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LITIGATION DOCKET

Since its founding, the National Security Archive (the "Archive") has actively sought to defend open government and the Freedom of Information Act ("FOIA") through litigation, filing of amicus briefs, and commenting on agency rulemaking proceedings concerning access to government records.

National Security Archive v. Department of Air Force (D.D.C. filed March 18, 2005)

- **Request(s):** More than 82 individual FOIA requests with the Department of the Air Force, a number of which have been pending for *more than ten years* and some for as long as *17 years*, without a completed response.
- **Claim(s):** The Air Force has a pattern and practice of mishandling, delaying, and failing to process FOIA requests and appeals in compliance with the law, and lacks any mechanism for overseeing, monitoring, or ensuring complete processing of requests.
- **Outcome:** The Air Force's answer to the lawsuit admitted most of the Archive's core allegation; the Archive has filed a motion for partial judgment based on the Air Force's admission that it has failed to process scores of FOIA requests.
- **Background and Court Filings:** <http://www.gwu.edu/~nsarchiv/news/20050318/index.htm>

Berman v. Central Intelligence Agency, Civ. No. S-04-2699 (E.D. Ca. filed Dec. 23, 2004)

- **Request(s):** The Archive represents noted Vietnam War scholar Larry Berman in his request for two historic President's Daily Briefs (PDBs) written for President Johnson in 1965 and 1968.
- **Claim(s):** Requested PDBs can no longer pose a risk to national security nearly 40 years after their creation; although PDBs are created by the CIA to inform the President about current intelligence matters and are generally considered secret, a number of other PDBs have been declassified and released publicly in recent years. In addition, the information in the requested PDBs is believed to be largely factual and publicly available through news reports and other government documents. To the extent that the PDBs contain references to intelligence sources, the CIA should redact them and release those portions that pose no risk to national security.
- **Outcome:** U.S. District Judge David Levi held that the CIA may withhold the PDBs because presidential communications privilege protected the documents in their entirety, and did not erode over time. Relying solely on the affidavit of CIA officer Terry Buroker, Judge Levi found that the release of the PDBs could impair the CIA's mission by revealing intelligence sources and methods, by contributing to a "mosaic" of information "that could provide damaging insight into how the CIA conducts its intelligence business," and would impede the frank discussion and deliberation between intelligence agencies and the President on matters of national security in the future.
- **Background and Court Filings:** <http://www.gwu.edu/~nsarchiv/pdbnews/index.htm>

National Security Archive v. Central Intelligence Agency, No. 04-1821 (D.D.C. filed Oct. 20, 2004)

- **Request(s):** Expedited processing and release of 2004 National Intelligence Estimate (NIE) on Iraq.
- **Claim(s):** CIA failed to comply with statutory expedited processing provisions and wrongfully withheld agency records. The NIE contains a pessimistic evaluation of the situation in Iraq, according to information widely reported news media. It is a critical resource for an immediate and informed public debate about U.S. military action in Iraq.
- **Outcome:** Upon filing of lawsuit, the CIA immediately processed the FOIA request and denied releasing the NIE in full. U.S. District Court Judge Rosemary M. Collyer did not review the NIE, but nonetheless accepted the CIA's contention that no portion of the NIE could be released without damage to national security.
- **Background and Related Documents:** <http://www.gwu.edu/~nsarchiv/news/20041020/index.htm>
 - Memorandum opinion
http://www.gwu.edu/~nsarchiv/news/20051021/show_case_doc_21,111442,,16563209,.pdf

Begleiter v. Department of Defense and U.S. Air Force (D.D.C. filed Oct. 4, 2004)

- **Request(s):** Still photographs and video showing the return of fallen military personnel to the United States in flag-draped caskets.
- **Claim(s):** Department of Defense and the Air Force policy barring media access to images of deceased U.S. soldiers, on privacy grounds, unlawfully deprives the public of the ability to honor these soldiers killed abroad; the government offers no compelling interest in withholding these images, which serve as important and powerful reminders to the American public of the costs of war.
- **Outcome:** In response to this lawsuit, the Department of Defense released hundreds of pictures of flag-draped caskets, and has committed to continue processing requests for these images without further litigation.
- **Background and Court Filings:** <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm>

American Historical Association, et al. v. The National Archives and Records Admin. (D.D.C. filed Nov. 28, 2001)

- **Claim(s):** President Bush's Executive Order 13,233 gives former Presidents and their heirs (as well as former Vice-Presidents for the first time) indefinite authority to assert privilege and block release of historical White House records, in violation of the Presidential Records Act (PRA) and NARA regulations.
- **Outcome:** Judge initially dismissed the case on grounds that it was moot and not ripe, but plaintiffs persuaded the judge to reopen the case; the case is still pending.
- **Background and Related Documents:** <http://www.gwu.edu/~nsarchiv/news/20040430/index.htm>
 - Complaint: <http://www.gwu.edu/~nsarchiv/news/20011128/complaint.pdf>

