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## The Mosaic Theory, National Security, and the Freedom of Information Act

**ABSTRACT.** This Note documents the evolution of the “mosaic theory” in Freedom of Information Act (FOIA) national security law and highlights its centrality in the post-9/11 landscape of information control. After years of doctrinal stasis and practical anonymity, federal agencies began asserting the theory more aggressively after 9/11, thereby testing the limits of executive secrecy and of judicial deference. Though essentially valid, the mosaic theory has been applied in ways that are unfalsifiable, in tension with the text and purpose of FOIA, and susceptible to abuse and overbreadth. This Note therefore argues, against precedent, for greater judicial scrutiny of mosaic theory claims.

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*It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.<sup>1</sup>*

*[G]iven judges' relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure.<sup>2</sup>*

## INTRODUCTION

The “mosaic theory” describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts. In the context of national security, the mosaic theory suggests the potential for an adversary to deduce from independently innocuous facts a strategic vulnerability, exploitable for malevolent ends. The Department of the Navy, in its Freedom of Information Act (FOIA) regulations, thus defines the theory as “[t]he concept that apparently harmless pieces of information when assembled together could reveal a damaging picture.”<sup>3</sup> The relevant pieces of information might come from the government, other public sources, the adversary’s own sources, or any mixture thereof. For several decades, government agencies have invoked mosaic concerns to justify both classifying documents at higher levels of confidentiality and withholding documents requested through FOIA or through pretrial discovery. President Reagan drew attention to the mosaic theory, and prompted criticism from civil libertarians, by using it to promote new schemes for safeguarding information, but once he left office the theory quickly receded from public view.

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1. *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978).
  2. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002).
  3. 32 C.F.R. § 701.31 (2005). The mosaic theory, as the Navy regulations indicate, is sometimes referred to as the compilation theory. *Id.* Both terms have been applied to areas unrelated to national security; this Note considers only the mosaic theory of intelligence gathering.

Since the attacks of September 11, 2001, however, the mosaic theory has made a comeback. If the judicial record is any indication, government agencies under the Bush Administration have been asserting the mosaic theory with greater vehemence, across a greater range of records. Courts, in turn, have grappled with the theory more frequently and more explicitly than ever before. Facing a post-9/11 national security environment of informational anxiety and terrorist threat, the Administration has designated FOIA a critical liability and narrowed its openness-forcing capacity accordingly; the aggrandizement of the mosaic theory, this Note will demonstrate, has been both a cause and consequence of the Act's diminishment. Although not all courts have sanctioned this expanded role for the theory, judges in several high-profile cases have relied on it to sustain unprecedented acts of secrecy. In *Center for National Security Studies v. U.S. Department of Justice*,<sup>4</sup> for example, the D.C. Circuit applied the mosaic theory to uphold the Justice Department's categorical denial of FOIA requests for information about more than seven hundred people detained in the wake of the 9/11 attacks. In *North Jersey Media Group v. Ashcroft*,<sup>5</sup> the Third Circuit likewise applied the theory to uphold the government's decision to close 9/11-related "special interest" deportation hearings to the public and the press. In neither case did the government proffer substantive evidence of likely harms from disclosure.

Taken along with other recent cases, *Center for National Security Studies* and *North Jersey Media* suggest the scope of official activity now being shielded by the mosaic theory, as well as the degree of judicial deference routinely granted to agencies making mosaic claims. For courts and agencies alike, since 9/11 the mosaic theory has at the same time manifested, justified, and exacerbated a new reticence to publicize government-controlled information. In the process, the theory has insinuated itself into the fundamental post-9/11 debates: how to balance civil liberties with national security and how to structure intelligence policy in an age of terrorism. Despite scant attention from the media or from scholars,<sup>6</sup> the mosaic theory has developed into a doctrinal tool of great force in national security law.

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4. 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

5. 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

6. While the mosaic theory has been discussed in the context of specific cases or executive actions, it has never been taken as an independent subject, in law or any other discipline, and I have discovered only one other argument for the theory as a theme in post-9/11 national security litigation beyond immigration proceedings. See Panel Discussion, American Constitution Society Conference, The United States, Human Rights, and International Law (Aug. 1, 2003), <http://www.acslaw.org/pdf/Human%20Rights.pdf> (statement of Patricia Wald, Former Chief Judge, U.S. Court of Appeals, D.C. Circuit) ("The government uses a kind of familiar argument . . . running through most of the 9/11

This Note, the first work to analyze the mosaic theory in systematic (or even sustained) fashion, attempts to document this development and assess its implications. In synthesizing the case history, I consider several interrelated areas of national security information law, but I focus on FOIA, where the mosaic theory has had greatest effect, and on the courts, where the theory's boundaries are ultimately delimited. In particular, I examine the difficulties the theory poses for courts hearing national security cases. New terrorists and new technologies have increased the risks from mosaic-making in recent years, and the trauma of 9/11 has increased the salience of such risks. Yet while the mosaic theory provides an accurate description of how adversaries might capitalize on information disclosure, courts have—in deference to agencies' perceived superiority at evaluating mosaic threats—applied it in ways that are unfalsifiable and deeply susceptible to abuse and overbreadth; they have created in the mosaic theory a latently subversive basis for withholding information. When courts accord heightened deference to agencies' mosaic claims, moreover, they contravene the text and purpose of FOIA. As a result, I argue that mosaic claims deserve additional judicial scrutiny, not additional deference.

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cases; the so-called mosaic theory.”). Commentators have recognized the theory as an important and vexing issue in national security law, but none has ventured an analysis of mosaic theory history or doctrine. The most prominent critical references include DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 20-21, 32-33 (2003) (assailing the Bush Administration's use of the theory in post-9/11 immigration proceedings); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 652 (2005) (same); Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 84 (1992) (calling the theory “[o]ne of the most serious challenges to effective judicial scrutiny of executive claims”); Janet Raloff, *Coming: The Big Chill?*, in *FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S*, at 86, 89-90 (Richard O. Curry ed., 1988) (summarizing the theory's application in the Reagan Administration); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 232 (2000) (“What made the Area 51 litigation a fascinating academic model was . . . the additional use of the highly controversial ‘mosaic theory’ to effectively defeat any enforcement of the statutory provisions.”); Keith Anderson, Note, *Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1641-42 (2003) (questioning the court's application of the theory in *Center for National Security Studies*); Rashad Hussain, Policy Comment, *Security with Transparency: Judicial Review in “Special Interest” Immigration Proceedings*, 113 YALE L.J. 1333, 1335 & n.12 (2004) (same for *North Jersey Media*); and Steven J. Lepper, Note, *Developments Under the Freedom of Information Act—1982, 1983* DUKE L.J. 390, 397-98 & n.56 (arguing that the theory gives FOIA an unlegislated tenth exemption).

The Note proceeds in three parts. Part I provides an overview of FOIA's relationship to national security and traces the mosaic theory's trajectory in national security information law from its advent in 1972 through September 11, 2001. Part II discusses the recent transformation of FOIA and the mosaic theory. Evaluating the major post-9/11 cases, I argue that the Bush Administration's bolder use of the theory has unsettled mosaic theory jurisprudence. At issue in this emerging doctrinal division is the extent to which the Administration's War on terror will be insulated from judicial scrutiny, as well as the future of FOIA's national security exemption. Moving from positive to normative examination of judicial review of mosaic cases, Part III challenges the longstanding assumption that these cases make up a special class of FOIA appeal and critiques the delegatory tradition in mosaic theory review. A concluding Section sketches proposals for invigorating judicial oversight without endangering national security.

#### I. THE MOSAIC THEORY IN FOIA LAW, 1972-2001

The mosaic theory is, essentially, a theory of informational synergy. It describes a process through which adversaries collect, combine, and compile items of information, some or even all of which are harmless in their own right. And it suggests an outcome whereby this process, in a feat of analytic alchemy, converts the harmless information into something useful. “[A]ll intelligence agencies,” one FOIA opinion recently noted, “collect seemingly disparate pieces of information [in the hope of] assembl[ing] them into a coherent picture.”<sup>7</sup> That is, they all make mosaics, constantly. It would be illogical, therefore, to make classification decisions on an item-by-item basis; instead, “[p]rotection through classification is required if the combination of unclassified items of information provides an added factor that warrants protection of the information taken as a whole.”<sup>8</sup> To determine the security risk of disclosing a given document, the mosaic theory stipulates, one must consider the possible mosaics to which the document might contribute. The mosaic, not the document, becomes the appropriate unit of risk assessment.

In the decades that courts have applied it to national security information law, this Part will show, the mosaic theory has hardly evolved past this sketch. Several early opinions set out a framework for the theory and a framework for applying it. For these courts, and for those that followed, the theory appeared

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7. *Berman v. CIA*, 378 F. Supp. 2d 1209, 1215 (E.D. Cal. 2005) (internal quotation marks omitted).

8. *Frost v. Perry*, 161 F.R.D. 434, 436 (D. Nev. 1995) (summarizing Information Security Oversight Office guidelines).

to make risk assessment more complicated—and hence to make judicial deference to government agencies more apposite. Beyond these principles, the mosaic theory has not been undertheorized in the case law or its derivative literature so much as it has not been theorized at all.

To elucidate the theory's development, this Part begins with an explanatory note on FOIA.<sup>9</sup> Although the text and legislative history of the Act contemplate judicial deference to federal agencies, as Section A explains, Congress aimed to circumscribe this deference through a number of mechanisms. Nevertheless, the history of FOIA national security adjudication makes plain that structural and psychological biases give the government a great advantage, in mosaic and non-mosaic cases alike. Sections B and C describe how, after a triad of early opinions established the conceptual and rhetorical core of mosaic theory doctrine, it steadily gained acceptance in other courts throughout the 1980s and 1990s. Without ever specifying what constitutes a mosaic theory case or why such a case demands special treatment, these courts consistently accorded heightened deference to agencies' mosaic arguments. Agencies were allowed to withhold information on the basis of mosaics that judges rarely, if ever, interrogated in detail, challenged as implausible, or attempted to segregate into harmful and nonharmful components. Most judges consigned the mosaic theory to the realm of metaphor. Even before 9/11, then, the mosaic theory had achieved a privileged status under FOIA, whereby courts accorded its government proponents especially lenient treatment.

### A. FOIA and National Security: A Brief Overview

#### 1. The Framework of FOIA

Replacing the ineffectual public disclosure section of the Administrative Procedure Act of 1946, FOIA was the first federal statute to establish an enforceable right of public access to executive branch information.<sup>10</sup> The “crystal clear . . . congressional objective” in promulgating FOIA, proclaimed the Supreme Court, was “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”<sup>11</sup> Pursuant to FOIA, the

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9. The origins and workings of FOIA, and the controversies surrounding it, have been treated extensively elsewhere. *See, e.g.*, HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT (1999); OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (2004) [hereinafter DOJ FOIA GUIDE].

10. Pub L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2000)).

11. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).

government has disclosed millions of documents to requesters and proactively released millions more to the general public through the *Federal Register*, reading rooms, and websites. The Act has become both a powerful tool for inducing disclosure and a powerful symbol of America's commitment to governmental transparency.

Yet from the beginning, FOIA has been marked by compromise, as its underlying principles of openness and accountability often conflict with other societal goals, "such as the public's interests in the effective and efficient operations of government . . . and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information."<sup>12</sup> To negotiate the countervailing interests opposing its "general philosophy of full agency disclosure,"<sup>13</sup> FOIA provides for nine exemptions under which agencies can withhold requested information.<sup>14</sup> For national security, the most significant are Exemption 1, which allows agencies to withhold records in the interest of national defense or foreign policy, and Exemption 3, which allows agencies to withhold records that are specifically exempted from disclosure by statute. Exemption 1 is *the* national security exemption;<sup>15</sup> Exemption 3 implicates national security because several withholding statutes—particularly the National Security Act and the Central Intelligence Agency Act—authorize the CIA, the FBI, the Department of Defense, and other agencies to protect large swaths of national-security-related records.<sup>16</sup> Defense and intelligence agencies have been among the most vocal critics of FOIA<sup>17</sup> and have typically had the lowest disclosure rates.<sup>18</sup>

The current framework for administering national security exemptions came into being with FOIA's first set of amendments,<sup>19</sup> which substantially limited agencies' ability to withhold documents for national security reasons.

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12. DOJ FOIA GUIDE, *supra* note 9, at 5.

13. S. REP. NO. 89-813, at 3 (1965).

14. 5 U.S.C. § 552(b)(1)-(9) (2000).

15. *See, e.g.*, ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) ("Exemption 1 is FOIA's national security exemption.").

16. *See* DOJ FOIA GUIDE, *supra* note 9, at 247-49.

17. *See, e.g.*, Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 761 (1988) ("[M]ost of [the security agencies] do not like the FOIA one whit . . .").

18. U.S. Dep't of Justice, Freedom of Information Act: Annual FOIA Reports, [http://www.usdoj.gov/o4foia/o4\\_6.html](http://www.usdoj.gov/o4foia/o4_6.html) (last visited Sept. 27, 2005) (reporting agencies' disclosure performance for fiscal years 1998 through 2004). For each of the past seven years, the CIA and the FBI have had among the lowest—and usually the lowest—ratios for any federal agency of FOIA requests granted to requests processed or answered.

19. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (2000)).



Overriding a presidential veto, Congress passed the 1974 amendments with the express purpose of overruling the Supreme Court's holding in *EPA v. Mink*<sup>20</sup> that courts should not review the substantive propriety of agencies' classification decisions.<sup>21</sup> Seeking to empower courts to rectify "the widespread abuses raging under the existing classification process,"<sup>22</sup> Congress changed Exemption 1 from exempting all matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"<sup>23</sup> to exempting only those matters that "are in fact properly classified pursuant to such Executive order."<sup>24</sup> Congress further narrowed Exemption 1, and all other exemptions, by inserting into FOIA a "segregation" provision requiring that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."<sup>25</sup> That is, Congress displaced "records" as the relevant unit of analysis under the Act: Agencies invoking exemptions would now have to look within records so as to excise only the minimal amount necessary. To facilitate meaningful judicial oversight, Congress authorized courts to review FOIA appeals de novo and inspect documents in camera, and placed the burden on agencies to sustain all withholding actions.<sup>26</sup>

## 2. *Judicial Review in FOIA National Security Cases*

After exhausting administrative remedies, a dissatisfied FOIA requester may contest agency decisions in federal district court.<sup>27</sup> In light of the

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20. 410 U.S. 73 (1973).

21. S. REP. NO. 93-1200, at 11-12 (1974) (Conf. Rep.); H.R. REP. NO. 93-1380, at 12 (1974) (Conf. Rep.).

22. 120 CONG. REC. 17,019 (1974) (statement of Sen. Kennedy).

23. FOIA, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) (codified at 5 U.S.C. § 552(b)(1) (1970)).

24. Act of Nov. 21, 1974, § 2(a) (current version at 5 U.S.C. § 552(b)(1)(B) (2000)). Rooted textually to these executive orders' definitions of national security, Exemption 1 has no meaning independent of them. The prevailing executive order establishes what types of information agencies will seek to exempt from FOIA, what processes they will follow and what standards they will apply in so doing, and for how long.

