CLOSE OBSERVATION ON THE VAUGHN INDEX AND ENLIGHTENMENT FOR JUDICIAL REVIEW IN CHINA

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I. INTRODUCTION

Far too much information has been kept in the dark for far too long. Despite transparency laws, classification remains widespread in the United States. Alarming figures demonstrate how pervasive over-classification might be. In 2017, the government made 58,501 original classification decisions along with 49 million derivative classification decisions.[1] Approximately 854,000 people in programs related to counterterrorism, homeland security and intelligence, about 1.5 times the population of Washington, D.C., are granted top-secret security clearances.[2] And the cost for maintaining the classification system continues to rise, with relevant government spending soaring to $18.39 billion and private companies spending $1.49 billion under the National Industrial Security Program in 2017.[3]

"Government secrecy is as old as government itself."[4] In the United States, a nation where openness is honored as a pillar of democracy, government secrecy is, in fact, not rare and has been criticized for being an executive tool to manipulate citizens, conceal errors, and avoid embarrassments.[5] For decades, from the issuance of the Administrative Procedural Act ("APA") in 1946 to the promising Freedom of Information Act ("FOIA") in 1966, efforts have been made by Congress to minimize secrecy and enhance transparency.[6] Expected to serve as a powerful check against executive secrecy, the judiciary, though granted with the power to review classification decisions *de novo*,[7] has been struggling to fulfill its

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[1] INFO. SEC. OVERSIGHT OFFICE, NAT'L ARCHIVES & RECORDS ADMIN., 2017 REPORT TO THE PRESIDENT (2017), *available at* https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf.

[2] Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010, 1:22 PM), http://media.washingtonpost.com/wp-srv/special/nation/tsa/static/articles/hidden-world.html.

[3] INFO. SEC. OVERSIGHT OFFICE, *supra* note 1.

[4] DERIGAN SILVER, NATIONAL SECURITY IN THE COURTS: THE NEED FOR SECRECY VS. THE REQUIREMENT OF TRANSPARENCY 3 (Melvin I. Urofsky ed., 2010).

[5] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 345 (reprt. ed. 2004).

[6] *See* JASON ROSS ARNOLD, SECRECY IN THE SUNSHINE ERA: THE PROMISE AND FAILURES OF US OPEN GOVERNMENT LAWS 2 (2014).

[7] 5 U.S.C. § 552(a)(4)(B) (2018).

critical role. There long seemed to be no feasible tools for courts to conduct effective judicial review in FOIA cases, except by deferring to executive's classification decisions or undertaking the time-consuming task of *in camera* inspection – where the judge examines each document to assess the relevance of the classification.[8] More than often, courts opt for the former.

The Vaughn Index,[9] recommended and elaborated by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in 1973, has emerged as an alternative to enable courts to serve their role without merely bowing to agencies' original decisions or taking up the burdensome *in camera* inspection.[10] Under the Vaughn Index, executive agencies alleging to withhold information based on FOIA exemptions shall submit to courts a detailed description of the classified information, along with an itemized and indexed explanation of justification for withholding the information.[11]

The United States is not the only country struggling with effective judicial review of nondisclosure of information concerning state secrets. China has also faced similar problems in cases concerning the state secret exemption, as manifested in fairly high affirmance rate in judicial practice.[12] The paradigm of Chinese judicial practice in these types of cases can be summarized as: agencies claim – courts defer – Plaintiffs accept. Information asymmetry and lack of adversariness are also inherent, visible features.[13] Similarities shared by the two countries seem to provide the basis for China to draw enlightenment from the Vaughn Index.

As the Vaughn Index has been widely adopted in FOIA litigations, questions regarding this procedural tool have come into sight. What is the value of the Vaughn Index? Can that value still be realized after over 45

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[8] 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, 72-73 (1992). *See also* Comment, *Vaughn v. Rosen, Toward True Freedom of Information*, 122 U. PA. L. REV. 731, 733 (1974) [hereinafter Comment].