The Kissinger Telephone Conversations (2001)

- **Request(s):** Transcripts of telephone conversations that Henry Kissinger conducted while Secretary of State and National Security Advisor to President Nixon, which Kissinger had removed from the State Department and purported to deed to the Library of Congress with restrictions on public access.
- **Outcome:** Upon receiving the complaint prepared by the Archive, the Archivist of the United States and the Secretary of State took action to recover the transcripts; Kissinger returned to the National Archives and Records Administration (NARA) 20,000 pages of transcripts from 1967-1973 and an additional 10,000 pages from 1973-1977.
- **Background and Related Documents:** <http://www.gwu.edu/~nsarchiv/news/20010809/#first>
 - Complaint: <http://www.gwu.edu/~nsarchiv/news/20010809/complaint.pdf>
 - Audio Conversation Between Kissinger and Nixon: <http://www.gwu.edu/~nsarchiv/news/20020211/>

The National Security Archive v. United States Central Intelligence Agency, Civ. No. 99-1160 (D.D.C. Jul. 31, 2000)

- **Request(s):** Biographies of nine former Eastern European Heads of State and histories compiled by the CIA concerning its involvement in the 1948 Italian elections and the 1953 Iranian coup.
- **Claim(s):** CIA may not invoke a "Glomar" response (neither confirming nor denying) that documents exist when the existence of the documents is classified) because it has publicly discussed and published information regarding the requested materials.
- **Outcome:** District Court ruled that CIA waived its right to refuse to confirm or deny the documents' existence by publishing information of the biography program in a declassified CIA journal article. The CIA released some portions of the histories that were marked as unclassified, but refused to declassify any of the classified paragraphs, and the court declined to order any further releases.
- **Background and Related Documents:** <http://www.gwu.edu/%7Ensarchiv/NSAEBB/ciacase/index.html>
 - Decision Rejecting CIA's Refusal to Deny or Confirm Documents: <http://www.gwu.edu/~nsarchiv/news/20000808/nsaa-2.pdf>

Public Citizen v. Carlin, 184 F.3d 900 (D.C. Cir. 1999)

- **Claim(s):** Archivist of the United States' practice of using a general records schedule to instruct agency staff to destroy electronic files after it had copied them to paper or computerized record system violates the Records Disposal Act (RDA), 44 U.S.C. 3393(a)(d), which requires the Archivist to personally review and approve all documents before an agency may discard them.
- **Outcome:** Court held that a general records schedule may be used to authorize a file's deletion upon a demonstration that the scheduled files are not worth preserving (e.g. because the files have been copied to paper or electronic record-keeping systems).

Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. 1999); 97-1096 (TFH) (D.C.C. filed 1997)

- **Request(s):** Fiscal Year 1997 and 1998 aggregate budget appropriations for intelligence; FY 1999 budget for all intelligence-related activities.
- **Outcome:** After releasing the FY1997 and 1998 budgets, the CIA withheld the FY1999 budget based on Exemptions 1 and 3.
- **Result:** Court granted summary judgment, finding that the CIA had met the procedural and substantive requirements to properly classify the budget data, allowing it to be withheld, and also concluding that budget information can be withheld under Exemption 3 because it constitutes an "intelligence method" that is protected under the National Security Act of 1947.
- **Related Documents**
 - Complaint Seeking 1997 Budget: <http://www.fas.org/sgp/foia/ciafoia.html>
 - CIA Statement Releasing 1997 Budget: <http://www.fas.org/sgp/foia/victory.html>
 - CIA Statement Releasing 1998 Budget: <http://www.fas.org/sgp/foia/intel98.html>
 - Opinion Denying Release of 1999 Budget: <http://www.fas.org/sgp/foia/hogan.html>

Anderson v. Central Intelligence Agency, 63 F. Supp. 2d 28 (D.D.C. 1999)

- **Request(s):** Associated Press correspondent Terry Anderson was held hostage by members of Islamic Jihad in Lebanon for nearly seven years; he subsequently filed FOIA requests to 11 agencies seeking information about his captivity.
- **Claim(s):** Non-compliance with plaintiff's FOIA requests, based on failure to segregate exempt and non-exempt material and insufficient description of "non-responsive"
- **Outcome:** District court granted CIA motion for summary judgment, holding that that CIA's *Vaughn* index showed "with reasonable specificity" the Agency's reason for withholding or redacting approximately 800 documents.

