agency concern about the vulnerabilities of the public fisc.

With all three policies, there would also be accountability benefits within the agency. Exposed policy statements provide a greater deterrent value, suggesting that those within the agency are more likely to adhere to the policy statements under increased scrutiny. If the policy is truly important to the agency, then having both an internal and external voice provides for greater deterrence of any misconduct or lack of adherence to the policy. It also allows for outsiders to consider whether the department policy adheres with the law and is one that should be endorsed by society. Knowledge of these policies may encourage additional legislation that might expand or curtail the selected agency policy. Transparency also provides greater trust in government, which is particularly important in criminal justice matters.[194]

Thus, using expertise, efficiency, and accountability as markers reveals how considering the legitimacy of secret policies enhances our understanding of where they should fit within administrative government. Notably, all three considerations had at least some rationale supporting disclosure, which serves as further evidence that the legitimacy of secret policies merits additional consideration.

B. Ethical Legitimacy

Secreting government policy also raises important concerns when individuals from within the agency leave that agency to join a law firm or company that might be opposing the agency. Having knowledge of the contents of the secret policy cannot be erased from their minds, even if they are unable to remove the actual written policy from the office. Government ethics rules and statutes[195] may exclude the individual who left the agency from participating in specific cases

193. *See generally* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011) (discussing whether prosecutors have to disclose impeachment evidence prior to the defendant pleading).

194. *See* Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 1003 (2017) (noting how transparency is important in the criminal justice process, especially with custodial interrogations).

195. *See Government Ethics Outlines, VII. Post-Employment Restrictions*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/jmd/government-ethics-outline (last visited Jan. 12, 2019).

that they were involved with when in the agency.[196] The conflict of interest statute on "Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches" also provides certain time limits in post-employment activities.[197] For example, in the conflict statute, one finds restrictions for individuals from representation "concerning particular matters under official responsibility."[198] But these statutes and ethics rules do not provide for wholesale recusal for knowledge of policy information by those previously employed by that agency. The focus is on recusal in specific matters in which the individual employee was involved, or on establishing a waiting period before they appear in actions against the agency in which they served.[199]

Using the Blue Book as an example, consider how those individuals who have viewed the Blue Book have this knowledge for the life of the document. Thus, Attorney Generals, Deputy Attorney Generals, United States Attorneys and those acting as AUSAs who have had the opportunity to view this document have knowledge of its contents when they leave the DOJ to join the defense bar. Likewise, law students who may have done externships in the local U.S. Attorneys' Office may have been privy to the Blue Book. Attorney General Eric Holder noted that the "Blue Book was distributed to prosecutors nationwide in 2011, and [he stated that it] is now electronically available on the desktop of every federal prosecutor and paralegal."[200] This inequality in access precludes all defense counsel from providing equal representation to their clients. Secreting this document precludes defense counsel who have not been exposed to service as a DOJ employee from being able to learn the DOJ discovery practices to a level comparable to those who may have served in the DOJ or a specific office. Thus, former government attorneys have the advantage of recognizing a failure on the part of the current government employee adhering to Blue Book policy.

DOJ internal policy is typically unenforceable at law, something routinely stated within internal government guidelines.[201] Thus, the ability to enforce guidance that is advanced by the DOJ is left to internal mechanisms. Both Department attorneys and outsiders, such as defense lawyers and judges, have the opportunity

196. Government employees face permanent restrictions on matters in which the government had a "direct and substantial interest," the employee "participated personally and substantially as such officer or employee," and "which involved a specific party or specific parties at the time of such participation." 18 U.S.C. § 207(a)(1)(A)–(C) (2018).

197. *Id.* § 207.

198. There are two-year restrictions concerning representing someone before the government on a particular matter involving specific parties that the individual knows was pending under his or her responsibility for the last year of government service and in which the U.S. is a party or has a substantial interest. *See* 18 U.S.C. § 207(a)(2). There are one-year restrictions for former employees of the Department. *See id.* § 207(b)–(c).

199. *Id.* § 207(b)(2)(B).

200. Eric H. Holder, Jr., *In the Digital Age, Ensuring that the Department Does Justice*, 41 GEO. L. J. ANN. REV. CRIM. PROC. iii, vi (2012) (discussing the training initiatives taken by the DOJ to fulfill discovery obligations).