25. *Id.* § 2(c) (current version at 5 U.S.C. § 552(b) (2000)).

26. *Id.* § 1(b)(2) (current version at 5 U.S.C. § 552(a)(4)(B), 552(b) (2000)). Judges have broad discretion over whether and how to conduct in camera review, *see* *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998), which is often employed in national security cases because it allows for confidentiality, DOJ FOIA GUIDE, *supra* note 9, at 801.

27. Because FOIA confers (nonexclusive) jurisdiction over all appeals on the D.C. District Court, 5 U.S.C. § 552(a)(4)(B) (2000), that court hears far more FOIA appeals than any other. *See, e.g.*, U.S. Dep't of Justice, 2003 Calendar Year Report on Department of Justice

Executive's "unique insights into what adverse effects might occur as a result of public disclosure," Congress indicated in drafting the 1974 amendments that courts in national security cases should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."<sup>28</sup> To fulfill their intended review role, however, courts strive to accord this weight "without relinquishing their independent responsibility"<sup>29</sup>—judicial "deference is not equivalent to acquiescence,"<sup>30</sup> and "conclusory and generalized allegations of exemptions" are not acceptable bases for withholding.<sup>31</sup> Moreover, Exemption 1, like all the exemptions, must be narrowly construed.<sup>32</sup> Nevertheless, the standard for withholding records on national security grounds remains accommodating, as courts test agencies' national security claims only for reasonableness, good faith, specificity, and plausibility.<sup>33</sup> They do not typically assess whether the alleged risks of disclosure would be likely to materialize, or weigh those risks against other interests.

This truncated judicial review comports, of course, with courts' broad tendency to defer to the political branches in matters of national security. Such deference reflects constitutional and statutory constraints on the judiciary as well as self-imposed prudential considerations, but in FOIA cases the prudential considerations predominate, for the Act explicitly enables courts to review appeals *de novo* and to order the production of improperly withheld documents.<sup>34</sup> Courts defer to the Executive because they believe judges "lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case."<sup>35</sup> Compounding this deference, the government has the advantage in FOIA appeals of controlling both the disputed information and—through Exemption 1's reliance on executive orders—the definition of national security. The result is that the government almost always

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Freedom of Information Act Litigation Activities: Decisions Rendered in 2003, <http://www.usdoj.gov/o4foia/o3decisions.htm> (last visited Sept. 27, 2005). The D.C. Circuit, consequently, has assumed unique significance for FOIA jurisprudence.

28. S. REP. NO. 93-1200, at 12 (1974) (Conf. Rep.).
29. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).
30. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).
31. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).
32. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).
33. *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).
34. 5 U.S.C. § 552(a)(4)(B) (2000).
35. *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

wins in FOIA national security litigation.<sup>36</sup> In only one Exemption 1 case has a court found agency bad faith, and that decision was vacated on appeal.<sup>37</sup> The CIA, which derivatively classifies more documents than any other government body,<sup>38</sup> has proven especially invulnerable to FOIA review: The Ninth Circuit conceded in 1992 that “we are now only a short step away [from] exempting all CIA records from FOIA.”<sup>39</sup> As the following Section will show, the mosaic theory had already emerged by the end of the 1970s as a powerful withholding tool for the CIA. Other agencies would soon follow.

*B. 1972-1980: Marchetti, Halkin, and Halperin*

Although the mosaic theory of intelligence gathering had existed in the national security community for some time,<sup>40</sup> its first—and still seminal—exposition in U.S. law came from Chief Judge Clement Haynsworth in the 1972 Fourth Circuit case *United States v. Marchetti*.<sup>41</sup> Not a FOIA case, *Marchetti* featured a government action to enjoin a former CIA employee from publishing an exposé of the agency entitled *The CIA and the Cult of Intelligence*. Drawing on an executive right to secrecy under Article II, Section 2 of the Constitution and *United States v. Curtiss-Wright Export Corp.*,<sup>42</sup> the court upheld Marchetti’s secrecy agreement with the CIA and found for the government. That much was predictable; more interesting was the prudential justification given by the court to reinforce its constitutional arguments:

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36. See Deyling, *supra* note 6, at 67; Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT. L.J. 79, 131-32 (2004); cf. Wald, *supra* note 17, at 760 (remarking, while Chief Judge of the D.C. Circuit, that de novo review in FOIA national security cases “often seems to be done in a perfunctory way”).

37. See DOJ FOIA GUIDE, *supra* note 9, at 150-51.

38. INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2003, at 18 (2004), available at <http://www.fas.org/sgp/isoo/2003rpt.pdf> (reporting classification activity for fiscal year 2003).

39. *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (internal quotation marks omitted).

40. Raloff, *supra* note 6, at 89. The theory was also recognized abroad: In a celebrated 1966 case, the German government asserted a mosaic theory of treason against the publishers of *Der Spiegel* magazine. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 397-402 (1989); Herbert Bernstein, Comment, *West Germany: Free Press and National Security: Reflections on the Spiegel Case*, 15 AM. J. COMP. L. 547, 557 (1967).

41. 466 F.2d 1309 (4th Cir. 1972).

42. 299 U.S. 304, 320 (1936).

## THE MOSAIC THEORY

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.<sup>43</sup>

Without labeling it as such, the Fourth Circuit grounded its practical argument for judicial restraint in the mosaic theory. Even if judges possess the ability to evaluate individual items of national security information, the court reasoned, they lack the “broad view” with which to contextualize these items and thereby glean their true significance. Consequently, judges should not only defer to agency expertise; they should avoid review altogether. The mosaic theory, as applied here in a related context, helps vindicate the pre-1974 model of FOIA, wherein courts hearing national security cases effectively abdicated disclosure decisions to agencies, rendering the Act—in then-Professor Antonin Scalia’s words—“a relatively toothless beast.”<sup>44</sup>

After several years of dormancy, *Marchetti*’s thread entered FOIA jurisprudence at the end of the decade through the D.C. Circuit, which extended *Marchetti*’s mosaic theory analysis in *Halkin v. Helms*<sup>45</sup> and *Halperin v. CIA*.<sup>46</sup> In *Halkin*, the D.C. Circuit upheld the government’s use of the state secrets privilege to deny former Vietnam War protesters’ discovery request for information on whether their international communications had been intercepted by the National Security Agency (NSA) and disseminated to other federal agencies. Noting that state secrets cases and FOIA Exemption 1 cases are “analogous,”<sup>47</sup> the court, citing *Marchetti*, likewise situated its deference in the mosaic theory.<sup>48</sup> In so doing, *Halkin* invoked the mosaic metaphor in

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43. 466 F.2d at 1318.

44. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 15.

45. 598 F.2d 1 (D.C. Cir. 1978).

46. 629 F.2d 144 (D.C. Cir. 1980).

47. 598 F.2d at 9.

48. See *supra* note 1 and accompanying text. In the subsequent civil suit, the D.C. Circuit reiterated the mosaic metaphor quoted in this Note’s epigraph in upholding again the government’s use of the state secrets privilege. *Halkin v. Helms*, 690 F.2d 977, 993 n.57 (D.C. Cir. 1982).

national security law for the first time, and, importantly, linked it to modern computer technology. Even in 1978, the potential for computers to increase exponentially their users' ability to process and find patterns in information—to make mosaics—was clear. Unlike in *Marchetti*, the jurists in *Halkin* tried to ascertain the mosaic-based risks of disclosure before finding for the government. They did so only at a highly general level, however, concluding without qualification that “[d]isclosure of the identities of senders or recipients of acquired messages would enable foreign governments or organizations to extrapolate the focus and concerns of our nation’s intelligence agencies.”<sup>49</sup>

In a separate statement explaining why he voted (unsuccessfully) for a rehearing en banc, Judge David Bazelon disputed the need for secrecy regarding the NSA intercepts and characterized the court’s “utmost deference” to the government as violating the legislative intent of the 1974 FOIA amendments.<sup>50</sup> According to Bazelon, “the panel could have reached its decision only by taking the government’s *ex parte* affidavits at face value and refusing to assess their credibility in light of reason and the information already made public, the minimal elements of *de novo* review.”<sup>51</sup> By casting the majority holding as the “willing suspension of disbelief,”<sup>52</sup> Bazelon implied that its mosaic discussion had been a sham—the majority had substituted rhetoric for analysis, an epigram for sensitive, individualized document review. Applied in this way, Bazelon foreshadowed, the mosaic theory could justify virtually any withholding.

Two years later in *Halperin*, the D.C. Circuit expressly introduced the mosaic theory to FOIA to affirm, under Exemptions 1 and 3, the CIA’s withholding of documents detailing its legal arrangements with private attorneys. After conceding that the disclosure of the CIA’s legal fees, without more, would not present obvious national security risks, the court cautioned:

We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction.<sup>53</sup>

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49. 598 F.2d at 8.

50. *Id.* at 14-18 (Bazelon, J., dissenting from denial of rehearing en banc).

51. *Id.* at 17.

52. *Id.* at 18 (internal quotation marks omitted).

53. *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980).

Fleshing out its mosaic metaphor with a jigsaw puzzle metaphor, the court rested its entire holding on the mosaic theory without ever discussing how a legal fee could be combined with “other small leads,” whatever these might be, to create a national security risk. The mosaic scenario posited here was even vaguer than the scenario contemplated in *Halkin*, yet the D.C. Circuit seemed even more reluctant to scrutinize it. While *Halperin* was not an important FOIA case in a direct sense—public interest in the CIA’s legal expenses being relatively tepid—it signaled the emergence of the mosaic theory as a potent argument for agencies seeking to withhold information.

Taken together, then, *Marchetti*, *Halkin*, and *Halperin*, in introducing the mosaic theory to national security law, use it to bolster judicial deference on two levels: They present the theory as a general reason for courts to fear disclosure and mistrust their own judgment; and they treat mosaic arguments as a unique rationale for nondisclosure, with lower requirements for specificity and support. The opinions’ bracing rhetoric, moreover, tints the theory with an element of mystery and malice. This logic and language continue to undergird mosaic theory jurisprudence, as essentially every subsequent opinion applying the theory has cited *Marchetti*, *Halkin*, and/or *Halperin* as key precedent, often excerpting the passages quoted above.

### C. 1981-2001: Statutory Recognition, Judicial Deference

The next important development in mosaic theory doctrine came from an extrajudicial source: President Reagan’s Executive Order 12,356, which in 1982 wrote the theory into law. The source of classification standards for FOIA’s Exemption 1, Reagan’s Order stated that “[i]nformation that is determined to concern one or more of the [classification] categories . . . shall be classified when an original classification authority also determines that its unauthorized disclosure, *either by itself or in the context of other information*, reasonably could be expected to cause damage to the national security.”<sup>54</sup> Under this language, government classifiers were charged with conceptualizing the dangers of disclosure in mosaic theory terms, and FOIA courts bound to uphold such an approach. By contrast, Presidents Nixon, Ford, and Carter had been silent about the mosaic theory in their analogous executive orders,<sup>55</sup> while Presidents Truman and Eisenhower had positively rejected it, decreeing: “Documents

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54. Exec. Order No. 12,356, § 1.3(b), 3 C.F.R. 166, 169 (1982) (emphasis added), *reprinted in* 50 U.S.C. § 401 (1982).

55. Exec. Order No. 11,652, 3 C.F.R. 375 (1973) (Nixon), *reprinted in* 50 U.S.C. § 401 (Supp. V 1975); Exec. Order No. 11,862, 3A C.F.R. 166 (1975) (Ford); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Carter), *reprinted in* 50 U.S.C. § 401 (Supp. V 1981).

shall be classified according to their own content and not necessarily according to their relationship to other documents.”<sup>56</sup>

Wary of KGB agents exploiting powerful new database technologies, President Reagan expressed alarm at the mosaic theory’s implications throughout his term in office.<sup>57</sup> Although small pieces of unclassified data might be innocuous in isolation, he feared they would “reveal highly classified and other sensitive information when taken in aggregate.”<sup>58</sup> In response, Reagan launched a campaign, ultimately abandoned in the face of widespread criticism, to safeguard unclassified data in private databases and to limit foreigners’ access to public databases.<sup>59</sup> In a Reagan Administration they already considered excessively secretive, some civil libertarians saw totalitarian undertones in this use of the theory. As Democratic Congressman Glenn English reportedly remarked, “[c]arried out to its logical conclusion, the mosaic theory justifies the withholding of all information, no matter how innocuous.”<sup>60</sup>

Hence, having written the mosaic theory into classification law, Reagan went further and pushed it into the public consciousness – but only for a brief while. After he left office, executive branch officials almost never spoke out on the mosaic theory, and the critical commentary quickly dried up.<sup>61</sup> Though

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56. Exec. Order No. 10,290, § 26.d, 3 C.F.R. 789, 794 (1949-1953) (Truman), *reprinted in* 50 U.S.C. § 401 (Supp. V 1952); Exec. Order No. 10,501, § 3(a), 3 C.F.R. 979, 980 (1949-1953) (Eisenhower), *reprinted in* 50 U.S.C. § 401 (1970).

57. Mary McIver & William Lowther, *Tapping New Secrets*, MACLEAN’S, Sept. 28, 1987, at 60, 60; *see also* Brock N. Meeks, *Uncovering the Secret History of the Cold War: The National Security Archive Beats the White House*, WIRED, Dec. 1993, at 48, 52 (discussing the Reagan Justice Department’s fear that the work of the National Security Archive, a repository for declassified government documents, would “nurture the Mosaic Theory, wherein KGB agents would be able to piece together US government secrets”).

58. National Security Decision Directive 145: National Policy on Telecommunications and Automated Information Systems Security (Sept. 17, 1984), *available at* <http://www.fas.org/irp/offdocs/nsdd145.htm>.

59. *See id.*; Raloff, *supra* note 6, at 89-90; McIver & Lowther, *supra* note 57, at 60-61.

60. *See* McIver & Lowther, *supra* note 57, at 60 (internal quotation marks omitted); *cf.* Lepper, *supra* note 6, at 396 n.49 (“The prevailing fear [regarding Reagan’s codification of the mosaic theory in Executive Order 12,356] is that the ‘mosaic theory’ alone provides sufficient incentive for overclassification.”); George Lardner Jr., *Secrecy System Pronounced Sound*, WASH. POST, Dec. 9, 1988, at A25 (“As a result of this “mosaic theory,” [Harvard Vice President John] Shattuck said, ‘we have an evolving system of scientific and technical censorship in this country.’”).