The White House E-mail Saga

Armstrong v. Reagan, Civ. No. 89-142 (D.D.C. 1989)

- **Claim:** On the last day of the Reagan presidency, staff of the National Security Archive became aware that the outgoing administration officials planned to destroy all electronic communications records and back-up tapes before they left the White House. Only 30 hours before the destruction was to take place, lawyers for the Archive and the Center for National Security Studies (CNSS) filed a series of FOIA requests together with a lawsuit against President Ronald Reagan, seeking an immediate temporary restraining order (TRO), to prevent the imminent erasure of the e-mail materials. The Archive claimed that the Presidential Records Act (PRA) and the Federal Records Act (FRA), which require approval from the Archivist of the United States before any records are erased, applied to the files in question.
- **Outcome:** At 6:10 pm on the eve of George H.W. Bush's inauguration, U.S. District Judge Barrington D. Parker concluded that the plaintiffs had made a threshold showing of cause and issued a TRO prohibiting the destruction of the backup tapes to the e-mail system until the case could be heard in its entirety.

Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991)

- **Outcome:** U.S. District Judge Charles B. Richey later ruled that the Archive and its co-plaintiffs had standing to sue President Bush under the APA, to force him to comply with the retention requirements of various records acts which potentially cover the White House e-mail; and determined the President is not an "agency" under the APA and has wide control over his records under the PRA, but allowing review of the adequacy of National Security Council's recordkeeping guidelines and suit against the National Archivist to compel enforcement of NSC regulations because of the risk that the agency would illegally destroy documents. Judge Richey remanded the case to the district court to determine whether the NSC guidelines were adequate. *See Armstrong v. Bush*, 139 F.R.D. 547 (D.D.C. 1991) (decision permitting discovery); *Armstrong v. Executive Office of the President*, 1992 U.S. Dist. LEXIS 7502 (D.D.C. 1992) (compelling an inventory of NSC computer system backup tapes). A subsequent action was brought regarding the Bush administration electronic records. *See Armstrong v. Bush*, 807 F. Supp. 816 (D.D.C. 1992) (granting temporary restraining order to force President Bush to save records stored on NSC computer systems until the court decides whether the FRA requires these records to be stored permanently for public research).

Armstrong v. Executive Office of the President, 810 F. Supp. 335 (D.D.C. 1993)

- **Outcome:** Court found Executive Office of the President ("EOP") and NSC recordkeeping practices to be arbitrary and capricious under the APA and violate the FRA; the Archivist failed to perform his FRA duties, case remanded to Archivist to preserve the federal records in dispute.

Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993)

- **Outcome:** Consolidating three appeals, the court affirmed that NSC and EOP electronic record keeping guidelines failed to meet FRA requirements. It reversed a finding of civil contempt against the agencies for failing to carry out the court's order that the Archivist "take all necessary steps" to preserve federal records and that the agencies save all records until the Archivist does so and reversed a determination that the PRA precludes judicial review of guidelines distinguishing between "agency" and "presidential" records. The court declared NSC and EOP electronic record keeping guidelines insufficient.

Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996)

- **Outcome:** Reversing holding of *Armstrong v. Executive Office of the President*, 877 F. Supp. 690 (D.D.C. 1995), that the NSC is an agency under the FRA and FOIA. The court held that the NSC is not an agency under the *Meyer* three-part test. *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993). Judge Tatel dissented, concluding that the NSC exercises sufficient independent authority to qualify as an agency.

In re: Oliver North, 1993 U.S. App. LEXIS 32690 (1993); 21 F.3d 434 (1994)

- **Request(s):** Independent Counsel Lawrence E. Walsh's Final Report on the Iran Contra Investigation.
- **Outcome:** Finding disclosure to be in the public interest, the court permitted a procedure that allowed redaction of materials properly protected by law and permitted people named in the report to comment on the report or prevent disclosure of portions of it. Once the report was released, the court ordered the unsealing of all sealed motions to prevent release, but permitted the movants to withdraw their motions to protect confidentiality.

National Security Archive v. Department of State (D.D.C. filed 1993)

- **Claim(s):** Challenging the State Department's deletion of material from released documents on the basis of "non-relevancy," i.e. that the deleted information was not relevant to the FOIA request.
- **Outcome:** Assistant U.S. Attorney representing the State Department offered to work with the Archive to propose a new State Department policy regarding "non-relevant" material. The Archive agreed to a settlement based on the State Department's offer of a new policy. The new policy, implemented in 1994, stated that no non-responsive information would be withheld from a document except where: "(1) in the judgment of the Department's reviewer and senior reviewer the document contains a substantial amount of information that is clearly non-responsive and would entail an undue burden to process; and (2) the consent of the requester to the withholding is first obtained."