201. *See U.S. Attorneys' Manual*, *supra* note 131, § 1-1.200–Authority ("The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.").

to file complaints for violations of guidance policy with the Office of Professional Responsibility,[202] but the ultimate decision of whether there is a violation of the internal policy, and whether that policy should be adhered to, remains within the agency.[203] Even with this guidance having limited repercussions for violations, its transparency assists those both inside and outside the agency. For example, defense counsel making a presentation to the government asking them to reconsider indicting a Racketeering Influenced and Corrupt Organization Act charge is benefitted in knowing that these charges require the approval of the criminal division.[204]

The insider knowledge provided when agency policy is not transparent beyond that entity is not assisted by existing ethical rules. This is because the ethics rules allowing movement between the prosecution and defense bar are somewhat diluted compared with those applicable to attorneys moving from one law firm to another. Although former government attorneys are precluded from representing someone they previously prosecuted, the now–defense attorney is not removed from all matters coming from the DOJ or a particular U.S. Attorneys' Office.[205] The Comments to Rule 1.11 of the *ABA Model Rules of Professional Conduct* provide for "a balancing of interests."[206] There was concern in drafting the rules that "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government."[207] To ameliorate this situation, the comment states that "[t]he government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."[208] Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.[209] Once the time limits for applicable federal conflict of issue statutes have passed,[210] there is no disqualification of those attorneys

202. *See Office of Professional Responsibility*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/opr (last visited Jan. 12, 2019). *See generally* Podgor, *supra* note 147 (discussing the role of DOJ guidelines); *but see* United States v. Ofshe, 817 F.2d 1508, 1516 n.6 (11th Cir. 1987) (forwarding the conduct of Assistant United States Attorney to Illinois disciplinary commission).

203. *See* Podgor, *supra* note 147, at 169.

204. *See U.S. Attorneys' Manual*, *supra* note 131, § 9-110.101 – Division Approval ("No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division.").

205. ABA Model Rule of Professional Conduct, Rule 1.11–Special Conflicts of Interest for Former and Current Government Officers and Employees states in 1.11(a):

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
> (1) is subject to Rule 1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

MODEL RULES OF PROF'L CONDUCT r. 1.11(a) (AM. BAR ASS'N 1983).

206. *See id.* cmt. 4.

207. *Id.*

208. *Id.*

209. *Id.*

210. *See* 18 U.S.C. § 207 (2018).

from all criminal matters, thus allowing the former government attorney to represent clients on criminal matters in which they were not personally involved.[211] The inside information previously acquired by that attorney can assist them in negotiating within the playing field, an asset not available to those who did not have access to the inside information. This differs from general knowledge that one working in the DOJ may acquire in their tenure in that position in that the general knowledge is typically transparent and accessible to those outside the agency, although perhaps entailing more study on the part of the outsider.

The failure of the government to distinguish between general government policy and specific case information in secreting the Blue Book fails to consider an underlying consideration in the ethical rules that allow easier movement between the government and private attorney employment. Failing to provide transparency to all attorneys handling criminal defense matters creates an imbalance in representation that can affect expertise, efficiency, and accountability.[212]

The same is true for the DACA Policy Manual and FCA Memo. Although neither implicates the heightened concerns related to inequities in the criminal law, if the FCA Memo had not been released, then those who had worked on FCA cases within the office would have an advantage in handling those cases upon leaving the office. Although the written document might not have gone with them, the knowledge of the factors being used by the government would be inside information unavailable to others who had not been privy to this document. Likewise, those within the office would not be precluded from handling cases as they would not have a conflict regarding a specific matter previously handled in the Department. The same is of course true for attorneys handing DACA cases after having access to the DACA Policy Manual. Knowledge of general office policy would not provide the basis for their removal from a specific, later-handled case.

211. *See* MODEL RULES OF PROF'L CONDUCT r. 1.11 cmt. 4.

212. Some may argue that anyone who has previously been employed by the DOJ has certain superior knowledge above those who have not been exposed to that agency. But one assumes here that experiencing working in the DOJ is the only way one can learn the workings of the office. With respect to secret policies, that is clearly accurate. But with respect to other internal agency practices of the DOJ, there are books and memorandum that can provide that knowledge. *See* Podgor, *supra* note 147, at 171–73.

C. Fostering Transparency

A concern in promoting transparency is that agencies may be less eager to place agency policy in writing, less likely to disseminate it to its employees, and less likely to provide internal monitoring of its application. A fear of having public knowledge of general agency policies may raise concerns regarding the writing of such policies.

These concerns, however, are not new as fear of adverse outside use was expressed in the writing of DOJ Guidelines, placing them in the United States Attorney Manual, and having them exposed for public use. Noting that these guidelines are for internal use only has satisfied these fears.[213] The benefit of the policy is that it offers the agency consistency in department policy, while also providing education to those who are new to the office.[214] As noted by Professor Norman Abrams, comprehensive policy has enormous benefits to the DOJ even if "making prosecutorial policy public" would "subject it to scrutiny, evaluation, and criticism by outsiders."[215]

At the heart of legitimacy is the assurance that conduct conforms to set rules and that those rules mirror societal norms and "shared beliefs."[216] When an agency uses its expertise, offers a more efficient method of serving its constituency, and provides accountability to the citizenry, it raises its legitimacy. At the heart of this legitimacy is the ability to analyze and assess the agency actions. Thus, transparency is key to assuring agency legitimacy.