61. A LexisNexis search on “mosaic theory” in the Major Newspapers database, for example, yields only three articles written in the 1990s (the second of which is a reprisal of the first) that use the term in the intelligence-gathering sense. The same search in the Magazine Stories, Combined database yields only one article.

abortive, Reagan's database campaign illuminates several important characteristics of the mosaic theory: its conceptual applicability beyond the classification process, its potential threat to civil liberties, and its dynamic relationship with information technology. When the Bush Administration resurrected the Reaganite approach to the mosaic theory after 9/11, all of these characteristics would once again manifest themselves.<sup>62</sup>

A few years after Reagan's executive order, the mosaic theory first (and last) reached the Supreme Court in *CIA v. Sims*,<sup>63</sup> a 1985 case concerning FOIA's Exemption 3. The CIA had denied the plaintiffs' request for information regarding a CIA-financed research project, code-named MKULTRA, established in 1953 to counter Soviet and Chinese advances in brainwashing and interrogation techniques. Echoing the government's brief,<sup>64</sup> the Court cited *Halperin*, *Halkin*, and *Marchetti* in quick succession in concluding that "the Director [of Central Intelligence] . . . has power to withhold superficially innocuous information on the ground that it might enable an observer to discover [through mosaic-making] the identity of an intelligence source."<sup>65</sup> The Court reasoned that the Director "must of course be familiar with 'the whole picture,' as judges are not," and so his decisions "are worthy of great deference."<sup>66</sup> Without qualifying this institutional self-deprecation or considering possible drawbacks to such "great deference," *Sims* vigorously endorsed the mosaic theory as a cause for judicial restraint and consolidated *Halperin*, *Halkin*, and *Marchetti* as its leading cases. Since *Sims*, the CIA has enjoyed virtually "carte blanche" immunity from FOIA.<sup>67</sup> Even though the case dealt with the CIA's enumerated powers under the National Security Act, lower courts have applied *Sims*'s mosaic-theory-based deference arguments more broadly, to other agencies and other exemptions.<sup>68</sup>

Throughout the 1980s and 1990s, the mosaic theory flourished in FOIA national security case law as a justification for classification and narrow judicial review. Outside of the D.C. federal courts, where the theory quickly took hold,

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62. See *infra* Part II.

63. 471 U.S. 159 (1985).

64. Brief for the Respondents at 7, *CIA v. Sims*, 471 U.S. 159 (1985) (No. 83-1249).

65. 471 U.S. at 178.

66. *Id.* at 179.

67. Halstuk, *supra* note 36, at 102, 112-17.

68. Recent examples include *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003), in which the court deferred to the Department of Justice under Exemption 7, and *Edmonds v. FBI*, 272 F. Supp. 2d 35, 47 (D.D.C. 2003), in which the court deferred to the FBI under Exemption 1. These cases are discussed *infra* Subsection II.D.1 and note 133, respectively.



the mosaic theory helped support judgments in favor of withholding agencies in FOIA national security opinions by, in chronological order, the District Court for the Northern District of New York,<sup>69</sup> the Sixth Circuit,<sup>70</sup> the Third Circuit,<sup>71</sup> the District Court for the Southern District of New York,<sup>72</sup> the Fifth Circuit,<sup>73</sup> and the Ninth Circuit.<sup>74</sup> In none of these cases did the court evaluate the agency's mosaic claims in any detail, address counterarguments, or acknowledge tensions between its application of the theory and FOIA. Such mosaic-theory-based deference assumed a steadily more significant, though low-profile role in FOIA jurisprudence as precedent accrued and as technology rendered "intelligence gathering . . . more highly sophisticated" and assessing the risks of disclosure "increasingly complicated."<sup>75</sup>

Only one case in this period suggested limits to the mosaic theory. In the 1987 case *Muniz v. Meese*,<sup>76</sup> the D.C. District Court became the first court to reject an agency's mosaic argument outright. *Muniz* was a Title VII case in which Hispanic special agents of the Drug Enforcement Agency (DEA) alleged discriminatory practices, and the government sought to block discovery of the DEA's employment records. The government argued, alongside two other primary defenses, that "anyone possessing the employment histories of DEA agents could piece together a mosaic of the agency's worldwide structure, capabilities, and enforcement activities."<sup>77</sup> Dismissing this argument in a footnote, the court found noncredible the assertion "that information as to when particular Hispanic agents were promoted in relation to their non-Hispanic counterparts would provide anyone with the ability" to make such a mosaic.<sup>78</sup> The D.C. District Court upset no mosaic theory doctrine with this holding, however, and no subsequent courts (or scholars) have ever cited *Muniz*;<sup>79</sup> the mosaic postulated by the DEA was too remote from the national

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69. *Daily Orange Corp. v. CIA*, 532 F. Supp. 122, 126 (N.D.N.Y. 1982).

70. *Ingle v. U.S. Dep't of Justice*, 698 F.2d 259, 268 (6th Cir. 1983).

71. *Am. Friends Serv. Comm. v. U.S. Dep't of Defense*, 831 F.2d 441, 445-46 (3d Cir. 1987).

72. *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 564 (S.D.N.Y. 1989).

73. *Knight v. CIA*, 872 F.2d 660, 663-64 (5th Cir. 1989).

74. *Hunt v. CIA*, 981 F.2d 1116, 1118-20 (9th Cir. 1992).

75. *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989).

76. 115 F.R.D. 63 (D.D.C. 1987).

77. *Id.* at 65.

78. *Id.* at 65 n.7.

79. This does not include two subsequent cases directly related to *Muniz*. See *Muniz v. Meese*, 122 F.R.D. 1, 1-2 (D.D.C. 1988); *Gallejos v. Thornburgh*, Civ. A. No. 88-1869, 1989 WL 206495, at \*3-4 (D.D.C. Nov. 22, 1989).

security mainstream to attract notice and too baldly pretextual to be taken seriously.

Outside of the courts, the most significant development in mosaic theory law between *Sims* and 9/11 was President Clinton's Executive Order 12,958. Superseding Executive Order 12,356, Clinton struck Reagan's mosaic theory clause and replaced it with section 1.8(e): "Compilations of items of information which are individually unclassified may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information."<sup>80</sup> Drawing on the "added factor" test of an earlier case,<sup>81</sup> this provision limits the contextual inquiry to preexisting, aggregated, government-controlled information, and it demands the revelation, not just the reasonable expectation, of an additional association or relationship meriting classification. It is therefore a "somewhat more restrictive form" of the mosaic theory, as the Department of Justice (DOJ) remarked at the time.<sup>82</sup> Yet whatever section 1.8(e)'s intended or implied differences from Reagan's provision, courts hearing FOIA appeals seemed unmoved by the new language.<sup>83</sup> Mosaic theory doctrine, largely developed by courts before any executive order had mentioned the theory, had hardened by 1995, and the Clinton Administration did little to promote section 1.8(e) as an alternative methodology.

## II. THE MOSAIC THEORY AFTER 9/11

As outlined above, the mosaic theory has supported heightened executive branch protection of national security information, and heightened judicial deference to that protection, for over thirty years. Except for one period in the Reagan Administration, the theory provoked little debate or even attention because agencies used it in isolated instances, its doctrinal foundations remained stable, and its basic premise makes sense. As the Bush Administration has increased secrecy and narrowed FOIA in the prosecution of

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80. Exec. Order No. 12,958, § 1.8(e), 3 C.F.R. 333, 339-40 (1995), *reprinted in* 50 U.S.C. § 435 (Supp. II 1996).

81. *Taylor v. Dep't of the Army*, 684 F.2d 99, 103-04 (D.C. Cir. 1982).

82. OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW 74 (1996).

83. *E.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 604 (D.C. Cir. 1996); *Billington v. U.S. Dep't of Justice*, 11 F. Supp. 2d 45, 55 (D.D.C. 1998). No published opinion has remarked on section 1.8(e) as requiring different analysis, or reevaluated mosaic theory precedent in light of it.

its War on terror, however, the mosaic theory has taken on a new prominence. In the rush to classify and safeguard information, including a new category of “sensitive but unclassified information,” federal agencies have used the mosaic theory more aggressively than in the past.<sup>84</sup> At the same time, in denying FOIA and document-discovery requests, the government has increasingly relied on the mosaic theory in court to conceal its actions. The theory has therefore supported both more secrecy in the government’s management of information and more secrecy about that secrecy by foreclosing scrutiny *ex post*. Reflecting both the gravity of today’s terrorist threats and the Administration’s zeal for secrecy in countering those threats, this expansion of the theory—in usage, not in concept—has forced judges to confront mosaic claims more explicitly, exposing deep divisions in how courts evaluate executive action in an age of terrorism.

This Part analyzes the recent decisions that have grappled with mosaic arguments in light of the changing role of information in national security strategy. After Section A summarizes the erosion of FOIA since 9/11, Section B explains how the attacks sensitized policymakers to the ways in which terrorism and technology have been increasing the scope of mosaic threats while decreasing their predictability. Section C follows these developments to the courts. I suggest that the theory has not only played a decisive role in the post-9/11 jurisprudence of information control, but also a divisive role, with standard “deference” and “abdication” emerging as challenges to the heightened deference (the “delegation”) courts have traditionally applied in mosaic cases. Section D concretizes these ruptures in mosaic theory doctrine with profiles of the two most controversial post-9/11 mosaic cases.

#### A. *The Narrowing of FOIA*

Although the Bush Administration exhibited a penchant for secrecy from the beginning,<sup>85</sup> it made no public alterations to FOIA prior to 9/11. As part of its dramatic expansion of government secrecy since the attacks, however, the Administration has undermined FOIA on a host of levels, most directly through Executive Order 13,292.<sup>86</sup> Issued by President Bush in March 2003,

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84. Of course, it is impossible to know exactly how much government classifiers and attorneys (in classified submissions) have relied on the mosaic theory. While it seems likely that such nonpublic usages of the theory have also proliferated, my arguments here reflect only the public record.

85. See Anderson, *supra* note 6, at 1620 n.74; Josh Chafetz, *The White House Hides History*, NEW REPUBLIC, Aug. 27 & Sept. 3, 2001, at 20.

86. Exec. Order No. 13,292, 3 C.F.R. 196 (2003), *reprinted in* 50 U.S.C.A. § 435 (West 2005).

this Order rescinds many of President Clinton's liberal innovations to the Reagan classification order. Order 13,292 reintroduces a presumption of harm to national security from the release of information provided by or related to foreign governments;<sup>87</sup> it drops the Clinton restrictions on the duration of classifications and the ability to classify information over twenty-five years old;<sup>88</sup> and it permits once again the reclassification of previously declassified information.<sup>89</sup>

An October 2001 memorandum on FOIA policy from Attorney General John Ashcroft to all federal agency heads,<sup>90</sup> meanwhile, rescinded his predecessor's "presumption of disclosure" for all FOIA requests.<sup>91</sup> In 1993, Janet Reno had announced that the DOJ would "defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."<sup>92</sup> Ashcroft, by contrast, advised withholding agencies, "you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis"<sup>93</sup>—an even more antidisclosure standard than the Reagan DOJ's "substantial legal basis" test.<sup>94</sup> Supplementing Ashcroft's communiqué, a March 2002 memorandum from Laura Kimberly, Acting Director of the Information Security Oversight Office (ISOO), instructed agencies to take "appropriate actions to safeguard sensitive but unclassified information related to America's homeland security . . . by giving full and careful consideration to

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87. *Id.* § 1.1(c).

88. Exec. Order No. 12,958, §§ 1.6, 3.4, 3 C.F.R. 333, 337-38, 343-45 (1995), *reprinted in* 50 U.S.C. § 435 (Supp. II 1996).

89. Exec. Order No. 13,292, § 1.7(c), 3 C.F.R. 196, 200 (2003), *reprinted in* 50 U.S.C.A. § 435 (West 2005). Given these substantive differences between Bush's Order and Clinton's Order 12,958 which it supersedes, there is a distinctly Orwellian tincture to the latest DOJ FOIA guide's insistence on referring to the Bush Order as "Executive Order 12,958, as amended" rather than simply "Executive Order 13,292." DOJ FOIA GUIDE, *supra* note 9, *passim*.

90. Memorandum from Attorney General John Ashcroft to the Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* <http://www.doi.gov/foia/foia.pdf>.

91. Memorandum from Attorney General Janet Reno to the Heads of Departments and Agencies (Oct. 4, 1993), *available at* [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm).

92. *Id.*

93. Memorandum from Attorney General Ashcroft to the Heads of All Federal Departments and Agencies, *supra* note 90.

94. Christopher M. Mason, Comment, *Developments Under the Freedom of Information Act—1981, 1982* DUKE L.J. 423, 425 (citing Letter from Attorney General William French Smith to All Federal Departments and Agencies (May 5, 1981)).

all applicable FOIA exemptions.”<sup>95</sup> Kimberly’s memorandum never defines “sensitive but unclassified information,” which some have estimated to subsume nearly seventy-five percent of all government-held information.<sup>96</sup>

In response to the 9/11 attacks and the Ashcroft and Kimberly memoranda, federal agencies have removed thousands of documents from their websites and classified millions more. Since the Electronic Freedom of Information Act Amendments of 1996,<sup>97</sup> agencies had increasingly been publicizing their records on the Internet, but in the wake of 9/11, as President Clinton’s Chief of Staff has observed, “[t]he breadth and the scope of the redaction of government information [has been] astounding.”<sup>98</sup> The ISOO’s official figures indicate that the federal government classified over fourteen million new documents in 2003, a nearly sixty-five percent increase over 2001 and the largest annual percentage increase for at least a decade.<sup>99</sup> In front of a House of Representatives panel last year, the director of the ISOO said “[i]t is no secret that [the] government classifies too much information” and called the amount of overclassification “disturbingly increasing.”<sup>100</sup> Scores of critics have charged the Bush Administration with obsessive, excessive secrecy and have argued, like Professor Geoffrey Stone, that “one cannot escape the inference that the cloak of secrecy imposed by the Bush administration has ‘less to do with the

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95. Memorandum from Laura L.S. Kimberly, Acting Dir., Info. Sec. Oversight Office, to Departments and Agencies (Mar. 19, 2002), available at <http://www.fas.org/sgp/bush/who31902.html>.

96. JOINT SEC. COMM’N, REDEFINING SECURITY: A REPORT TO THE SECRETARY OF DEFENSE AND THE DIRECTOR OF CENTRAL INTELLIGENCE ch. 2 (1994), <http://www.fas.org/sgp/library/jsc>; see also Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at A14 (noting that “vague tags” like sensitive-but-unclassified “lack clear rules or definitions,” leading one Republican congressional aide to call such categories “bogus”).

97. Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. § 552 (2000)).

98. John Podesta, *Need To Know: Governing in Secret*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 220, 223 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

99. INFO. SEC. OVERSIGHT OFFICE, *supra* note 38, at 19-20 (reporting combined classification activity); see also Shane, *supra* note 96 (describing how “the declassification process . . . has slowed to a relative crawl, from a high of 204 million pages in 1997 to just 28 million pages last year” and how “[t]he secrecy wave has reached obscure outposts of federal power” like the Mine Safety and Health Administration).