[9] "A comprehensive list of all documents that the government wants to shield from disclosure in Freedom of Information Act (FOIA) litigation, each document being accompanied by a statement of justification of nondisclosure." *Vaughn Index*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[10] *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

[11] *Id.* at 826-28.

[12] *See infra* notes 153-58 and accompanying text.

[13] *See* Geng Baojian & Zhou Mi (耿宝健&周密), Xin Tiaoli Zhidu Huanjing xia Zhengfu Xinxi Gongkai Xingzheng Susong de Bianhua Tanxi (新条例制度环境下政府信息公开行政诉讼的变化探析) [Changes and Prospects of Government Information Publicity Litigation under the New Institutional Environment], 2 Zhongguo Xinghzeng Guanli (中国行政管理) [CHINESE PUB. ADMIN.] 20, 22 (2020); YANG WEIDONG (杨伟东), ZHENGFU XINXI GONGKAI ZHUYAO WENTI YANJIU (政府信息公开主要问题研究) [STUDY ON MAIN ISSUES OF GOVERNMENT INFORMATION DISCLOSURE] at 248 (2013). The author takes sole responsibility for the accuracy of all citations to Chinese-language sources throughout this article, including in this note and notes 29, 34, 41, 141, 148, 161-64, 172, 173, & 184.

years? This article examines the Vaughn Index in light of its historical context and relevant judicial practice and argues that the Vaughn Index is a significant procedural tool in restoring the adversarial nature of FOIA litigations and guaranteeing efficient judicial review of classification decisions. Nonetheless, this article also contends that various forms deriving from the original Vaughn Index, including the "Selective" Vaughn Index, the "Boilerplate" Vaughn Index, and the "Multiple" Vaughn Index, may hinder the objectives of this procedural tool. Given the similarities and differences between judicial reviews in the US and China, this article argues that the Vaughn Index could provide some enlightenment to China, but the value of transplantation might be limited due to China's special legal framework governing state secret exemptions.

Focusing on the Vaughn Index in cases concerning the national security exemption, this article starts with a brief introduction to FOIA litigations, examining relevant historical background and developments. Part I of this article also analyses the dilemma courts face in conducting *de novo* reviews. Part II devotes substantial attention to the emergence of the Vaughn Index as a possible solution for courts in the trade-off between simple deference and *in camera* inspection and details the merits of this procedural instrument. Part III depicts the various declinations of the Vaughn Index and analyses this procedural tool in legal practice throughout the years. Part IV briefly summarizes the current legislation regarding state secrets exemption in China, presents a general study of cases concerning this subject, revealing that China faces problems similar than those observed in the US, and analyses how the Vaughn Index could be introduced in China.

II. FOIA LITIGATIONS: IDEALS AND REALITY

The APA allowed government agencies to withhold information necessary to be classified with regard to public interest.[14] Acknowledging the wide discretion under such a standard, FOIA was originally intended to diminish discretion while retaining reasonable protections for necessary sensitive information.[15] FOIA is a promise of free information, an open government and a truly democratic state. However, skeptics have described it as an illusion.[16] Professor Kenneth Davis pointed out that FOIA actually strengthens the executive's hand in "withhold[ing] information about national defense or foreign policy with the formal approval of Congress,

[14] *See* 5 U.S.C. § 552 (1946).

[15] *See* SAM LEBOVIC, HOW ADMINISTRATIVE OPPOSITION SHAPED THE FREEDOM OF INFORMATION ACT, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 14-16 (David E. Pozen & Michael Schudson eds., 2018).