The benefits of transparency in government are not unique to the United States. In December 2016, Improving Public Policies in a Digital World ("IMODEV") held Academic Days on Open Government Issues at the Sorbonne University in Paris, France. The Secretary General and President of IMODEV, Irene Bouhadana and William Gilles, delivered ten principles for an effective Open Government.[217] Each of these principles came with subparts that provides depth to the general statements.[218] Some of these principles are particularly important for achieving agency legitimacy in the United States. For example, it

213. *See U.S. Attorneys' Manual*, *supra* note 131, § 1-1.100 – Authority.

214. *See* Podgor, *supra* note 147, at 169.

215. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 27 (1971) (discussing the advantages and disadvantages of internal office guidelines for the DOJ).

216. *See* DAVID BEETHAM, THE LEGITIMATION OF POWER 20 (1991). For a discussion of legitimacy in the criminal justice process, see generally Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925 (discussing aggressive government policies that undermine legitimacy and deterrence). *See also* Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 168 (2012).

217. The ten principles are: (1) The Right to Transparency and Access to Public Information; (2) The Right to Reuse Public Information; (3) The Right to Take Part in Public Decisions; (4) The Right to Renewal and Democratic Pluralism; (5) The Right to Truthfulness and Reliance on Your Government; (6) The Right to a Responsible Government; (7) The Right to Protection of Actors of the Opening of Governments; (8) The Right to Effectiveness of Open Governments; (9) The Right to Proportionality and to Justification of Exceptions to the Principles of Open Government; and (10) The Right to Outreach of the Open Government Culture. *See* Irene Bouhadana & William Gilles, *The 10 Principles for an Effective Open Government*, IMODEV (Dec. 5, 2016), http://cms.imodev.org/publications/10-principles-for-an-effective-open-government/.

218. *Id.*

notes that "[a]n open government should commit to promote open government culture in the entirety of society and in all levels of territorial, administrative and institutional organization."[219]

V. CONCLUSION

Secrecy of government policies moves the regime away from an open democratic society. Clearly, some policies need to remain outside the purview of the public in order to protect the country. One would hardly want military secrets or specific strategy in a case to be accessible to everyone. Other policies, however, need to be unmasked to provide more clarity in the administrative process. In examining discovery, for example, concerns may arise when protecting a witness or when needing to secure evidence for an ongoing investigation.[220] But secrecy outside the confines of a specific case, and more importantly as to policies regarding such procedures, remains questionable. It directly opposes the prosecutorial role of being a "minister of justice"[221] and puts prosecutors in an arena of engaging in a "sporting event."[222] To mask itself in the nuances of FOIA, the government fails to recognize these important concerns. It also creates an ethical imbalance that can only be corrected through disclosure. More importantly, secreting these government policies raises potential conflicts with key administrative law principles of legitimacy: expertise, accountability, and efficiency—goals that are fostered by transparency.

The key here for transparency is when the government agency has a written policy that it is disseminating across the agency, and that policy is not specific to an individual case. When the agency determines internally the importance of consistency, and recognizes the importance of legitimizing this guidance through a written format, then transparency is necessitated. If in fact the policy is unique to a specific case, or oral guidance offered by a supervisor, it is left for another day as to whether the line has been crossed mandating transparency.

Professor Kim Lane Scheppele recognized the importance in "society's rules about secrets" by cautioning that secrets can "undermin[e] the existing order and creat[e] alternative social forms."[223] Allowing general written administrative policies as beyond exhibition to the public fails to recognize the importance of government transparency in achieving legitimacy of the process. In the face of growing polarization of society, discovery debacles in the criminal sphere, and uncertainty as to government process, transparency is needed to as-

219. *Id.*

220. *See generally* Gerrilyn G. Brill et al., *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781 (1999) (discussing practical issues that arise in the context of providing discovery).

221. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

222. *See generally* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279 (1963).

223. SCHEPPELE, *supra* note 11, at 308; *see also* ELI LEDERMAN, INFOCRIME (2016) (discussing the value of information).

sure the general public of the integrity of the process, including the administrative process. As noted by the concurring opinion in the Blue Book Litigation, "the conduct with the U.S. Attorney must not only be above board, it must be seen to be above board. If the people cannot see it at all, then they cannot see it to be appropriate, or more is the pity, to be inappropriate."[224] Transparency is clearly the bedrock of legitimacy in the government, and precluding the public from seeing written generic agency policy hampers its being achieved.

224. Nat'l Ass'n of Criminal Def. Lawyers v. U.S. DOJ Exec. Office for U.S. Attorneys, 844 F.3d 246, 260 (D.C. Cir. 2016).