100. Press Release, ACLU, ACLU Lauds Introduction of Cornyn-Leahy ‘Open Government Act’ (Feb. 16, 2005), <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=17485&c=108>.

war on terrorism’ than with its desire ‘to insulate executive action from public scrutiny.’”<sup>101</sup>

In addition to these moves by the Executive to increase information safeguarding and secrecy, Congress has narrowed FOIA in significant ways. Placing limits for the first time on who may submit a FOIA request,<sup>102</sup> the 2003 Intelligence Authorization Act amended FOIA to preclude intelligence agencies from disclosing records in response to any request made by a foreign government entity, either directly or through a representative.<sup>103</sup> More controversially, Congress has been enacting legislation that limits disclosure through Exemption 3’s incorporation of withholding statutes.<sup>104</sup> Section 214 of the Homeland Security Act of 2002, for instance, exempts from FOIA “critical infrastructure information” that is voluntarily submitted to the federal government for homeland security purposes.<sup>105</sup> As with sensitive but unclassified information, critics have argued that critical infrastructure information is an overly vague and capacious category whose exemption from FOIA will allow the government to withhold records unrelated to national security.<sup>106</sup> “Congress also has enacted legislation,” the DOJ’s FOIA guide observes, “evidently aimed at achieving an ‘Exemption 3 effect’ in an *indirect* fashion—i.e., by limiting the funds that an agency may expend in responding to a FOIA request.”<sup>107</sup> Finally, Congress has enacted new regulations allowing the NSA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency to exempt their “operational files” from FOIA in the same manner as the CIA does.<sup>108</sup>

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101. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 557 (2004) (quoting with approval Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, in *THE WAR ON OUR FREEDOMS*, *supra* note 99, at 74, 91); *see also* Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20 (criticizing the Bush Administration’s “addiction to secrecy” and suggesting that its main purpose in increasing classification is “cloaking nonlethal cases of mismanagement and bureaucratic embarrassment”).

102. DOJ FOIA GUIDE, *supra* note 9, at 19.

103. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 312, 116 Stat. 2383, 2390-91 (2002) (codified at 5 U.S.C. § 552(a)(3)(A), (E) (Supp. II 2002)).

104. DOJ FOIA GUIDE, *supra* note 9, at 230 & n.18 (providing examples).

105. Pub. L. No. 107-296, § 214, 116 Stat. 2135, 2152-55 (2002) (codified at 6 U.S.C. § 133(a)(1)(A) (Supp. II 2002)).

106. *See, e.g.*, Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1214 (2004); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 826-27 (2004).

107. DOJ FOIA GUIDE, *supra* note 9, at 231.

108. *See id.* at 233 & nn.34-39 (providing citations).

*B. Mosaic-Making and Informational Paranoia*

As the mosaic theory has risen to prominence in the Bush Administration's paradigm shift away from public disclosure, the theory itself has not changed; rather, the national security landscape has changed, and the theory has taken on new salience as a result. The dangers of adversarial mosaic-making were brutally underscored by the 9/11 attacks, as "[i]t is widely believed . . . that the public criminal trials of the men who attempted to blow up the World Trade Centers in 1993 made available information about government techniques for monitoring terrorists, as well as critical information about what it would take to actually bring the towers down."<sup>109</sup> Conversely, the attacks also highlighted our government's failure at defensive mosaic-making, at "connecting the dots" that would have predicted the hijackings.<sup>110</sup> Shifting the mosaic-making advantage back to the federal government will not be easy, however. The government now generates and manages more information than ever before, and is increasingly doing so in digital form, which permits users to process, share, and disseminate the data more easily. The Internet provides a ready medium for adversaries to locate and transfer this information, while data-mining technologies, becoming more powerful and accessible over time, can help them extract useful knowledge from otherwise unwieldily large or complex data sets.<sup>111</sup> Under FOIA, agencies must provide documents in "any form or format requested" that is "readily reproducible," including electronic

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109. CRAIG L. LAMAY, *DEMOCRATIC ENTERPRISE: SUSTAINING MEDIA AND CIVIL SOCIETY* 6 (2003).

110. See, e.g., MARY DEROSA, *CTR. FOR STRATEGIC & INT'L STUDIES, DATA MINING AND DATA ANALYSIS FOR COUNTERTERRORISM* 5 (2004), available at [http://www.csis.org/media/ctsis/pubs/040301\\_data\\_mining\\_report.pdf](http://www.csis.org/media/ctsis/pubs/040301_data_mining_report.pdf) ("Even in hindsight, we can see no single source . . . that could have provided the full or even a large part of the picture of what was being planned [for 9/11]. We have seen a number of clues, however, that if recognized, combined, and analyzed might have given us enough to track down the terrorists and stop their plan."); Donald F. Kettl, *Unconnected Dots*, *GOVERNING*, Apr. 2004, at 14 ("In the awful first months following the 9/11 attacks, there was constant talk about a need to 'connect the dots.'"). To facilitate and institutionalize counterterrorism dot-connecting—which DeRosa stresses has become more crucial since the end of the Cold War, when we relied "on finding a relatively few rich sources of intelligence," DEROSA, *supra*, at 5—President Bush founded the Terrorist Threat Integration Center, now subsumed under the National Counterterrorism Center. Press Release, White House, Fact Sheet: Strengthening Intelligence To Better Protect America (Feb. 14, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030214-1.html>.

111. See DEROSA, *supra* note 110, at 3. DeRosa focuses on the use of data-mining for counterterrorism, but would-be terrorists could likewise exploit data-mining tools, both to generate otherwise invisible mosaics and, at a minimum, to lower their search costs.

formats.<sup>112</sup> Courts have not directly considered whether the mosaic theory becomes more significant when applied to electronic records, but the Supreme Court has acknowledged in discussing personal privacy that, because the value of information increases with the facility with which one can use it, computer compilations pose special dangers.<sup>113</sup>

More broadly, in the post-9/11 national security landscape, intelligence gathering and analysis have become perhaps our most important strategic assets,<sup>114</sup> while critical infrastructure data has become a key liability;<sup>115</sup> communications and computer technologies have increased the volume, accessibility, and manipulability of sensitive knowledge and enabled more sophisticated scheming;<sup>116</sup> new types of adversaries – more dispersed, harder to identify, and possibly more ruthless than their predecessors – have proliferated; and the specter of another attack on U.S. soil has framed political debate and dictated policymaking. Federal agencies are being pressed to expand information-sharing with each other,<sup>117</sup> but to reduce information-sharing with the public.<sup>118</sup> All of these developments have served to vitalize the role of information in national security strategy. That role, however, is characterized by uncertainty: As information implicating national security has become more heterogeneous and more abundant, we increasingly do not know what information matters, or who has it, or how to control it. As the Director of the University of Maryland’s Center for Information Policy has observed, “there are thousands of nodes of information in the United States and each

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112. 5 U.S.C. § 552(a)(3)(B) (2000).

113. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763-64 (1989).

114. See, e.g., WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 30 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (“Intelligence – and how we use it – is our first line of defense against terrorists and the threat posed by hostile states.”).

115. See, e.g., 6 U.S.C. § 133(a)(1)(A) (Supp. II 2002) (exempting critical infrastructure information from FOIA).

116. See, e.g., Todd M. Hinnen, *The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 5 (2004) (describing terrorists’ Internet-based scheming).

117. See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1016, 118 Stat. 3638, 3664-70 (codified at 6 U.S.C.A. § 485(b)(1)(A), (b)(2)(F) (West 2005)) (tasking the President with creating an “information sharing environment” that “facilitates the sharing of information at and across all levels of security”).

118. See *supra* Section II.A.



does not know what it does not know or what it needs to know.”<sup>119</sup> More than ever, mosaics usable for terrorism and counterterrorism abound. Seen in this light, the narrowing of FOIA and the expanding role of the mosaic theory become, normative judgments aside, more understandable.

C. *Deference, Delegation, Abdication, and the Unraveling of Mosaic Theory Jurisprudence*

With the mosaic theory and FOIA growing in strategic significance for the government since 9/11, courts have had to assess federal agencies' mosaic claims over broad, at times extraordinary acts of secrecy undertaken in the name of national security. In the post-9/11 cases summarized below, three modes of judicial review emerge. In the first, apparent in holdings by the D.C. federal courts, judges treat mosaic claims as a distinct, and privileged, defense of secrecy. Because they see mosaic arguments as especially difficult to evaluate and mosaic risks as especially frightening in the post-9/11 world, these judges are especially reluctant to challenge agency opinion when confronted with mosaic claims: These judges treat mosaic claims with an augmented form of deference, which amounts to an effective *delegation* of mosaic theory oversight to the agencies themselves. The Third Circuit has gone even further, treating mosaic claims not merely with extra deference, but with complete deference. Echoing *Marchetti's* call for “avoidance of judicial review of secrecy classifications,”<sup>120</sup> the Third Circuit has countenanced an *abdication* of mosaic theory review. In contradistinction to this approach, a third set of courts has opposed the application of any special treatment to mosaic claims. Instead, these courts aim to evaluate mosaic claims like any other, with the standard *deference* accorded the government in national security litigation.<sup>121</sup>

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119. Lee S. Strickland, *The Information Shortcomings of 9/11*, INFO. MGMT. J., Nov./Dec. 2004, at 34, 40.

120. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

121. *See supra* Subsection I.A.2 (describing standard deference under FOIA). I employ these three categories—deference, delegation, and abdication—not to specify a rigorous taxonomy of judicial review, but to capture the basic distinctions in the degree and type of deference courts have granted mosaic arguments. When reviewing any such argument, a court can grant the government the usual FOIA deference, total deference, or something in between. (To grant the government no deference or minimal deference would violate explicit congressional instruction, a long line of precedent, and deeply held norms of national security litigation.) Delegation occupies that space in the deference spectrum between standard deference and abdication, so that even though delegation can be seen as representing a qualitatively distinctive modality of judicial review, no bright line separates it from the other two categories.

To help clarify what is distinctive about deference, delegation, and abdication, they can be conceptualized, like judicial deference under FOIA review more generally, along three main axes: (1) “support,” the extent to which the court requires evidence to back up government arguments; (2) “specificity,” the extent to which the court requires the government to tailor its arguments to the specific withholdings; and (3) “plausibility,” the extent to which the court requires clear or convincing showings of potential harm. On each axis, delegation rates lower than deference.<sup>122</sup> Relative to the typical national security FOIA case, delegating courts are more willing to credit government arguments unsupported in the record, to allow the government to use the same argument across multiple records or classes of cases, and to accept as reasonable less persuasive showings of potential harm. They ask less of the government, and interpose less of their own reasoning. Abdication represents the logical endpoint of such delegation: no review whatsoever. Yet even without the abdication of mosaic theory oversight—which only the Third Circuit has explicitly endorsed—the effect of delegation is to pare down judicial review, already deferential in national security matters, closer to judicial acquiescence, and to insulate all but the most outrageous mosaic arguments from scrutiny.

Delegation of mosaic claims is at once traditional and new. It is traditional because, as Part I showed, ever since the canonical triad of *Marchetti*, *Halkin*, and *Halperin*, courts have accorded the mosaic theory special deference, finding for the government in nearly every instance. Indeed, the idea that mosaic claims are worthy of special judicial deference arose concomitantly in case law with the mosaic theory itself. With the accretion of precedent, the mosaic trope came to assume a talismanic quality in national security jurisprudence, threatening the skeptical judge with unknown vulnerabilities, unknown evils. *Halkin* and *Halperin* typify this paranoid posture and the low-support, low-specificity, low-plausibility mosaic claims that have succeeded in courts for decades.<sup>123</sup> What is new about delegation after 9/11 is therefore not the method or philosophy of judicial review, but the withholdings to which it has been applied. In line with the narrowing of FOIA and expansion of government secrecy, the withholdings validated in the recent mosaic theory cases have been

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122. I do not mean to imply that these axes will yield precise quantification. They are presented, rather, to help illuminate the salient indicia of deference in this context.

123. See *supra* Section I.B. This is not to say that every court evaluating mosaic claims from *Halperin* to 9/11 applied delegation, nor to deny that deference and delegation may shade into each other or that courts may be less than transparent in their reasoning. The point here is that delegation started as and has remained the dominant approach to mosaic theory review.

more speculative, more categorical, and more controversial than the withholdings validated before the attacks. Permitting the theory's blanket application across hundreds of individuals and records with minimal evidentiary basis, post-9/11 delegation courts have sanctioned a greatly enlarged role for the mosaic theory in controlling information.

The D.C. District Court and the D.C. Circuit, the most important lower courts for FOIA law,<sup>124</sup> have proven among the staunchest defenders of delegation after 9/11. A good example was provided by the District Court in *ACLU v. U.S. Department of Justice*,<sup>125</sup> a case pitting the mosaic theory against public attempts to learn about the government's domestic prosecution of its War on terror. In *ACLU*, plaintiffs sued the DOJ under FOIA seeking information on the FBI's use of section 215 of the PATRIOT Act, a provision that significantly expands the powers of the FBI under the Foreign Intelligence Surveillance Act (FISA) to order "the production of any tangible things" for investigations relating to international terrorism or intelligence.<sup>126</sup> The plaintiffs wanted to learn only the total number of section 215 FISA applications placed by the FBI, and did not seek access to the applications' dates, disposition, or content. Even still, the government invoked Exemption 1 and the mosaic theory to deny their request, reasoning that if the number of FISAs which have been requested "were coupled with the number of FISAs which have been authorized (a statistic which is publicly available), and the number of cases opened/closed per year, a database could be built with relative ease which would reveal a detailed road map of how the FBI conducts its investigations."<sup>127</sup>

With this argument, the government strained the meaning of "detailed": Such a road map, however constructed, would not be so detailed as to have directions, because the plaintiffs were not seeking locations of the requesting offices, or indeed to have any substantive content, because the plaintiffs were not seeking information about the requests. But despite the narrowness of the plaintiffs' FOIA request and the "widespread and exceptional media interest in

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124. See *supra* note 27. I discuss the D.C. Circuit in the following Subsection.

125. 321 F. Supp. 2d 24 (D.D.C. 2004).

126. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287-88 (codified as amended at 50 U.S.C. § 1861 (Supp. II 2002)).

127. Supplemental Declaration of David M. Hardy at 6, *ACLU*, 321 F. Supp. 2d 24 (No. 03-CV-02522). The "road map" in Hardy's argument substitutes for the more common mosaic metaphor. Hardy goes on to explicitly invoke mosaic terminology and precedent later in his declaration. *Id.* at 7.

which there exist possible questions about the government's integrity,"<sup>128</sup> the court found for the government. "While the resolution of this issue [was] hardly free from doubt,"<sup>129</sup> the opinion confesses, and while mosaic arguments "may cast too wide a net,"<sup>130</sup> the court upheld the government's nondisclosure out of deference to the Executive and to mosaic theory precedent.<sup>131</sup> The government thus prevailed on a mosaic claim with little support, specificity, or plausibility. Taken along with other recent holdings, *ACLU* evinces how the D.C. District Court—which hears more FOIA appeals than any other court<sup>132</sup>—has remained wedded to delegation in the face of increasingly attenuated mosaic claims.<sup>133</sup>

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128. 321 F. Supp. 2d at 31-32.

129. *Id.* at 35.

130. *Id.* at 37.

131. *Id.*

132. See *supra* note 27.

133. As controversially, the D.C. District Court upheld the government's mosaic theory arguments in *Edmonds v. FBI*, 272 F. Supp. 2d 35, 47-49, 59 (D.D.C. 2003), and *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 77-78 (D.D.C. 2004), to deny an FBI whistleblower information necessary to prosecute her wrongful termination suit. See, e.g., Clay Risen, 'Nuff Said, *NEW REPUBLIC*, June 7 & 14, 2004, at 12 (casting the government's mosaic arguments as specious and its classification of *Edmonds*-related documents as an attempt to cover up FBI failures). However, it is hard to categorize the *Edmonds* decisions, both of which included in camera document review, as examples of either deference or delegation because the opinions divulge only generic information about the government's claims and the records withheld.