National Security Archive v. FBI, 759 F. Supp. 872 (D.D.C. 1991); 1993 U.S. Dist. LEXIS 4830 (D.D.C. Apr. 14, 1993)

- **Request(s):** Documents regarding the "Library Awareness Program" that the FBI used to respond to fears that Soviet agents used our libraries to steal scientific knowledge and recruit students and librarians to the Communist cause.
- **Claim(s):** FBI improperly withheld many documents in whole or in part under Exemptions 1 (classified national security information), 2 (internal agency practices), 5 (inter- or intra-agency deliberative materials), and 7 (information compiled for law enforcement purposes).
- **Outcome:** The District Court granted both parties' partial summary judgment. After initially determining that some of the FBI's explanations were insufficient to justify its Exemption 1 withholdings, the court accepted and relied on a FBI supplemental declaration to justify Exemption 1 withholdings; upheld Exemption 2 claims because the Archive did not contest deletion of employee room numbers and telephone extensions; and granted the Archive summary judgment on the FBI's Exemption 5 claim, under which it tried to conceal as "predecisional and deliberative" a briefing book prepared for the Assistant Director of the Intelligence Division for a House Subcommittee meeting. Under Exemption 7, the court allowed the FBI to withhold the names of its agents, confidential informants, and third parties.

National Security Archive v. Office of Independent Counsel, 1992 U.S. Dist. LEXIS 13146 (D.D.C. 1992)

- **Request(s):** Notebooks maintained by Oliver North when he worked for the National Security Council (NSC), which had been obtained by the Office of Independent Counsel (OIC) during North's criminal prosecution.
- **Outcome:** The district court ordered the OIC to disclose relevant portions of the notebooks and prepare a *Vaughn* index to explain any segments it chose to redact. The Archive then challenged the adequacy of these *Vaughn* indices. The court found that OIC, as well as the Drug Enforcement Agency (DEA) and the CIA, had failed to provide an adequate public rationale for withholding portions of the notebooks; the OIC further failed to turn over materials that it had disclosed previously. The court granted in part the Archive's motion to compel complete production of the *Vaughn* index and ordered the OIC to reexamine all

requested materials in light of developments in the Iran Contra investigation and the one-sided nature of FOIA requests.

In Re United States Department of Defense, 848 F.2d 232 (D.C. Cir. 1988)

- **Request(s):** Approximately 14,000 pages of documents from the Department of Defense (DOD) regarding American efforts to rescue hostages in Iran.
- **Claim:** When DOD claimed partial or entire exemption for 1400 documents, the Archive filed suit and the District Court appointed a special master skilled in the classification of national security documents to compile a meaningful sample of the requested documents for the court to review. The Department of Defense petitioned for a writ of mandamus directing the district judge to revoke the appointment of a special master for the case.
- **Outcome:** Chief Judge Wald held that the district court had not abused its discretion by appointing a special master to compile a meaningful sample of requested documents for the court to review. DOD's petition was denied.

Washington Post v. U.S. Department of Defense, 789 F. Supp. 423 (D.D.C. 1992)

- **Claim(s):** The Special Master examined the documents and directed the release of 2000 additional pages of records. Subsequently, the newspaper challenged the court's assessment of fees for the services of the Special Master.
- **Outcome:** The court held that the plaintiff had "substantially prevailed" because DOD had disclosed a significant number of previously withheld documents. The court rejected the DOD's argument that sovereign immunity precluded the government from paying fees, because FOIA explicitly permits courts to require the government to pay attorneys' fees and reasonable litigation costs. Ultimately, each of the parties was responsible for one-half of the fee. The case resulted in the release of several thousand additional pages of formerly classified documents regarding American intervention in Iran.

Bonner v. U.S. Department of State, 928 F.2d 1148 (D.C. Cir. 1991)

- **Request(s):** 86 requests for 4500 documents about U.S.-Philippines relations during the Marcos years.
- **Claim(s):** State Department improperly withheld a large number of the requested documents, and failed to justify all of its redactions and withholdings because it provided only a "representative sampling" of the withheld documents in its *Vaughn* index.
- **Outcome:** D.C. Circuit held that an agency must justify all exemptions rather than reviewing only a representative sample of documents for review that were selected by the agency itself.

Rush v. Department of State, 716 F. Supp. 598 (1989); 748 F. Supp. 1548 (1990)

- **Request(s):** Hon. Kenneth Rush, former Ambassador to the Federal Republic of Germany, sought declassification and release of conversations he had with Henry Kissinger during the 1971 Berlin Negotiations. Rush had given the documents to the State Department when he left government service in 1977.
- **Claim(s):** FOIA applies to these documents because they are "agency records" and have been maintained under the control of the State Department since their receipt; the documents are not exempt from release under the FOIA.
- **Outcome:** The court held that the transcripts from Rush's conversations met the test for agency records that the Supreme Court set out in *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). Under *Tax Analysts*, to make a document a record for the purposes of the FOIA, an agency must 1) create or obtain the materials and 2) control the materials at the time the request is made. The Court, however, agreed that Exemption 1 applied to the documents because they were properly classified pursuant to Executive Order 12,356. Furthermore, release of the talks could threaten subjects of the documents who are still involved in foreign relations. The court approved State's Exemption 5 claim because disclosing the documents could damage the agency's policy making by curbing the free flow of recommendations from subordinates to superiors. Though Rush authored most of the documents, he was not their sole author and as an agency outsider cannot waive the privilege on the agency's behalf.