[16] *See* MARK FENSTER, FOIA AS AN ADMINISTRATIVE LAW, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 52-53 (David Pozen & Michael Schudson eds., 2018).

previously lacking."[17] In 2018, the total number of government information requests amounted to 863,729, of which 38.9% received a partial grant or partial denial and 4.3% received a full denial.[18] Apparently, there is a gap between an ideal FOIA as protection of the public's right to obtain information from government and a "broken" FOIA featuring unnecessary complications, misapplication of laws, and extensive delays.[19]

A. Ideals: Balancing Right to Know and Need for Secrecy

The tension between an ideal and a broken FOIA is magnified when it comes to requests involving the national security exemption,[20] where the balancing test between people's right to know and government's need for secrecy proves to be extremely difficult and controversial. The national security exemption, provided as the very first exemption in FOIA, has been one of the main excuses for withholding government information from requesters.[21]

National security, a concept universally acknowledged by courts and critics as "a notoriously ambiguous and ill-defined phrase," emphasizes a country's strategy to tackle all sorts of threats and covers a wide range of capabilities of a nation, including its intelligence apparatus, as well as its industrial, scientific, and economic capacities.[22] National security is a "contested, subjective, [and] socially constructed concept,"[23] and it is hard to identify concrete and tangible threats due to its prophylactic nature.

i. From APA to FOIA

Tracing back to the APA, signed by President Truman in 1946, the United States has long been striving to achieve a workable balance between enabling public access to government information and the legitimate need for government secrecy.[24] Cruelly, as the very first attempt to facilitate the free flow of government information, the Public Information section of the

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[17] Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 785 (1967).

[18] OFFICE OF INFORMATION POLICY, U.S. DOJ, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2018 at 2-6 (2018), *available at* https://www.justice.gov/oip/page/file/1170146/download.

[19] SHEILA REED, IS THE FREEDOM OF INFORMATION ACT BROKEN?: BACKGROUND, PERSPECTIVES AND RECOMMENDATIONS 29 (Sheila Reed ed., 2016).

[20] The "national security exemption" hereinafter refers to the first exemption under FOIA. "This section does not apply to matters that are (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *See* 5 U.S.C. § 552(b)(1) (2018).

[21] *See id.*

[22] Note, *National Security and the Amended Freedom of Information Act*, 85 YALE. L.J. 401, 407-410 (1976).

[23] ARNOLD, *supra* note 6, at 17.

[24] *See* 5 U.S.C. § 552 (1946).

APA proved to be a fiasco.[25] At least two inherent flaws could be identified from the text.

One flaw was the lack of judicial review on the disclosure or nondisclosure of government information.[26] The other deficiency was that the statute listed information involving "any function of the United States requiring secrecy in the public interest" or "held confidential for good cause found" as an exception.[27] This provision is considered to be a predecessor of the national security exemption of FOIA.[28] However, "public interest" is widely held as an extremely ambiguous term,[29] and, by adopting such a standard and excluding judicial scrutiny, the APA granted government agencies complete discretion in determining whether information shall be disclosed. To quote Lord John Acton, "[p]ower tends to corrupt and absolute power corrupts absolutely."[30] Government's natural tendency to secrecy inevitably propels it to abuse such discretion as an excuse for withholding information.[31] The Public Information section turned out to be a "statutory excuse" for denying disclosure of government information.[32]

To hasten the end of government's secrecy culture, the Congress enacted a series of laws that are labeled as "Sunshine Laws," including

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[25] *See* Kenneth D. Salomon & Lawrence H. Wechsler, *Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151-52 (1969).

[26] There was no provision regarding judicial review of government information nondisclosure in the APA. *See* 5 U.S.C. § 552 (1946).

[27] "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest… (c)PUBLIC RECORDS - Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." 5 U.S.C. § 552 (1946).

[28] *See* Kathleen A. Mckee, *Remarks on the Freedom of Information Act: The National Security Exemption in a Post 9/11 Era*, 4 REGENT J. INT'L L. 263, 263-67 (2006).