Less politically charged, *Aftergood v. CIA*, 355 F. Supp. 2d 557 (D.D.C. 2005), offers a clearer example of delegation. In *Aftergood*, the D.C. District Court relied on the mosaic theory in granting summary judgment under FOIA Exemption 3 to the Director of Central Intelligence's (DCI) withholding of intelligence budget information from 1947 through 1970. Despite the apparently harmless public disclosure of 1997 and 1998 budget figures, the Acting DCI argued that release of the 1947-1970 figures, "[w]hen coupled with other clandestinely obtained information, and when viewed from a perspective spanning many decades," would enable foreign intelligence services "to draw the clearest and most cogent picture of U.S. intelligence activities, priorities, vulnerabilities, and strengths." Declaration of John E. McLaughlin at para. 20, *Aftergood*, 355 F. Supp. 2d 557 (No. 01-2524), available at <http://www.fas.org/sgp/foia/1947/mclaughlin.pdf>. Though historically illuminating, how this picture, composed only of aggregated budgetary data over twenty-five years old, might threaten national security today was never explained. Compare *id.*, with Patrick S. Roberts, "Withering on the Vine" Yet Not Uprooted: Reputation and Autonomy in the CIA and FBI 9 (May 5, 2005) (unpublished Ph.D. dissertation, University of Virginia) (on file with author) (noting that all of the government-appointed commissions to study the CIA in recent decades, including the 9/11 Commission, "agreed that more historical intelligence budget data should be released to the public, while some studies advocated complete disclosure"). In another recent case involving old records, the Bush Administration successfully invoked the mosaic theory in the Eastern District of California to help deny the

Juxtaposing *ACLU* with another PATRIOT Act opinion just issued underscores the difference between delegation and deference. In *Gerstein v. U.S. Department of Justice*, a reporter sued to enforce his FOIA request seeking summary statistics on the DOJ's use of section 213 of the PATRIOT Act, a "controversial, high-profile component of the [War on terror]" that permits courts to issue search and seizure warrants without immediately notifying the warrant's target.<sup>134</sup> To protect a six-page compilation indicating the number of times each U.S. Attorney's Office (USAO) had used section 213, the DOJ asserted the mosaic theory under FOIA Exemption 7(E), which allows agencies to withhold records whose release "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."<sup>135</sup> To "reveal a statistical distribution [of section 213 usage] by particular USAO," the DOJ claimed, "could allow criminals 'to direct [their] efforts to a disclosed weakness and avoid a disclosed strength in the national law enforcement system.'"<sup>136</sup> Noting that the government's "sole support for its parade of horrors [was this] conclusory assertion," the District Court for the Northern District of California—though it upheld the government's Exemption 7(C) privacy claim in spite of prior DOJ disclosures<sup>137</sup>—rejected its 7(E) claim as "dubious."<sup>138</sup> Among other deficits in the government's reasoning, Judge Ronald Whyte's opinion noted that "the fact that a certain USAO has yet to use Section 213 is hardly a reliable indicator that it will continue not to do so;"<sup>139</sup> "the [section 213] 'procedure' here is a matter of common knowledge;"<sup>140</sup> and the attorney whose declaration explicated the government's mosaic claim "has no special expertise in criminology or criminal psychology."<sup>141</sup> With this commonsensical

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National Security Archive's FOIA request for selected Presidential Daily Briefs from the Lyndon Johnson presidency, even though these briefs were over thirty years old and a number of similar briefs had already been released without incident. *Berman v. CIA*, 378 F. Supp. 2d 1209, 1217-18 (E.D. Cal. 2005).

134. No. C-03-04893, slip op. at 2 (N.D. Cal. Sept. 30, 2005) (order granting in part and denying in part cross-motions for partial summary judgment, denying in part motion to strike, and denying motion for a more definite statement).

135. 5 U.S.C. § 552(b)(7)(3) (2000).

136. *Gerstein*, slip op. at 19 (quoting the government's declaration) (second alteration in original).

137. *Id.* at 16-17.

138. *Id.* at 20.

139. *Id.* at 19.

140. *Id.* at 21.

141. *Id.* at 20.

analysis (and dismissive language), the court made a mockery of the identical “road map” logic that had prevailed in *ACLU*; such conclusory mosaic claims, *Gerstein* protests, lack sufficient support, specificity, or plausibility to prevail under FOIA. In so holding, the *Gerstein* court became the third district court to apply deference and reject a mosaic claim involving a controversial PATRIOT Act provision.<sup>142</sup>

Thus, while a number of post-9/11 courts have, like the D.C. District Court in *ACLU*, continued to apply delegation even if they have grappled more

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142. *Gerstein* was, however, the first FOIA case to do so. Like the *Detroit Free Press* and *North Jersey Media* cases discussed *infra* Subsection II.D.2, these two other PATRIOT Act cases featured constitutional challenges and were therefore subject to greater weighting of the public interests opposed to secrecy. In *Doe v. Ashcroft*, the government argued that mosaic theory risks justified the preclusion of judicial review of a PATRIOT Act provision expanding FBI authority to compel communications firms, through the issuance of “national security letters,” to produce customer records deemed relevant to an international-terrorism- or intelligence-related investigation. 334 F. Supp. 2d 471, 523-24 (S.D.N.Y. 2004) (construing 18 U.S.C. § 2709(b)(2) (Supp. I 2001)), *appeal filed sub nom.* *Gonzales v. Doe*, No. 05-0570 (2d Cir. Feb. 3, 2005). Although this mosaic argument persuaded the district court that “the Government should be accorded a due measure of deference when it asserts that secrecy is necessary for national security purposes in a *particular situation* involving *particular persons* at a *particular time*,” here, by contrast, the government sought to “universally apply these general principles to impose perpetual secrecy upon an entire category of future cases whose details are unknown.” *Id.* at 524. Unsatisfied with this preemptive abandonment of support and specificity, the court demanded a “more targeted and precise” approach. *Id.* (quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 693 (6th Cir. 2002)).

With *Doe v. Ashcroft* on appeal at the Second Circuit, the FBI demanded customer records from a member of the American Library Association under § 2709, and warned the institution not to disclose to anyone that the Bureau had sought or obtained the information. The institution challenged this gag as an unlawful prior restraint on speech in the District Court for the District of Connecticut, and the government rebutted with a vague mosaic theory: Although the institution’s identity “may appear innocuous by itself,” the government asserted, “it could still be significant to a terrorist organization when combined with other information available to it.” *Doe v. Gonzales*, 386 F. Supp. 2d 66, 77 (D. Conn.) (granting preliminary injunction), *stay granted pending appeal* 126 S. Ct. 1 (2005); *see also* Barton Gellman, *The FBI’s Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1 (describing the latest developments in this case and revealing that, despite intense opposition from civil libertarians and some politicians, “[t]he FBI now issues more than 30,000 national security letters a year, . . . a hundredfold increase over historic norms”). After expressing doubts about the mosaic theory’s applicability in this non-FOIA context, *Gonzales*, 386 F. Supp. 2d at 77-78, the court held that, regardless, “the defendants’ conclusory statements that the mosaic argument is applicable here, absent supporting facts, would not suffice to support a judicial finding to that effect,” *id.* at 78. The court further noted that when it asked the government counsel at oral argument if he could confirm that there was, in fact, a mosaic in this case that might threaten the FBI’s investigation, he “did not do so.” *Id.* In addition to lacking support and specificity, the opinion suggested by recounting this anecdote that the government’s mosaic argument did not even appear plausible to its own lawyers.

openly with its costs and benefits, deference has emerged as a viable alternative and so fractured mosaic theory jurisprudence. In holdings by the Sixth Circuit and several district courts and in a notable dissent on the D.C. Circuit, judges like Ronald Whyte have accepted the mosaic theory's general validity, but rejected its unsubstantiated, unpersuasive, or categorical application. Their review is meant to be meaningful, though not too searching, as these judges accord agencies' mosaic theory claims, like all national security claims, substantial weight—standard deference still means deference.<sup>143</sup>

#### *D. Opposing Modalities of Judicial Review: Two Case Studies*

##### *1. Center for National Security Studies*

In *Center for National Security Studies v. U.S. Department of Justice*<sup>144</sup> (CNSS), a landmark post-9/11 mosaic theory case, public interest groups brought a FOIA suit against the DOJ to compel disclosure of information about persons detained in the wake of the attacks, including their names, their attorneys' names, dates of arrest and release, locations of arrest and detention, and reasons for detention. After the D.C. District Court had ordered release of the detainees' and attorneys' names but permitted the DOJ to withhold the other records under Exemption 7(A),<sup>145</sup> the D.C. Circuit reversed in part, allowing the DOJ to withhold all requested information under the mosaic theory.

The district court had found the government's reliance on the mosaic theory to withhold the names "misplaced" because "there is simply no existing precedent applying the mosaic theory to Exemption 7" and "application of the

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<sup>143</sup> Hence, even though the government has lost in several of the deference rulings I describe, a court's application of deference to a mosaic claim by no means ensures a plaintiff victory; to the contrary, the government retains the advantage. Examples of post-9/11 FOIA cases in which the court applied deference and upheld an agency's mosaic claim include *Coastal Delivery Corp. v. U.S. Customs Service*, 272 F. Supp. 2d 958, 964-66 (C.D. Cal. 2003), and *Florida Immigrant Advocacy Center v. National Security Agency*, 380 F. Supp. 2d 1332, 1342 & n.7 (S.D. Fla. 2005). In both cases the court, through independent analysis, validated reasonably well-supported, specific, plausible mosaic arguments—even though the threats they represented appeared neither obvious nor severe. *Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C. 2003), may also provide an example of the government winning under deference, but the opinion reveals too little to permit strong conclusions. See *supra* note 133.

<sup>144</sup> 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

<sup>145</sup> *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

mosaic theory would essentially turn 7A into an exemption dragnet.”<sup>146</sup> The district court also found it troubling that the “key Government affidavit on the mosaic theory was not even prepared for this case, but rather [was] a copy of the affidavit prepared for an unrelated case filed in the Eastern District of Michigan,”<sup>147</sup> *Detroit Free Press v. Ashcroft*.<sup>148</sup> At oral argument before the district court, the first question from the judges and much of the discussion concerned the theory.<sup>149</sup> Counsel for plaintiffs argued that the mosaic theory advocated by the government could authorize “the secret jailing of unlimited numbers . . . on immigration violations as long as the government asserts that it is done in connection with the terrorism investigation.”<sup>150</sup> In their appellate brief, the plaintiffs further noted that, as opposed to most previous mosaic theory cases, the information at issue here was not classified and had in fact been provided to the detainees themselves and to their lawyers, who had been free to disclose it however they wished.<sup>151</sup>

Nevertheless, in finding for the government, the D.C. Circuit forcefully endorsed its mosaic theory arguments and the need for judicial deference. After noting that “America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore,”<sup>152</sup> the court paraphrased the mosaic theory concerns outlined in the government’s *Detroit Free Press* declaration, that “[a] complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation” might “allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts.”<sup>153</sup> Citing *Sims* and *Halperin* as mosaic theory precedent,<sup>154</sup> the court went on to propound that “[i]t is not within the role of the courts to second-guess executive judgments

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<sup>146.</sup> *Id.* at 103. Interestingly, in contemporaneous cases the D.C. District Court did not seem concerned about turning Exemptions 1 or 3 into dragnets. See *supra* notes 125-133 and accompanying text.

<sup>147.</sup> 215 F. Supp. 2d at 104.

<sup>148.</sup> 195 F. Supp. 2d 937 (E.D. Mich. 2002). This was the district court precursor of *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), discussed in the following Subsection.

<sup>149.</sup> Transcript of Motions Hearing at 8, *Ctr. for Nat’l Sec. Studies*, 215 F. Supp. 2d 94 (No. 01-2500), available at <http://www.cnss.org/oralargument.htm>.

<sup>150.</sup> *Id.* at 83-84.

<sup>151.</sup> Brief for Appellees/Cross-Appellants at 25-26, *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (Nos. 02-5254 & 02-5300), available at <http://www.cnss.org/Final%20Brief.pdf>.

<sup>152.</sup> *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003).

<sup>153.</sup> *Id.* (paraphrasing Declaration of Dale L. Watson at 4-5, *Detroit Free Press*, 195 F. Supp. 2d 937 (No. 02-70339), available at <http://www.cnss.org/watsonaffidavit.pdf>).

<sup>154.</sup> *Id.* at 928-29.



made in furtherance of that branch's proper role [protecting national security]."<sup>155</sup>

In its unwillingness to second-guess the Executive—a brazenly ahistorical stance given that Congress explicitly instructed courts to do so in FOIA review<sup>156</sup>—the D.C. Circuit ignored both the great public interest in the propriety of the detentions as well as, it seems, the dictates of common sense. For, as the *Washington Post's* amicus brief stressed, the government “ha[d] not advanced any reason to believe that Al Qaeda—unlike any other rebellious faction in history—is so cunning that it can build a [dangerous] ‘mosaic’ from simple names of detainees, or that it is so inept that it doesn’t even know when significant people have been detained.”<sup>157</sup> The government had not denied, moreover, “that many, if not most of the detainees neither [were] terrorists nor [had] any knowledge concerning terrorism.”<sup>158</sup> CNSS’s blanket no-disclosure holding therefore vindicated an extreme application of the mosaic theory: Through the court’s delegation, the government prevailed on a mosaic claim with low plausibility, very little support, and even less specificity. Essentially, the court ruled that because the plaintiffs requested too much information—all of the detainees’ names and records—they were not entitled to any information,<sup>159</sup> lest disclosure enable adversarial mosaic-making.

In a scorching dissent, Judge David Tatel accused the majority’s delegation approach of “drastically diminish[ing], if not eliminat[ing], the judiciary’s role in FOIA cases that implicate national-security interests.”<sup>160</sup> For Tatel, the mosaic scenario at the heart of the government’s defense provided too speculative a basis for FOIA exemption:

The only argument that could conceivably support withholding innocent detainees’ names is the assertion that disclosure of the names

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155. *Id.* at 932. Highlighting this passage, Professor Cass Sunstein recently identified the CNSS ruling as a prime exemplar of “national security fundamentalism,” the position that “when national security is genuinely threatened, the president must be permitted to do whatever needs to be done to protect the United States.” Cass R. Sunstein, *Monkey Wrench*, *LEGAL AFF.*, Sept./Oct. 2005, at 37, 37.

156. *See supra* notes 19–26 and accompanying text.

157. Brief for Amicus Curiae The Washington Post Company et al. in Support of Plaintiffs-Appellees/Cross-Appellants at 24, *Ctr. for Nat’l Sec. Studies*, 331 F.3d 918 (Nos. 02-5254 & 02-5300), available at <http://www.cnss.org/cnss%20amicus%20brief%20final.pdf>.