Philip Brenner v. U.S. Department of State, Civ. No. 88-0034 (D.D.C. filed 1989)

- **Request(s):** Numerous classified documents relating to the Cuban Missile Crisis, including correspondence between Kennedy and Khrushchev during the crisis in 1962.
- **Claim(s):** *Vaughn* index of 700 withheld documents did not adequately describe their contents with the specificity required for the court to evaluate the State Department's basis for refusing to release the documents; supported by affidavits of former Kennedy administration officials including George Ball, Theodore Sorensen, and Alexis Johnson stating that the index did not adequately describe the documents. Further, there is no privilege for diplomatic communications, as the State Department claimed, and the

historical significance and public interest in the release of these documents far outweighed government arguments for maintaining their classification.

- **Outcome:** After the Russian foreign ministry sent a diplomatic note to the State Department requesting the release of the Kennedy-Khrushchev correspondence at the request of Brenner and the litigation team, the State Department released all of the remaining classified correspondence the day before the start of a conference in Havana with former U.S. and Soviet officials and Fidel Castro on the 30th anniversary of the crisis. Subsequently, the State Department agreed to release an additional 600 documents and provide a detailed *Vaughn* index for the few documents that it determined could not be released.

National Security Archive v. U.S. Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989)

- **Claim(s):** Challenging denial by Department of Defense (DOD) of preferential fee status for the Archive under FOIA (as either an “educational institution” or a “representative of the news media”).
- **Outcome:** The D.C. Circuit reversed the lower court and found that the Archive is a “representative of the news media,” based on legislative history granting preferential fee status to any organizations that “regularly publishes or disseminates information to the public.” The court found that the Archive “publishes or otherwise disseminates” information for non-commercial purposes when it compiles and distributes document sets. The Supreme Court denied certiorari petition to hear the case. This decision also allowed the Archive to resolve similar pending cases with the CIA, the Department of Commerce, and the U.S. Agency for International Development, among others.

National Security Archive v. CIA, Civil No. 88-119 (D.D.C. July 26, 1988), *aff’d mem.*, No. 88-5298 (D.C. Cir. 1989)

- **Request(s):** Electronic index of all documents declassified by the CIA pursuant to public request, which consisted of more than 17,000 entries and 34,000 entries.
- **Outcome:** In an unprecedented settlement, the CIA provided the Archive, for the first time to any requester, an electronic index to all documents they had declassified pursuant to public request. Unfortunately, the format required by the allowed by the district court was not the electronic database requested, but a printed “dump” of the document listings in random order. The CIA’s action, however, spurred congressional hearings that were part of the precursor to the E-FOIA Amendments of 1996 and led to the CIA agreeing to provide an electronic version of the index.

National Security Archive v. Executive Office of the President, 688 F. Supp. 29 (D.D.C. 1988)

- **Request(s):** Documents from the President’s Special Review Board, or Tower Commission, which was established to review the activities of the National Security Council (NSC) following revelations that NSC staff may have sold weapons to Iran and diverted the profits to support the Contra insurgency in Nicaragua.
- **Claim(s):** As a commission established under the Federal Advisory Committee Act (FACA), the Tower Commission’s records are subject to FOIA. When the Commission disbanded, the FOIA requests were rejected because the Commission had forwarded the requested documents to the Office of the Counsel to the President, part of the Executive Office of the President (EOP). Because the EOP is not an “agency” under the FOIA, it need not disclose its records to the Archive. The Archive objected that: 1) under Executive Order, the White House Office of Administration (OA) must handle the Commission’s FOIA requests, and 2) the EOP deliberately avoided disclosure by transferring the documents from an agency (which must disclose under FOIA) to a presidential advisor (who must not).
- **Outcome:** The court found that FOIA did not require the Office of Administration to disclose the Commission’s records because the documents were never agency records under OA control and the Executive Order that created the Commission in no way compels the OA to affirmatively control its files. Under FACA, the EOP provides that FOIA requests be made directly to its individual divisions, and the FOIA requests should have been made to the Tower Commission before the Commission gave up control of the records.
- **Appeal: National Security Archive v. Archivist of the United States**, 909 F.2d 541 (D.C. Cir. 1990) The D.C. Circuit affirmed the lower court’s holding that neither the FOIA nor FACA required the government to produce the requested documents. Because the Archive initially requested the documents from the Office of Administration, which never possessed the documents, FOIA did not require their disclosure. Because EOP is not an agency, FOIA does not apply to it. Furthermore, the FACA imposes no special responsibilities on the government that empower the court to override FOIA’s commands.