[29] *See* JIANG BIXIN (江必新), ZUIGAO RENMIN FAYUAN GUANYU SHENLI ZHENGFU XINXI GONGKAI XINGZHENG ANJIAN RUOGAN WENTI DE YANJIU: LIJIE YU SHIYONG (最高人民法院关于审理政府信息公开行政案件若干问题的规定：理解与适用) [PROVISIONS OF THE SUPREME PEOPLE'S COURT ON SEVERAL ISSUES CONCERNING THE TRIAL OF ADMINISTRATIVE CASES ABOUT OPEN GOVERNMENT INFORMATION: UNDERSTANDING AND APPLICATION] at 137 (2011); *see also* Cheng Jie (程洁), Zhengfu Xinxi Gongkai de Falv Shiyong Wenti Yanjiu (政府信息公开的法律适用问题研究)[Study on Application of Law in Open Government Information], 3 Zhengzhi yu Falv (政治与法律) [POL. SCI. & L.] 28, 28 (2009); *see generally* Wang Jingbo (王敬波), Zhengfu Xinxi Gongkai zhong de Gonggogn Liyi Hengliang (政府信息公开中的公共利益衡量) [Weighing the Public Interest in the Publication of Government Information], 9 Zhongguo Shehui Kexue (中国社会科学) [SOC. SCI. IN CHINA] 105 (2014).

[30] Lord John Acton, *Letter to Bishop Mandell Creighton*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010 (last visited Feb. 21, 2020, 11:45PM).

[31] *See* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 10-28 (1999); *see also* H.R. REP. NO. 1497 at 23-27 (1966).

[32] Patrick J. Ward, *The Vaughn Index - Enforcing Agency Compliance under the Freedom of Information Act: Coastal State Gas Corp. v. DOE*, 16 NEW ENG. L. REV. 979, 993 (1980) (emphasis omitted).

FOIA, the Federal Advisory Committee Act, and the Government in the Sunshine Act.[33] Among them, FOIA may be the most influential, providing a key template for relevant laws of other countries.[34] To amend the flaws of the APA, FOIA enumerated nine exceptions, allowing legitimate withholding of government information and attempting to shrink the discretion resulting from the vague standard of the APA.[35] Additionally, FOIA authorizes judicial review as a check against government secrecy.[36] Strongly favoring openness, FOIA serves to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[37]

ii. FOIA National Security Exemption and *De Novo* Review

Under FOIA, only information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "in fact properly classified pursuant to such Executive order" could fall within the national security exemption.[38] Information alleged to be relevant to national security shall be classified in accordance to both substantive and procedural requirements of the executive orders.[39]

What is equally important to the national security exemption is the authorization of *de novo* review, under which courts must conduct a comprehensive and non-deferential review of the prior decision made by the administrative agency.[40] Before 1974, FOIA was silent on judicial review of nondisclosure of national security information.[41] Justice Stewart complained that the courts were endowed with no approach to question and challenge executive's classification decisions, however "cynical, myopic, or even corrupt that decisions might have been," and Justice Stewart blamed

[33] ARNOLD, *supra* note 6, at 2; *see* Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

[34] HOU XIANGDONG (后向东), MEIGUO LIANBANG XINXI GONGKAI ZHIDU YANJIU (美国联邦信息公开制度研究) [FREEDOM OF INFORMATION ACT: REGIME, HISTORY AND PRACTICE] at 117 (2014).

[35] *See* 5 U.S.C. § 552(b) (2018).

[36] *Id*. § 552(a)(4)(B).

[37] Rose v. Dep't of Air Force, 495 F.2d 261, 263 (2d. Cir. 1974).

[38] 5 U.S.C. § 552(b)(1) (2018).

[39] Congress made it clear that the standard for evaluating classification decisions is not "a general national-defense or foreign-policy standard, but the [Senate] committee prefers to rely on *de novo* judicial review under standards set out in Executive orders or statutes." S. REP. NO. 93-854 at 30 (1974) (emphasis added).

[40] "De novo" stands for "anew," and "de novo review," as contrary to "deferential review," refers to courts' non-deferential review of an administrative decision. *See De Novo*, BLACK'S LAW DICTIONARY (11th ed. 2019); *De Novo Review*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[41] Deyling, *supra* note 8, at 67; HOU, *supra* note 34, at 17.