158. *Id.*

159. Brief Amici Curiae for The Washington Post Company et al. in Support of Petitioners on Petition for a Writ of Certiorari at 18, *Ctr. for Nat’l Sec. Studies*, 540 U.S. 1104 (2004) (No. 03-472), available at <http://www.cnss.org/Media%20Cert%20Amicus%20Brief.pdf>.

160. *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 951 (Tatel, J., dissenting).

“*may* reveal details about the focus and scope of the investigation and thereby allow terrorists to counteract it.” That [the government] believes these harms *may* result from disclosure is hardly surprising—anything is possible.<sup>161</sup>

Tatel called instead for deference, a “more particularized approach” under which the government would, as in an ordinary FOIA case, have to “describe, for each detainee or reasonably defined category of detainees, on what basis it may withhold their names and other information.”<sup>162</sup>

With so much argument devoted to the mosaic theory, the *CNSS* opinions offer the most complete articulation on record of the advantages and disadvantages of delegating mosaic claims, and signal the emergence of the theory as a governing framework in which to assess post-9/11 security threats. The majority-dissent dialectic, furthermore, neatly frames the debate over the judiciary’s proper role in regulating the War on terror. As one commentator has argued, *CNSS* “is an immensely significant case because it indicates a shift toward greater judicial deference regarding FOIA requests with the post-9/11 emphasis on homeland security.”<sup>163</sup> Whether or not *CNSS* ultimately proves a signpost toward greater deference, its opinions indicate the deep divisiveness such a shift would engender, with battle lines drawn around the mosaic theory.

## 2. North Jersey Media and Detroit Free Press

Paralleling the majority-dissent divide in *CNSS*, the companion cases *North Jersey Media Group, Inc. v. Ashcroft*<sup>164</sup> and *Detroit Free Press v. Ashcroft*,<sup>165</sup> in the Third and Sixth Circuits respectively, likewise turned on the mosaic theory and its use by the government to insulate 9/11-related measures from judicial and public scrutiny. The Third Circuit applied delegation of the most extreme kind, abdication, and found for the government; the Sixth Circuit applied deference and found for the plaintiffs. With the Supreme Court denying certiorari in *North Jersey Media*, the disharmony between its holding and *Detroit Free Press*’s epitomizes the way in which mosaic theory doctrine, in stasis for two decades,

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<sup>161.</sup> *Id.* at 942 (quoting Declaration of James Reynolds at para. 16, *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (No. 01-2500), available at <http://www.cnss.org/dojreynoldsdeclaration.htm> (emphasis added by Tatel)).

<sup>162.</sup> *Id.* at 951.

<sup>163.</sup> Anderson, *supra* note 6, at 1628.

<sup>164.</sup> 308 F.3d 198 (3d Cir. 2002).

<sup>165.</sup> 303 F.3d 681 (6th Cir. 2002).

has become newly unsettled as a result of the Bush Administration's aggressive use of the theory.

In these cases, consortia of media groups sought access to "special interest" deportation hearings involving people whom the Attorney General had determined might have connections to or knowledge of the 9/11 attacks. Although deportation hearings have long been open proceedings, a September 21, 2001 directive issued by Michael Creppy, the Chief U.S. Immigration Judge, closed off these special interest hearings to the public and the press.<sup>166</sup> To justify this unprecedented move, the government turned to the mosaic theory: With public hearings, the information presented "could allow terrorist organizations to alter their patterns of activity to find the most effective means of evading detection," while "[i]nformation that is *not* presented at the hearings also might provide important clues to terrorists, because it could reveal what the investigation has not yet discovered."<sup>167</sup>

Faced with the same mosaic theory arguments, the circuit courts reached opposite conclusions. In *North Jersey Media*, although the Third Circuit acknowledged that the plaintiffs "are undoubtedly correct that the [government's mosaic arguments] are to some degree speculative," it held that "given judges' relative lack of expertise regarding national security and their *inability to see the mosaic*, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure."<sup>168</sup> For the Third Circuit,

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166. Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.

167. Brief for Appellants at 48, *Detroit Free Press*, 303 F.3d 681 (No. 02-1437) (internal quotation marks omitted). Within a year of the Creppy directive, the DOJ also advanced mosaic theory justifications in the preambles of two related regulations enabling greater court control of information about immigration detainees. See Protective Orders in Immigration Administrative Proceedings, 8 C.F.R. § 1003.46 (2004); Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 8 C.F.R. §§ 236, 241 (2004). The Department of Transportation, in the preambles to two new regulations restricting the access of persons denied airmen certificates for national security reasons to information about their denials, similarly invoked the mosaic theory. See Threat Assessments Regarding Alien Holders of, and Applicants for, FAA Certificates, 49 C.F.R. § 1540.117 (2004); Threat Assessments Regarding Citizens of the United States Who Hold or Apply for FAA Certificates, 49 C.F.R. § 1540.115 (2004).

168. 308 F.3d at 219 (emphasis added) (paraphrasing with approval the government's argument). Judges, in this view, cannot "see" the mosaic even after the government has described it for them. Cf. *THE MATRIX* (Warner Bros. 1999) ("Unfortunately, no one can be told what the Matrix is. You have to see it for yourself."). Judge Scirica's *North Jersey Media* dissent also found mosaic concerns significant, but would have allowed immigration judges to make determinations on whether a given special interest deportation hearing should be closed. 308 F.3d at 227-28 (Scirica, J., dissenting).

like the Fourth Circuit in *Marchetti*,<sup>169</sup> mosaic theory considerations did not merely make judicial review of special interest cases more complicated; they made judicial review inappropriate.

In *Detroit Free Press*, by contrast, the Sixth Circuit, after conceding the general validity of the mosaic theory and the Executive's superior knowledge of national security threats, nevertheless found the Creppy directive unconstitutionally "over-inclusive."<sup>170</sup> "While the risk of 'mosaic intelligence' may exist," the court argued, "we do not believe speculation should form the basis for such a drastic restriction of the public's First Amendment rights."<sup>171</sup> Fearing that the "[g]overnment could use its 'mosaic intelligence' argument as a justification to close any public hearings completely" and to "operate in virtual secrecy in all matters dealing, even remotely, with 'national security,'"<sup>172</sup> the Sixth Circuit echoed Judge Tatel's *CNSS* dissent in applying deference—and demanded a more direct showing of potential harm than a generic appeal to the mosaic theory.

### III. EVALUATING MOSAIC CLAIMS: THEORY AND APPLICATION

Having summarized the history and current status of mosaic theory jurisprudence, I explore in this Part the theoretical, legal, and policy dimensions of applying the theory under FOIA. Comparing mosaic claims to ordinary exemption claims, Section A questions the assumption that mosaic claims are special, and therefore worthy of special forms of judicial review. The distinctive feature of mosaic claims is not, I contend, that they involve mosaic analysis or facially innocuous information, but rather the degree to which they may depend on speculative reasoning by the government. Mosaic theory doctrine, consequently, has been misconceived from the start.

As discussed above, mosaic-making and information generally have taken on new salience in national security strategy after 9/11, with today's mosaic threats both more numerous and more speculative than ever before.<sup>173</sup> In light of these developments, Section B presents arguments in favor of courts

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<sup>169.</sup> See *supra* notes 41-44 and accompanying text.

<sup>170.</sup> 303 F.3d at 708.

<sup>171.</sup> *Id.* There is irony in this: Whereas the D.C. Circuit in *CNSS* found the government's Watson declaration sufficient to justify secrecy over post-9/11 detentions, here the Sixth Circuit found the same Watson declaration—which was originally prepared for this case and simply reproduced for *CNSS*—insufficient to justify secrecy over post-9/11 deportation hearings.

<sup>172.</sup> *Id.* at 709.

<sup>173.</sup> See *supra* Section II.B.

delegating mosaic claims, while Section C presents counterarguments. Because it is such an outlier, I do not explicitly address abdication in either Section; as an extension of delegation, abdication possesses its same merits and demerits, only in greater proportion. I conclude that, whatever its risk-reducing potential, delegation (and, by extension, abdication) is legally unjustified and practically unwise. Rather than review mosaic claims with extra deference, as courts have traditionally done, courts ought to review these claims with extra scrutiny and skepticism on account of their susceptibility to misuse. Section D offers suggestions on how judges can do this in practice.

A. *“Mosaic” Claims and “Ordinary” Exemption Claims*

For all the mosaic theory’s status and import in national security information law, courts have never set out to analyze it beyond a recitation of the mosaic (or jigsaw puzzle, or road map) metaphor. Underlying courts’ application of special deference to agencies’ mosaic claims, however, is the idea that there is something special about those claims as compared to other claims for FOIA exemption. Whereas a typical exemption claim involves only one piece of information, the standard argument runs, mosaic claims involve multiple pieces of information interacting with each other in potentially nonobvious ways; as a result, mosaic claims are more difficult for judges to evaluate and so demand additional deference. Judges lack the “broad view of the scene,” in *Marchetti*’s figuration, to “put the questioned item of information in its proper context.”<sup>174</sup> They cannot “see the mosaic.”<sup>175</sup>

The simplicity of this argument masks its fundamental errors: assuming that information (in non-mosaic cases) can be dangerous in and of itself, and assuming that information relevant to national security comes packaged in stable, meaningful units. To the contrary, information can become dangerous only in combination with other information and capabilities, and no clear boundaries demarcate one “piece” or “item” of information from another. To illustrate, consider two scenarios. In Case One, an ordinary national security FOIA case, the disclosure of requested record *A* poses a national security risk. In Case Two, a mosaic theory case, requested records *B* and *C* pose a risk only when taken together. What makes *A*, or *B* + *C*, dangerous? For either to create an actual threat to national security, an adversary must be able to assimilate this new information into its other information and have the capacity to act on the end product. Information poses no intrinsic threat, for to be dangerous,

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174. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

175. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002).

even the recipe for the atomic bomb demands an understanding of what it is, how to interpret it, and access to the ingredients. For FOIA courts, consequently, proper contextualization *always* matters; courts must always be mindful, as the current executive order on classification instructs, of additional “relationship[s] . . . not otherwise revealed in the individual items of information.”<sup>176</sup> To advocate delegation—or, like *Marchetti* and *North Jersey Media*, abdication—in cases where mosaic analysis is necessary is to advocate delegation in every national security FOIA case.

If risk determination thus depends inescapably on a “broad view” and “proper context,” what makes Cases One and Two different? Because FOIA recognizes no distinction between complete records and parts of records—the Act’s segregation clause requires that “[a]ny reasonably segregable portion of a record” be released<sup>177</sup>— $B + C$  can always be reconceptualized as  $D$ , a single unit of information (or, conversely, as many smaller units).  $A$ , likewise, can be reconceptualized, and segregated, into any number of alternative configurations. The essential arbitrariness of defining units of information under FOIA renders illusory the analytic distinction between Case One and Case Two, between an ordinary FOIA case and a mosaic one. Only an empty formalism would, *ceteris paribus*, justify judges treating Case Two with more deference than Case One or, if  $A = B + C$ , justify releasing more information in Case One than in Case Two. Coupled with the insight that every national security exemption claim is, ultimately, a mosaic claim, this deconstruction holds arresting implications: Inasmuch as the rush to judicial collapse in the face of “mosaic” arguments has been predicated on a belief in their uniqueness, it has lacked any legitimate analytic basis.

However, even though the notion of the mosaic theory as a distinctive class of exemption claim cannot withstand scrutiny, mosaic arguments may still differ from each other in meaningful ways—for example, in the degree to which they encompass information that would not otherwise merit protection, and in the degree to which they are speculative. The former attribute has typically determined whether or not an argument receives the mosaic label: When a relatively high portion of the information claimed exempt would be independently unclassifiable, agencies and courts identify the argument as an application of the mosaic theory. But it is the second attribute, speculativeness, that most influences the nature of the FOIA judge’s task. Assume in a given case that  $X$  represents the government-controlled information requested

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176. Exec. Order No. 13,292, § 1.7(e), 3 C.F.R. 196, 200 (2003), *reprinted in* 50 U.S.C.A. § 435 (West 2005).

177. 5 U.S.C. § 552(b) (2000); *see supra* Subsection I.A.1 (explaining the segregation requirement).

through FOIA, and *Y* the external information the government fears will be combined with *X* to form a dangerous mosaic. Because the government controls *X*, it can describe *X* in detail for the court and, if necessary, present *X* for in camera review. The government cannot, by contrast, present *Y* for review. Indeed, it may not even be able to describe *Y* or know what *Y* is or who has it. The government must use deductive reasoning, possibly supplemented by intelligence reports, to convince the court that adversaries could combine the disputed information *X* with *Y* (whatever *Y* is) in a harmful way. While a prediction of national security harm from FOIA disclosure “will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm,”<sup>178</sup> predictions that depend more on *Y* are necessarily more speculative in that they rely more on absent, and perhaps unknown, information. More precisely, a mosaic claim’s speculativeness will vary inversely with the ratio of *X* to *Y*, with the amount of government knowledge about *Y*, and with the amount of government knowledge about adversaries’ capacity to access and exploit *Y*. The lower the percentage of the posited mosaic for which the government can provide evidentiary support, the greater the speculativeness, and the greater the judicial deference needed to sustain the exemption claim.

Since 1995, the prevailing executive order on classification has required for all classifications that authorities be “able to identify or describe the damage” to national security that “reasonably could be expected to result” from disclosure.<sup>179</sup> Mosaics comprising substantial amounts of extrinsic information, about which the government does not possess full knowledge, tax both the government’s ability to identify or describe their risk and the integrity of a reasonableness standard for evaluating the likelihood of damage. As mosaic claims become more speculative, the national security expertise gap between the government and the court widens and the task of judicial review becomes more difficult. And in the wake of 9/11, mosaic threats to national security have become more speculative, and more alarming, than ever before.

### *B. Advantages of Delegation*

If today’s terrorist threats are characterized by their simultaneous intensity and uncertainty, judicial reluctance to question mosaic theory claims might be seen as a rational response. Decisionmaking about information disclosure has

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178. *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980).

179. Exec. Order No. 13,292, § 1.1(a)(4), 3 C.F.R. 196, 196 (2003), *reprinted in* 50 U.S.C.A. § 435 (West 2005).

always been constrained by the practical impossibility of measuring the costs and benefits of openness versus secrecy. This informational deficit exacerbates a tension that has always existed in FOIA between the goal of promoting transparent, accountable government and the imperative not to endanger national security in the process. Yet because the potential costs of an ill-advised FOIA disclosure, and the difficulties of evaluating what might constitute an ill-advised disclosure, are seen to have increased after 9/11, the balancing calculus has shifted. Adversarial mosaic-making now seems especially dangerous and unpredictable. In response, post-9/11 courts applying delegation have upheld agencies' highly speculative, highly generalized mosaic claims when disclosure would pose no evident danger; they have demanded little from the agencies in the way of support, specificity, or plausibility. Delegation errs, more so than deference, on the side of nondisclosure. In its caution, it instantiates a conservative vision of information policy, wherein executive agencies, not courts, should control information, and more control is presumed safer.