Washington Post Company v. Department of Defense, 1987 U.S. Dist. LEXIS 16108 (D.D.C. 1987)

- **Request(s):** Archive co-founder Scott Armstrong requested from the Department of Defense (“DOD”) a report Brigadier General Frederick Woerner wrote to evaluate El Salvador’s military needs.
- **Claim(s):** Challenge to DOD’s withholding under FOIA Exemptions 1 and 5

- **Outcome:** The court approved DOD's Exemption 1 claim because it classified the report as reasonably likely to harm foreign relations under Executive Order 12,356. El Salvador expected confidentiality when it provided the information contained in the report, and its release would thus damage future relations. Though the report's data was already unofficially published, its release would reveal: (1) the sources' identities, (2) the level of the relationship that provided the information, and (3) the focus of U.S. relations with El Salvador. The court also granted DOD's Exemption 5 claims because it found the report to be "predecisional and deliberative" because an executive officer requested it to aid his decision making, and because Woerner used it candidly to evaluate alternative courses of agency action. However, the Archive subsequently obtained declassification and release of these documents after President Clinton's Executive Order in 1993.

National Security Archive v. Department of State (1987)

- **Request(s):** In a series of requests to the State department, the Archive asked for all documents described by the Department's internal four-letter computer codes, one or more of which is attached to every cable as a subject descriptor (PINT for political intelligence, SHUM for social and human rights, etc.), to request all relevant cables on U.S.-Nicaragua policy.
- **Claim(s):** Although it located 17,000 responsive records, State responded that the TAGS were not a sufficient descriptor of the materials. Suit to compel production of records.
- **Outcome:** The Department's lawyers pushed the FOIA office to provide the Archive with a computer printout of the document titles, so that the Archive could narrow its request to those specific documents most helpful to its analysts. After the Archive filed suit, State agreed to provide a computer printout of all cables that contained the documents by title, date and so forth, and agreed to process the ones the Archive selected for release at a rate of about 200 per month.

Institute of Policy Studies v. Department of the Air Force, 676 F. Supp. 3 (D.D.C. 1987)

- **Request(s):** Security Classification Guide for Air Force Groundwave Emergency Network (GWEN) program, a low-frequency radio network designed to allow members of the government and military to communicate during and after a nuclear attack.
- **Claim(s):** Air Force denied the release of unclassified GWEN Guide improperly under FOIA Exemption 2, which is inappropriate for withholding unclassified national security information.
- **Outcome:** Government has met its burden of showing that the Guide is protected by Exemption 2; this document is "predominantly internal" and its disclosure would risk circumvention of lawful agency regulation. The use Exemption 2 to withhold agency documents for national security reasons is not inconsistent with Exemption 1, which excludes classified national security information.

AMICUS BRIEFS

Yousuf v. Samantar, No. 05-110 (D.C. Cir., filing pending 2005)

- **Case:** In a case brought under the Torture Victim Protection and Alien Tort Claims Acts alleging that defendant was responsible for acts of torture and crimes against humanity as a government official in Somalia during the 1980s, plaintiffs sought to compel the U.S. Department of State to comply with a subpoena for documents relevant to the case. The district court ruled that an agency may not be compelled to produce documents when it is not a party to the case, where the plaintiffs have failed to rebut the presumption under Rule 45 of the Federal Rules of Civil Procedure that the federal government is not a "person" within the meaning of the rule. The procedures adopted by agencies under the *Touhy* decision are the proper mechanism by which parties may request documents from the government for litigation purposes and plaintiffs did not adhere to its regulations for this process.
- **Amicus:** National Security Archive and *amici* the Center for National Security Studies and the Education Fund to Stop Gun Violence argue that the district court's ruling is based on the faulty premise that Rule 45 governs who may be subpoenaed in federal court, when in fact the subpoena power is a Constitutional right and Rule 45 merely sets out procedures for issuing subpoenas. Moreover, the ruling threatens public access to the judicial system to resolve disputes.
- **Outcome:** Appeal pending in the D.C. Circuit Court.

Sibel Edmonds v. U.S. Department of Justice, Civ. No. 05-190 (U.S. Supreme Court filed Oct. 10, 2005)

- **Case:** Ms. Edmonds, a contract linguist fired by the Federal Bureau of Investigation (FBI), challenged her termination as a retaliatory measure for her reporting serious problems in the translation unit where she worked. After the suit was filed, the government classified all of the information related to the case and invoked the state secrets privilege, although it had previously released much of the information in congressional briefings and to the media. The district court dismissed Ms. Edmonds' case on the basis of the government's invocation of the privilege, and the appellate court sealed the courtroom during arguments in the case and affirmed the district court ruling without written opinion.
- **Amicus:** The National Security Archive and *amici* argued that the Supreme Court should grant certiorari to clarify for lower courts the significant role that judicial review plays in evaluating the government's demand for secrecy. Secrecy has grown exponentially over the last four years and government officials admit that much of it is unnecessary. Excessive secrecy imposes significant social costs on society, and meaningful judicial review of government secrecy is necessary to prevent overreaching and government misconduct.
- **Outcome:** Writ of certiorari to the U.S. Supreme Court pending.
- **Background and Related Documents:** <http://www.gwu.edu/~nsarchiv/news/20051010/index.htm>