Congress for the absence of such an approach.[42] In *Environmental Protection Agency v. Mink* ("*Mink*"), the Supreme Court held that the claim for exemption could be sustained solely by an affidavit stating that the information had been, in fact, classified and that, if a government document was in fact classified in a procedurally proper manner, the substantive adequacy of the classification decision shall not be subject to judicial review.[43] *Mink* seemed to defeat Congress's intention to grant every person the right to access government records and distorted FOIA litigation that was designed to serve as a check on agency power and protect the public's right to know.[44]

Aiming to overrule *Mink*, Congress promptly amended FOIA in 1974,[45] intending to empower courts to conduct *de novo* review of classification decisions and to authorize *in camera* inspection[46] of the classified documents when necessary, without relying on the original agency contentions.[47]

B. Reality: Dilemma of De Novo Review

Though granted the power to conduct *de novo* review and *in camera* inspection, courts still tend to affirm agency's classification decisions,[48] which seems quite odd given Congress's strong desire to minimize overclassification in the 1974 amendment. Paradoxically, Congress may be the one to blame for this one-sided result.

Congress, in Committee Reports, stated its desire to rectify abuse of "SECRET" stamps in the 1974 amendment, yet such an attempt was likely to be vetoed by the President.[49] To avoid a potential veto, Congress inserted a reminder stating that, when conducting *de novo* review, courts shall "accord substantial weight to an affidavit of an agency concerning the agency's determination" of the classified status of the disputed record due

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[42] Environmental Protection Agency v. Mink, 410 U.S. 73, 94-95 (1973) (Stewart, J., concurring).

[43] *Id.* at 92-94.

[44] In *Mink*, Justice Brennan wrote an opinion concurring in part and dissenting in part. "We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly 'in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion'….The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design." *Id.* at 100-01 (Brennan, J., concurring in part and dissenting in part).

[45] *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

[46] Before 1974, many courts had adopted *in camera* inspection when dealing with cases concerning FOIA exemptions. *See* Richard H. Walker, *Vaughn v. Rosen: New Meaning for the Freedom of Information Act*, 47 Temp. L.Q. 390, 397 (1974).

[47] *See* 5 U.S.C. § 552(a)(4)(B) (2018). Whether to conduct *in camera* inspection is within the discretion of courts. *See* Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

[48] *See* Deyling, *supra* note 8, at 67.

[49] *Id.* at 78-79; *see* S. REP. NO. 93-854 at 30 (1974).

to agency expertise and agency's unique insights on national defense and foreign policy matters.[50] This reminder, however, has been then held as a source of deference by many courts.[51]

Despite the clear language of the FOIA mandate, courts continue to frequently defer to executive agencies in cases concerning the national security exemption.[52] This leads to a surprising finding. The affirmance rate under *de novo* review in FOIA cases is even higher than the theoretically more lenient standard of review in other agency-related cases, the arbitrary and capricious standard, with the former being 90% and the latter around 50%.[53] Critics have deemed FOIA litigation as a frustration in practice, viewing it as a more symbolic commitment to the free flow of government information rather than an actual and effective approach to minimize government secrecy.[54]

If one observes the typical FOIA litigations involving national security exemptions, the government will almost always start with a concise affidavit and a motion for summary judgment, stating that the document has been in fact properly classified and is within the exemptions under FOIA.[55] Courts, to determine whether to grant the motion, will be faced with a dilemma. On the one hand, courts are aware that government litigants have "the inevitable temptation" of giving "an expansive interpretation in relation to the particular records in issue,"[56] and, if courts continue to affirm agency's classification decisions with great deference to affidavits, they inevitably will serve no more than a rubber stamp. On the other hand, courts will not be able to survive the heavy workload if they determine to conduct an *in camera* inspection, due to the immense volume of documents,[57] which would also be an "unfortunate misuse of scarce judicial resources."[58] For instance, in *Shannahan v. I.R.S.*, the defendant identified 5,735 pages of documents and a 35.7 MB electronic database after receiving Plaintiff's request, and consequently withheld a total of 5,417 pages of documents and

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[50] 5 U.S.C. § 552(a)(4)(B) (2018); H.R. CONF. REP. No. 93-1380 (1974).

[51] *See, e.g.*, Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

[52] Nathan Slegers, *De Novo Review under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 212 (2006).