For those who advocate utmost judicial deference to the Executive in times of emergency, and who see the present as such a time, delegation holds obvious appeal. Lest they compromise the War on terror, decisions like *CNSS*, *North Jersey Media*, and *ACLU* self-consciously integrate the mosaic theory into, in the approving words of constitutional scholar John Yoo, "a deferential standard of scrutiny that provides the political branches with the flexibility to conduct war successfully."<sup>180</sup> By empowering the Executive with greater control over information, delegation sacrifices liberty, in the form of governmental transparency, for the sake of security. As with the shift in power from judiciary to executive, many accept this tradeoff in a time of emergency. From its coinage in *Marchetti*, *Halkin*, and *Halperin*, the mosaic theory has been a vehicle for increasing judicial deference. Now that this heightened deference accommodates the War on terror, it may—irrespective of the exceptional mosaic concerns arising after 9/11—appear particularly prudent and legitimate.

An additional argument for delegation is prudential in a narrower sense: It economizes on administrative and judicial effort. FOIA requests routinely encompass thousands of pages of government records. Scouring all requested records for possible mosaics may consume substantial agency resources, especially if the agency does not know what information (and information technologies) adversaries possess. Although courts have traditionally been sensitive to such administrative burdens,<sup>181</sup> they have demanded that agencies articulate a reasonably specific justification for each document or section

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<sup>180</sup>. John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 451 (2003).

<sup>181</sup>. See, e.g., *Assassination Archives & Research Ctr. v. CIA*, 177 F. Supp. 2d 1, 9 (D.D.C. 2001).



withheld.<sup>182</sup> Post-9/11 courts applying delegation, by contrast, have allowed information withholding under generic, categorical descriptions of mosaic consequences—in *CNSS*, recall, the government defended its mosaic claims with the exact declaration it had used in *Detroit Free Press*, and won. In a few pages of argument, that declaration swept all information about all detainees under the mosaic theory, sparing the government the burden of having to “describe, for each detainee or reasonably defined category of detainees, on what basis it may withhold their names and other information,” as Judge Tatel’s “more particularized approach” would have demanded.<sup>183</sup> The D.C. Circuit was, in turn, spared the burden of having to evaluate such descriptions, which may have required extensive in camera review. The difference between deference and delegation is one of degree here, rather than kind; the mosaic theory deals in aggregates and conjectures and so can always act as a labor-saving device when the government does not control all of the mosaic’s components. Relative to standard deference under FOIA national security review, however, delegation saves more effort by extracting nearly all “particularity” from the process of asserting and analyzing mosaic defenses.

### C. Problems with Delegation (and Deference)

Even if delegation appears attuned in these ways to the post-9/11 national security environment, its application raises a set of insoluble legal and policy problems. (Abdication, again, exacerbates delegation’s disadvantages as well as its advantages.) Legally, delegation threatens FOIA’s principles of segregation and individualized document review; it undermines the Act’s allocations of burdens, if not de novo review itself; and it violates legislative intent. Practically, delegation permits weak, irrebuttable arguments to justify nondisclosure; it invites agency opportunism and abuse; it lacks theoretical limits; it facilitates excessive secrecy; and it impairs the courts’ institutional integrity.<sup>184</sup> Speculative mosaic claims may have greater force in today’s world, but their validation comes at a steep price. There is no analytic justification, moreover, for holding a professed “mosaic” claim to lower standards of specificity and plausibility than a claim not blessed with the mosaic moniker.

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182. See *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987).

183. *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 951 (D.C. Cir. 2003) (Tatel, J., dissenting).

184. Although the legal problems addressed in this Section pertain specifically to FOIA, delegation’s policy problems obtain equally in other contexts.

1. *Legal Problems*

The effort-saving processual advantages of delegation exacerbate a tension that has always existed between the mosaic theory and FOIA's text. By blurring the lines between exempt and nonexempt content, the mosaic theory collides with FOIA's requirement that "[a]ny reasonably segregable portion of a record" must be released after appropriate application of any exemptions.<sup>185</sup> In 1987, the Third Circuit explicitly confronted this tension in *American Friends Service Committee v. Department of Defense*,<sup>186</sup> a FOIA case in which plaintiffs sought disclosure of a series of unclassified Department of Defense technical reports. In denying the plaintiffs' request, the court reflected: "The doctrine of segregability suggests that we should order the release of that number of reports which can be disclosed without the whole picture becoming 'guessable.' We are most reluctant to determine, however[,] . . . what the number of entries is . . . at which the picture becomes 'guessable.'"<sup>187</sup> That is, somewhere in between releasing zero reports and all the reports there lay a tipping point beyond which a dangerous mosaic would become guessable; the Third Circuit did not believe that it should risk triggering this revelation, or that it should be the body to locate the tipping point.

Although the mosaic theory was held in this case and others not to violate FOIA's segregation requirement,<sup>188</sup> some argue that the theory allows agencies to circumvent the provision because it "requires agencies to classify information that is harmless when segregated—and, therefore, 'reasonably segregable'—but potentially damaging to national security interests when combined with other information."<sup>189</sup> One does not have to accept this interpretation of "reasonably segregable" to accept that as mosaic claims for exemption have become more speculative, categorical, and attenuated, they have become more likely to sweep in records that could have been segregated and released without a reasonable likelihood of harm.

Applying the segregation doctrine to mosaic claims, courts can still enforce the usual requirement that a "withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the

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<sup>185.</sup> 5 U.S.C. § 552(b) (2000).

<sup>186.</sup> 831 F.2d 441 (3d Cir. 1987).

<sup>187.</sup> *Id.* at 445-46.

<sup>188.</sup> *Id.*; see also *Taylor v. Dep't of the Army*, 684 F.2d 99, 102-05 (D.C. Cir. 1982).

<sup>189.</sup> Lepper, *supra* note 6, at 397 (evaluating and quoting from section 1.3(b) of Reagan's executive order on classification). Ironically, the thousand-plus-page DOJ FOIA guide discusses the segregation requirement under Exemption 1 immediately after the mosaic theory, without comment on their relationship. DOJ FOIA GUIDE, *supra* note 9, at 185-88.

consequences of disclosing the sought-after information.”<sup>190</sup> This tailoring is precisely what delegation (and abdication) does not do. In *North Jersey Media*, the Third Circuit cites the mosaic theory as grounds for denying any access to all special interest deportation hearings, while in *CNSS*, the D.C. Circuit uses the mosaic theory to deny publication of any information about all seven-hundred-plus people detained after 9/11. These cases did not turn on tipping points because the government never made arguments specific enough to enable such analysis. “In both cases,” Professor Peter Margulies notes, “the government failed to demonstrate the accuracy of its [mosaic] assertion, relying on a conclusory affidavit from one law enforcement official [in *North Jersey Media*] and, in [CNSS], on unsupported assertions at oral argument.”<sup>191</sup> Delegation thus saves labor only at the cost of undermining FOIA’s principles of segregation and document-by-document review.

More basically, when courts uphold mosaic claims with minimal scrutiny they risk undermining FOIA’s presumption of disclosure. Since the 1974 amendments, FOIA has placed the burden of sustaining withholding actions on the agency.<sup>192</sup> However, when judges defer to conclusory warnings about mosaics, and accept no counterarguments,<sup>193</sup> the effect is to reverse the presumption of disclosure.<sup>194</sup> With agency expertise so privileged, the integrity of de novo review itself begins to unravel. Given that the DOJ has reversed its own presumption of disclosure in telling agencies it will support all withholding actions unless they lack a “sound legal basis,”<sup>195</sup> such uncritical judicial affirmation of mosaic claims now figures to prove especially damaging to FOIA’s stated allocation of burdens.

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190. *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987). When in camera review would involve a substantial number of documents, as is often the case, agencies can meet their production burden by submitting a “Vaughn index” that itemizes and justifies all withheld documents (or portions thereof). *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). *Vaughn* indices can mitigate, but do not remove, agencies’ descriptive-tailoring burden. *King*, 830 F.2d at 223–24.

191. Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 400 (2004).

192. 5 U.S.C. § 552(a)(4)(B) (2000).

193. In the vast majority of FOIA national security cases, courts have credited only the opinions of the agency classification authority. See *infra* note 224.

194. Professor David Cole, COLE, *supra* note 6, at 20, and Professor Susan Akram and Maritza Karmely, Akram & Karmely, *supra* note 6, at 652, make a similar point regarding the Bush Administration’s reliance on, and some judges’ uncritical application of, the mosaic theory in immigration proceedings.

195. See *supra* notes 90–94 and accompanying text.

Courts' delegation of mosaic claims not only diverges from the text of FOIA, but also, more dramatically, from the intent of Congress. Given that Congress amended FOIA in 1974 specifically to foster substantive review over national security cases,<sup>196</sup> it is difficult to reconcile delegation, and its expressly acquiescent posture, with the Act's legislative history. By authorizing courts to review appeals *de novo* and examine withheld documents *in camera*, the amendments aimed to fulfill FOIA's underlying goal of "prevent[ing] [review] from becoming meaningless judicial sanctioning of agency discretion."<sup>197</sup> Judicial review of FOIA appeals was explicitly sculpted to safeguard the principles of democratic self-determination and good government. Today's mosaic claims may be more difficult to resolve than their predecessors, but that does not absolve courts of their responsibility to evaluate their substance.<sup>198</sup>

## 2. Policy Problems

If every national security FOIA case is, at bottom, a mosaic case, then it is illogical for courts to treat cases differently depending on whether or not the government has presented its exemption claim as a mosaic scenario; regardless, the court will have to consider mosaic-making possibilities in assessing the withholding's reasonableness. Fixating on whether an exemption claim involves mosaics is, in fact, worse than illogical if it deflects attention from the relevant aspects of the claim: its support, specificity, and plausibility.<sup>199</sup> There is no good reason why courts should uphold less narrowly tailored, less persuasive government arguments when the specter of mosaic-making is raised, no reason why delegation should exist for the specificity and plausibility axes.<sup>200</sup> Fixing a deference standard for the support axis, however, is more complicated, for highly speculative mosaics, composed in large part of

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<sup>196.</sup> See *supra* Subsection I.A.1.

<sup>197.</sup> S. REP. NO. 89-813, at 8 (1965).

<sup>198.</sup> Inadequate judicial review of mosaic theory claims appears especially troubling in the context of the state secrets privilege, asserted sometimes (but not exclusively) in FOIA litigation, in that it deprives litigants of their right of access to court. See, e.g., *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 77-78 (D.D.C. 2004). In state secrets cases, the mosaic theory, if misused, undermines due process in addition to principles of democratic self-determination and good government.

<sup>199</sup> Sincerity is a fourth relevant aspect, but to a significant extent support, specificity, and plausibility should proxy for sincerity, which—as suggested by the virtually complete absence of bad faith findings in Exemption 1 litigation, see *supra* note 37 and accompanying text—will often be difficult for courts to assess independently.

<sup>200.</sup> See *supra* Section II.C (defining axes of deference).

inaccessible and even unknown information, may indeed pose a threat to national security, now more than ever.

From a plaintiff's standpoint, the fundamental difficulty with courts upholding highly speculative mosaic claims under a delegation approach is that it will often be impossible to falsify or rebut such claims. In its most tentative formulation, the classic mosaic argument against disclosure runs: An unidentified adversary might at an unspecified time use this information alongside other unknown information to help construct a mosaic that will threaten national security in an unpredictable way. As Professor Jane Kirtley has commented, such a theory is "impossible to refute . . . because who can say with certainty that it's not true?"<sup>201</sup> There are infinite possible informational mosaics that could be constructed from the release of any record, the expected impact of each one of which has a distinct probability and magnitude. Evaluating what harms "reasonably could be expected to result" from disclosure—the legal standard by which judges evaluate the propriety of classification decisions<sup>202</sup>—becomes especially problematic in the context of a theoretical construct so characterized by uncertainty. Given courts' baseline of deference in national security cases, the predictable result is that they have rejected only the most fantastical mosaic arguments: *Gerstein*, handed down in the fall of 2005, was the first published FOIA opinion to reject an agency's mosaic argument on its logic (as opposed to procedural deficiencies or countervailing considerations).<sup>203</sup> Amplifying deference for a category of claims already so insulated from scrutiny seems perverse.

The practical unfalsifiability of highly speculative mosaic claims not only problematizes judicial review; it also makes the mosaic theory ripe for agency opportunism and abuse. This is the casuistry, and the slippery slope, lurking in the background of the mosaic theory—a creative agency can justify almost any withholding under it. Indeed, anecdotal accounts suggest that executive officials gravitate to the mosaic theory precisely when they know their case for withholding documents is weak.<sup>204</sup> Intelligence agencies are known to dislike

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201. Adam Liptak et al., *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1 (internal quotation marks omitted).

202. Exec. Order No. 13,292, § 1.1(a)(4), 3 C.F.R. 196, 196 (2003), reprinted in 50 U.S.C.A. § 435 (West 2005); see also *supra* note 24 and accompanying text.

203. *Gerstein v. U.S. Dep't of Justice*, No. C-03-04893, slip op. at 19-21 (N.D. Cal. Sept. 30, 2005); see *supra* notes 134-142 and accompanying text.

204. E.g., E-mail from David Vladeck, Former Dir., Publ. Citizen Litig. Group, to David Pozen (Mar. 25, 2005) (on file with author) ("The government never has to defend the soundness of its mosaic theory, which of course is why the government gravitate[s] to that theory above all others.").

FOIA,<sup>205</sup> and all government agencies lack incentives for disclosure, yet the agencies alone control the requested information, making the Act amenable to, if not destined for, undercompliance in security-related areas. When courts delegate mosaic theory claims, they create a ready vehicle for opportunistic withholding.

Even without intentional abuse, the application of delegation creates dramatic potential for overbreadth—for an “exemption dragnet”<sup>206</sup>—because it permits the government to withhold even the most innocuous (and politically controversial) items of information without specifying how each item might facilitate a dangerous mosaic.<sup>207</sup> The Bush Administration’s policy of encouraging the withholding of “sensitive but unclassified information,” presumably under a mosaic theory rationale, seems to have formalized such a role for the theory. Suggesting what withholdings under this standard might look like, the government’s argument in *ACLU* that releasing merely the total number of section 215 FISAs sought by FBI field offices could reveal “a detailed road map of how the FBI conducts its investigations,” offers a textbook example of overbreadth.<sup>208</sup> Yet while the Bush Administration, in narrowing FOIA and promoting the mosaic theory, has generated particularly fierce accusations of abuse and overbreadth, these problems, like delegation itself, predate 9/11.<sup>209</sup>

The ultimate concern underlying all these problems is that special deference to the mosaic theory will corrode the courts’ institutional integrity and lead to excessive secrecy. Excessive secrecy has direct costs, of course, for people denied information or detained anonymously without good cause. These costs may fall disproportionately on certain segments of the population, such as immigrants after 9/11, and so impair equity values.<sup>210</sup> There are also

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205. See Wald, *supra* note 17, at 761.

206. *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 215 F. Supp. 2d 94, 103 (D.D.C. 2002).

207. See Turley, *supra* note 6, at 233 n.108; see also Hussain, *supra* note 6, at 1335 (“[T]he very nature of the mosaic theory renders it overbroad.”).