Ashcroft v. Doe, Civ. No. 05-0570 (2d. Cir. filed August 2, 2005)

- **Case:** Internet service provider that had received Federal Bureau of Investigation (FBI) national security letter (NSL) mandating production of customer records challenging the Patriot Act provisions that permit the FBI to issue NSLs upon a self-certification that the NSL meets the statutory standards and permanently bars the NSL recipient from disclosing to anyone the existence of the NSL.
- **Amicus:** The Archive and *amici* Federation of American Scientists, Project on Government Secrecy, the Electronic Privacy Information Center (EPIC), and the National Whistleblower Center argued that the broadening of the national security letter provisions enacted at 18 U.S.C. § 2709 serve to facilitate government secrecy and have contributed to the dramatic rise in classification and the dramatic reduction in declassification and disclosure since September 11. Moreover, meaningful judicial review of the government's demands for secrecy is necessary in order to protect national security and the quality of democratic decision-making.
- **Outcome:** District court held that the NSL provision violated the Fourth Amendment and the bar on disclosure violated First Amendment free speech because it was not narrowly tailored to protect government interests in furthering terrorist investigations. Appeal pending.
- **Background and Related Documents:** <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB160/index.htm>

Harry C. Piper v. U.S. Department of Justice, Civ. No. 04-5198 (D.C. Cir. filed June 24, 2005)

- **Case:** Plaintiff sought records pertaining to the kidnapping of his mother and the FBI investigation and prosecution, which he believed would reveal government wrongdoing. Piper received a large number of documents, some with substantial redactions, and challenged propriety of the FBI's withholdings under FOIA Exemption 7(C). The district court imposed a categorical rule against disclosure of identities of suspects, witnesses, and investigators, finding that privacy interests of these individuals outweighed the significant public interest in the case.

- **Amicus:** The Archive argued that the district court improperly applied a categorical rule against disclosure when the only purpose of disclosure under FOIA was uncovering agency wrongdoing; the FOIA statute does not distinguish between requesters or the purposes for which information is requested, and always mandates a balancing of privacy and public interests in the disclosure of information.
- **Outcome:** Appeal pending in D.C. Circuit.

In re Richard B. Cheney, Vice President of the United States, 542 U.S. 367 (2004), *remanded to* 406 F.3d 723 (D.C. Cir. 2005)

- **Case:** Plaintiffs sought information under the Federal Advisory Committee Act (FACA) about who participated in Vice President Cheney's National Energy Policy Development Group (NEPDG). The trial judge ordered limited discovery, and the ruling was appealed to a three judge panel of the D.C. Circuit, which upheld discovery. The case went to the Supreme Court, which avoided the constitutional issues and sent the case back to the D.C. Circuit, suggesting that it may be appropriate to search for pragmatic approaches that resolve those specific matters genuinely in dispute while accommodating the legitimate interests of all parties and avoiding the constitutional separation of powers issue.
- **Amicus:** In their brief for the D.C. Circuit, *amici* argued that the court should seek a resolution that both recognizes the importance of the public's right to know what the government is doing and why as well as preserves the interests of the executive branch in independence and confidentiality of certain deliberations; the *Vaughn v. Rosen* case provides a valuable model on which to establish such a compromise in this case. *Amici* argued further in a brief for the Supreme Court that the goals and mechanisms of FACA support our democratic principles of government based on checks and balances among three coordinate branches of government, and nonetheless requiring the government to disclose the identities of private individuals who serve on advisory committees and are therefore involved in policy-making poses no threat to executive power. Further, the Court should refrain from deciding the larger constitutional issues before the discovery disputes have been resolved in the lower court by ordinary judicial processes.
- **Outcome:** On remand, the D.C. Circuit sitting *en banc* held that the NEPDG was not an "advisory committee" for purposes of FACA because no non-federal employees were given a vote in or veto over the committee's decision; therefore, under the exception to FACA for committees composed entirely of federal government employees, NEPDG owed no duty of disclosure to plaintiffs public interest organization and environmental group.
- **Background:** <http://www.gwu.edu/~nsarchiv/news/20050510/index.htm>
 - Court Decision http://www.gwu.edu/~nsarchiv/news/20050510/En_Banc_Decision.pdf
 - Amicus Brief in the D.C. Circuit Court of Appeals <http://www.gwu.edu/~nsarchiv/news/20041130/Cheney%20Amici%20Brief.pdf>
 - Amicus Brief in the United States Supreme Court <http://www.gwu.edu/~nsarchiv/news/20040311/amicus.pdf>