208. Supplemental Declaration of David M. Hardy at 6, *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004) (No. 03-CV-02522); see *supra* notes 125-131 and accompanying text.

209. These problems, moreover, are not confined to Republican administrations. Most notably, critics charged the Clinton Administration with abusing the mosaic theory, and courts with allowing the abuse, in *Frost v. Perry*, 161 F.R.D. 434 (D. Nev. 1995), in which the government relied on the theory to withhold all information concerning its activities near a classified, but well-known area purported to harbor hazardous waste. Richard Leiby, *Secrets Under the Sun*, WASH. POST, July 20, 1997, at F1; Turley, *supra* note 6, at 232-36.

210. See Margulies, *supra* note 191, at 400-01 & nn.87-88 (arguing that excessive judicial deference in *CNSS* and *North Jersey Media* offended equity and integrity).

indirect social costs of government secrecy—ranging from reducing accountability, to hindering technological progress, to degrading public debate, to breeding paranoia—which, while they do not capture attention like the possibility of inadvertently tipping off a terrorist, are just as real. Disclosure of security-related information, furthermore, does not necessarily increase risk, but may reduce it by alerting the public to threats and enabling better-informed responses: As a theoretical matter, it is unclear whether publicizing vulnerabilities makes them more or less likely to be exploited.<sup>211</sup> Because FOIA courts consider only the threatening mosaics presented to them by withholding agencies, the exclusively sinister connotations the mosaic metaphor has acquired<sup>212</sup> thus mask the substantive neutrality of the theory as well as the pervasiveness, even banality, of mosaic-making activity.<sup>213</sup> Historical experience<sup>214</sup> and research on humans' cognitive limitations and biases,<sup>215</sup> moreover, suggest that terrorist threats are particularly likely to trigger excessive secrecy and general over-response. For reasons such as these, FOIA set out to overcome the federal government's long-nurtured aversion to openness and "pierce the veil of administrative secrecy."<sup>216</sup> Inasmuch as delegation—by precluding evidentiary counterargument, by inviting abuse and overbreadth in the classification process, and by minimizing substantive oversight—generates or facilitates excessive secrecy, it imposes costs on us all.

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211. See DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 60, 80 (1998); James A. Goldston et al., Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 451 (1986).

212. In the national security context, I have only seen the mosaic metaphor applied to adversaries' behavior (offensive mosaic-making), never to the public's or the government's (defensive mosaic-making), even though legions of commentators have used comparable metaphors like "connect-the-dots" or "fusion" in describing counterterrorism. See *supra* note 110. While the sinister coloration of the mosaic metaphor surely has a complex etymology, the oft-repeated *Halkin* quotation, see *supra* note 1 and accompanying text, must have played a part.

213. At a micro level, the banality and pervasiveness of the mosaic theory are predicated on the fundamental role mosaic-making plays in how humans process and construct meaning out of information. See, e.g., JEROME S. BRUNER, *BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING* (1973); JAMES HARTLEY, *LEARNING AND STUDYING: A RESEARCH PERSPECTIVE* 18 (1998) ("Learning results from inferences, expectations and making connections.").

214. See Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215 (2003) (arguing that national crises consistently provoke civil liberties restrictions that Americans later come to regret).

215. See, e.g., Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003); W. Kip Viscusi & Richard J. Zeckhauser, *Sacrificing Civil Liberties To Reduce Terrorism Risks*, 26 J. RISK & UNCERTAINTY 99 (2003).

216. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).

Unlike its susceptibility to abuse and overbreadth, however, inadequate judicial review is not an inherent feature of the mosaic theory. To the contrary, these inherent features make judicial review of mosaic claims especially important. The irony is that the same speculative quality of the theory that makes it so attractive for agencies to misuse is the reason why courts have *increased* their deference to agencies relying on it. At the same time, then, that the mosaic theory threatens to stimulate excessive governmental secrecy, the additional demands it places on judges undermine their ability and willingness to confront that secrecy.

#### D. Practical Solutions

As the theory is both sensible and wildly exploitable by agencies, there are no easy answers for courts evaluating (highly speculative) mosaic arguments. Courts already have tools, however, to mitigate the theory's excesses. Most fundamentally, courts can force withholding agencies to articulate with as much specificity and support as possible the mosaic harms they anticipate from disclosure. Mosaic metaphors may provide a useful heuristic for conceptualizing adversaries' behavior, but without adequate specificity and support they should not be cognizable arguments under FOIA, and without adequate plausibility they should not win. Even though a single mosaic claim may legitimately encompass a range of documents, some or all of which are innocuous in their own right, courts can—with the use of *in camera* review if necessary (and possible)—still enforce FOIA's segregation requirement by demanding justifications for each document or portion thereof withheld.<sup>217</sup> When such justifications are valid, courts should allow withholding and thereby avoid triggering an analytic tipping point.<sup>218</sup> When, by contrast, the withholding agency cannot identify specific mosaic-making scenarios reasonably likely to result and describe how they would threaten national security, courts should, following the executive order on classification,<sup>219</sup> force disclosure.<sup>220</sup> This is, essentially, standard deference under FOIA: the “more

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217. See *supra* notes 185-191 and accompanying text. If multiple documents share the same function in the posited mosaic, the agency could describe this through a *Vaughn* index, as in any FOIA case.

218. See *supra* notes 186-188 and accompanying text.

219. Exec. Order No. 13,292, § 1.1(a)(4), 3 C.F.R. 196, 196 (2003), *reprinted in* 50 U.S.C.A. § 435 (West 2005); see *supra* note 179 and accompanying text.

220. Because any piece of information may contribute to infinite possible mosaics, each with a distinct probability and magnitude, it would be impossible for reviewing courts to survey the entire mosaic landscape. But they do not have to: They need only consider the mosaics



particularized approach” intended by Congress in its 1974 amendments, called for by Judge Tatel in his CNSS dissent, and applied by courts in *Gerstein* and (outside of FOIA) in *Detroit Free Press*. Rejecting categorical assertions and gross speculation as bases for withholding, this approach aims to align judicial review of mosaic claims as closely as possible with review of claims not framed in mosaic terms.

As discussed in Section III.A above, standard deference becomes most problematic when faced with a highly speculative mosaic claim, in which a high portion of the posited mosaic consists of inaccessible and possibly unknown information. At what point does a mosaic become too speculative to provide a reasonable basis for withholding information? Practically and theoretically, there can be no fixed answer to this question: Some very speculative mosaic claims would protect against real threats to national security, while others would deny the public valuable yet harmless information. As a rule of thumb, though, the more speculative a mosaic claim is and the more independently innocuous information it covers, the more skeptical should be the court’s review, given the greater risks of abuse and overbreadth and given agencies’ predilection for turning to the mosaic theory when they know their case for withholding is tenuous.<sup>221</sup> Such skepticism, evident in *Muniz v. Meese*<sup>222</sup> and *Gerstein*,<sup>223</sup> would help counterbalance the expertise gaps that mosaic claims magnify and the opportunism they invite. Gauging the plausibility of mosaic claims will never be an exact science, but by cabining them with reasonable requirements of proof and by matching speculativeness with skepticism, courts can at least weed out the most spurious assertions.

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presented to them by the parties, who have the information and incentive to alert the court to all relevant ones. Government agencies have typically presented one mosaic claim per case; it is conceivable, though, that an agency could present multiple different mosaics, with an explanation of and risk assessment for each. So long as at least one of these mosaics meets the standards for exemption, withholding would be appropriate. More problematic would be a case in which none of the proffered mosaic claims meets the minimal standards for exemption, but taken together—their magnitude-times-probability sum aggregated in some way—the threat posed by all the mosaics appears nontrivial. In such a scenario, I would favor disclosure. FOIA’s bar for meeting the national security exemption is already low: Agencies’ arguments need not be convincing so much as plausible. *See supra* Subsection I.A.2. Allowing agencies to aggregate mosaic claims in this way would eviscerate FOIA’s already minimalist plausibility constraint, and it would invite opportunism by encouraging agencies to make as many different mosaic claims as possible, no matter how weak.

221. *See supra* note 204 and accompanying text.

222. 115 F.R.D. 63, 65 & n.7 (D.D.C. 1987); *see supra* notes 76–78 and accompanying text.

223. *Gerstein v. U.S. Dep’t of Justice*, slip op. at 19–21 (N.D. Cal. Sept. 30, 2005); *see supra* notes 134–142 and accompanying text.

Courts should, moreover, consider positive mosaic scenarios as well as negative ones—the public too can mosaic-make, and thereby respond more intelligently to threats. If FOIA disclosures inform a community of its critical infrastructure vulnerabilities, for example, its residents may be able to devise better protection schemes and lobby for their implementation (or, if still unsatisfied, to relocate). Plaintiffs should have the opportunity to present such positive scenarios and to rebut the government’s mosaic claims.<sup>224</sup> Likewise, courts should consider not only the ways in which information technologies can facilitate adversarial mosaic-making, but also the ways in which they can help combat such activity. Data-mining technologies may allow agencies to search their own records more easily and more powerfully for possible mosaics, reducing their compliance burden as well as enabling more precise arguments about how threatening mosaics could be constructed. If the information in dispute is being requested in electronic form, courts may want to consider releasing only hard copies or encrypted versions rather than denying all disclosure out of mosaic theory concerns.

The above suggestions operate within the current framework of FOIA review.<sup>225</sup> A somewhat more radical measure could further invigorate judicial oversight of mosaic claims: allowing courts to utilize extrajudicial assistants such as special masters when confronted with difficult mosaic arguments.<sup>226</sup> While Chief Judge of the D.C. Circuit, Patricia Wald observed that “judges often feel inadequate or incompetent to address either the factual predicates or the policy judgments involved in executive claims of national security.”<sup>227</sup>

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224. Plaintiffs have traditionally not had this opportunity in FOIA national security appeals. FOIA courts have accorded “little or no weight to opinions of persons other than the agency classification authority when reviewing the propriety of agency classification determinations.” DOJ FOIA GUIDE, *supra* note 9, at 153. Some scholars have argued, unsuccessfully, that FOIA courts should weigh the public interest in disclosure against the risk to national security. *See, e.g.,* MOYNIHAN, *supra* note 211, at 217; Halstuk, *supra* note 36, at 132. I am not taking up that issue here, but am, rather, proposing a different type of balancing: Instead of weighing other public interests, such as democratic accountability, against increased national security risk from disclosure, I am advocating that FOIA courts weigh the expected (mosaic-based) reduction in national security risk against the expected increase from disclosure. The balancing calculus remains one of national security alone.

225. While FOIA itself could also be amended to clarify that mosaic claims should receive no special treatment, President Clinton already made essentially this clarification in his executive order on classification, and no courts seemed to find the provision helpful or even relevant. *See supra* notes 80-83 and accompanying text.

226. In at least one FOIA Exemption 1 case, a district court appointed a special master to review and categorize a large volume of classified records. *Wash. Post v. U.S. Dep’t of Defense*, 766 F. Supp. 1, 4 (D.D.C. 1991). For a thoughtful discussion of the costs and benefits of employing such special masters in FOIA litigation, see Deyling, *supra* note 6, at 105-11.

227. Wald, *supra* note 17, at 760.

Judges also fear being responsible, and seen as responsible, for putting the country at risk.<sup>228</sup> Highly speculative mosaic claims, being both particularly difficult to evaluate and particularly susceptible to abuse, exaggerate a judge's dilemma. At the least, extrajudicial assistants could help with fact finding. More significantly, assistants with backgrounds in national security—for instance, intelligence agency retirees or officials on rotation, granted immunity and perhaps even anonymity—could help judges evaluate the plausibility of posited mosaics.<sup>229</sup> Even if courts continue to weight agencies' risk assessments above all other viewpoints, the existence of any special mechanism for dealing with mosaic claims might remind them that the theory is a likely vehicle for excessive secrecy, and that secrecy has real costs.

### CONCLUSION

For all the problems it generates, the mosaic theory, already entrenched through executive order, agency regulation, and judicial precedent, will remain a fixture in national security law. As it should. The theory's basic premise is valid, if simple: Informational synergy does exist, and adversaries can capitalize on it to our detriment. Indeed, the only way adversaries can capitalize on information disclosure is through mosaic-making. As the Department of Justice noted in its CNSS brief, the mosaic theory "is principally an exercise of common sense."<sup>230</sup> The attacks of September 11 brutally affirmed the theory<sup>231</sup> and highlighted its increased valence in an age of information technology and nonconventional terrorism. Litigation arising out of the government's response to the attacks, meanwhile, highlighted the theory's pliability in justifying official secrecy across a great range of activities.

This expanding role for the mosaic theory, and the continued willingness of some courts to delegate agencies' mosaic claims, should give us pause. With mosaic decisions still coming down apace and government secrecy still on the

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228. See Halstuk, *supra* note 36, at 131. Halstuk recommends a more radical measure than special assistants to invigorate FOIA review: a special Article III court, composed of federal judges with intelligence bona fides, for national security cases. *Id.* at 131-32. Halstuk's judges would have their own special masters. *Id.* at 132.

229. Extrajudicial assistants would be especially valuable in this respect if provided access to government classifiers' work. Yet given the absence of independent expert opinion in FOIA national security litigation, *see supra* note 224, extrajudicial assistants should improve the quality of decisionmaking with or without such access.

230. Brief for Appellant at 33, *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (No. 02-5254), available at <http://www.cnss.org/CNSSbrief-final.pdf>.

231. See *supra* notes 109-110 and accompanying text.

rise, the stakes of mosaic theory jurisprudence are higher than ever. While judicial review in FOIA national security litigation has often been perfunctory, courts applying standard deference have at least helped check governmental abuse by demanding plausible arguments tailored to the specific documents withheld. The recent delegation and abdication cases, by contrast, stand for the proposition that mosaic risks are beyond courts' ken; that categorical mosaic assertions can justify unprecedented acts of government secrecy; that judges should reject mosaic-based withholdings only when patently incredible. Highly speculative mosaic claims will always provide a challenge to a reviewing court, but delegation exacerbates the theory's potential for misuse. It is hard to see in delegation much more than courts' "acquiescence,"<sup>232</sup> or to reconcile it with FOIA's text and purpose. It is hard to miss in *North Jersey Media's* abdication approach the acquiescence; the opinion flaunts it. Rather than have courts reward more speculative, more categorical, more extreme mosaic claims with additional deference, I advocate various tools for modulating mosaic theory review to conform as closely as possible to standard FOIA review. Most of these suggestions are tactical and would require from judges only vigilance. More radically, I also recommend the use of extrajudicial assistants such as special masters for difficult mosaic cases.

In over thirty years of the theory's existence, only one FOIA court on record has rejected a government agency's mosaic defense. In theory, highly speculative mosaic claims are unfalsifiable; in practice, they have proven unimpeachable. That a model of reviewing them so undertheorized and so prone to misuse has, with minimal resistance, risen to such stature in national security information law is, I submit, remarkable. Heightened deference for mosaic claims may seem the safe move post-9/11, but courts should not forget mosaic-making's ubiquity—or such deference's own dangers. Maybe more than vigilance is required.

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232. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 940 (Tatel, J., dissenting).