Electronic Privacy Information Center v. U.S. Department of Justice, (D.C. Cir. filed July 27, 2004)

- **Case:** Electronic Privacy Information Center (EPIC) sought expedited processing of a FOIA request regarding FBI testing of a new airline passenger screening system. The district court held that EPIC's request did not concern an "urgency to inform the public concerning actual or alleged Federal Government activity" or "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," basing its decision largely on the number of news articles cited by EPIC in its request.
- **Amicus:** The National Security Archive and *amici* argued that substantial media interest is not a prerequisite to showing the "urgency to inform" and "compelling need" for expedited processing; rather, a "compelling need" exists when normal processing would produce government records too late for the public to act on them. In addition, "widespread and exceptional media interest" is not merely a function of the quantity of articles published on the topic because a small number of articles may be merely an indication that there is little information to report, and in some cases media interest can be demonstrated in other ways.
- **Outcome:** Case settled.

City of Chicago v. U.S. Department of Treasury, BATE, 287 F.3d 628 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 536 (2002), *vacated and remanded by* 123 S. Ct. 1352 (2003)

- **Case:** The City of Chicago made a request under FOIA to the Bureau of Alcohol, Tobacco and Firearms (ATF) for ATF databases of the manufacture, sale, and possession of firearms recovered in connection with

crimes, to further its nuisance suit against gun manufacturers. ATF disclosed portions of these databases but withheld the names and addresses of all manufacturers, dealers, purchasers, and possessors in each database, as well as further information about gun locations and serial numbers under FOIA Exemptions 6, 7(A), and 7(C). The district court struck down all exemption claims and granted summary judgment for the City; the 7th Circuit affirmed.

- **Amicus:** Any person is entitled to disclosure of government records under the FOIA for any public or private purpose, subject only to nine specific exemptions. The court should reject ATF's argument that when balancing disclosure against privacy the court may only consider a public interest in evaluating the conduct of a federal agency; rather, valid public interests under the balancing test should include educating the public, understanding the law, and gaining information on public health, safety, and welfare. *Amici* thus supported the district court decision and urged the Court to consider in this case the public interest in evaluating gun violence patterns and the need for gun control, as well as the interest of the City in effective gun control legislation.
- **Outcome:** The Supreme Court granted certiorari, but Congress passed legislation explicitly prohibiting ATF from expending funds to disclose gun ownership records. The Supreme Court then remanded the matter for consideration of the impact, "if any," of the new statutory language. Upon consideration in light of the statute, 18 U.S.C. § 923 (2004), the 7th Circuit vacated its prior opinions and remanded to the district court with instructions to enter judgment in favor of ATF. 423 F.3d 777 (7th Cir. 2005).
- **Background and Court Filings:** <http://www.gwu.edu/~nsarchiv/news/amicus0203/>

Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998)

- **Case:** Plaintiff sought a letter sent to the Department of Justice (DOJ) by the British government when it extradited two women after the United States charged them with conspiring to murder Oregon's U.S. Attorney. The DOJ consulted the British government, classified the letter, then withheld it under FOIA Exemption 1. Though the government failed to show that release would harm the national security, the district court reviewed the letter *in camera* and upheld its classification. The Ninth Circuit reversed, called the letter "innocuous," and granted summary judgment for the plaintiff.
- **Amicus:** The Archive argued that DOJ's failure properly to classify the letter precludes the need to address the standard of review under Exemption 1 or the government's separation of powers objections. If the Court were to address these issues, the FOIA expressly requires *de novo* review and not "utmost deference"; Congress has concurrent power over national security; and the judiciary retains jurisdiction independently to review national security issues.
- **Outcome:** The Supreme Court granted certiorari, but the government subsequently declassified the document and the Supreme Court declared the case moot.

Maxwell v. The First National Bank of Maryland, 143 F.R.D. 590 (D. Md. 1991)

- **Case:** Robert Maxwell sued The First National Bank of Maryland ("FNB") and Associated Traders Corp. ("ATC"), alleging that FNB threatened him and forced him to resign when he questioned arms deals its client, ATC, may have been doing in violation of federal law. Claiming that FNB told him ATC was a Central Intelligence Agency ("CIA") corporation, Maxwell moved to compel FNB to answer deposition questions regarding FNB's connection with the CIA. The United States intervened and moved for a protective order, pressing the state secrets privilege.
- **Amicus:** The Archive filed an *amicus curiae* brief contesting invocation of the privilege.
- **Outcome:** The district court granted the United States a protective order, barred Maxwell from discovering or using as evidence any information about secret relationships between the CIA and FNB or ATC, and denied Maxwell's request to issue interrogatories into ATC's transactions. The 4th Circuit affirmed and the Supreme Court denied certiorari.