[53] Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 718-20 (2002). Professor Verkuil examined *de novo* review standard under FOIA cases and arbitrary and capricious standard under "reverse-FOIA" cases where private parties seek to prevent agencies from voluntarily producing documents requested under FOIA.

[54] FENSTER, *supra* note 16, at 52-53.

[55] Deyling, *supra* note 8, at 72.

[56] *See, e.g.*, Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[57] As the court in *Vaughn v. Rosen* stated: "where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case." *See Vaughn*, 484 F.2d at 825.

[58] Comment, *supra* note 8, at 740.

the electronic database from disclosure.[59] It would have required an immense amount of judicial resources to review these documents *in camera* and identify their factual characteristics and whether they were properly withheld.[60]

III. ADOPTION OF THE VAUGHN INDEX

A. Inherent Feature and Procedural Crux of FOIA Litigations

Courts face a dilemma, forced to either defer to the routinely rough and sketchy agency affidavits or to take on the time-consuming job of reviewing disputed documents *in camera*. If one observes this dilemma from a procedural perspective, the dilemma may be, to a large extent, due to a lack of adversariness. The lack of adversariness is rooted in an inherent feature of FOIA cases – the asymmetry of information.

In FOIA cases, especially in cases concerning the national security exemption, the executive agency is the sole subject with full access to the disputed information, and the requesters are often "at a loss" because of ignorance of the information.[61] This lack of knowledge leaves requesters unable to effectively challenge the government's classification decisions. They can only make weak, generic arguments that the documents contain no information worth classifying.[62] Absent of in camera inspection, both the courts and the requesters would have to rely on the agencies' characterizations of the documents sought to be protected.[63] Before *Vaughn v. Rosen*, by the mere contention that the requested information falls within the national security exemption of FOIA, the government was deemed to have fulfilled its burden of proof, and the burden to rebut such factual characterization will then be incumbent upon the Plaintiffs, who have strong desires for disclosure but lack the knowledge to controvert the government's contentions.[64] This easy and quick shifting of the burden of proof fails to embody impartiality and apparently grants more advantages to the already dominant party.

Acknowledging the imbalance of information and the unreasonable transfer of the burden of proof, courts resort to *in camera* inspection to minimize such defects.[65] Though meant to mend the disadvantages arising from the asymmetry of knowledge, adopting *in camera* inspection triggers three major concerns. First, as illustrated in Part B, *in camera* inspection

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[59] Shannahan v. I.R.S., 672 F.3d 1142, 1145 (9th Cir. 2012).

[60] *See id.*

[61] *Vaughn*, 484 F. 2d at 824.

[62] *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 221 (2013).

[63] King v. U.S. Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987).

[64] Richard H. Walker, *Vaughn v. Rosen: New Meaning for the Freedom of Information Act*, 47 TEMP. L.Q. 390, 396 (1974).

[65] *See, e.g.*, Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Evans v. U.S. Dep't of Transp., 446 F.2d 821 (5th Cir. 1971); *Ackerly*, 420 F.2d. at 1336.

places undue burden on courts due to the often-voluminous documents in dispute.[66] The immense volume of requested documents would very likely render inspection sloppy. Second, one major consequence resulting from the asymmetry of knowledge – the lack of adversariness – remains unsettled, and cases are still without the "benefit of criticism and illumination by a party with the actual interest in forcing disclosure."[67] Finally, interestingly enough, the courts often end up undertaking the burden of proving the government's claim.[68] Courts, instead of plaintiffs, become the adversary in FOIA litigations.[69] The Supreme Court's decision in *Mink* also has contributed to discouraging the use of *in camera* inspections.[70]

The dilemma is now clear and distinct. The express statutory language of *de novo* review in FOIA[71] and the enumerated congressional policy favoring openness[72] compel courts to carry out their function as effective checks against executive secrecy, while the incubus of *in camera* inspection and the lack of other feasible tools render courts helpless in reviewing FOIA cases concerning national security exemptions.

A "quick fix" to tackle the dilemma was to regain the adversarial nature of litigations by enabling plaintiffs more information to base their arguments and, thus, allowing courts to review agencies' claims more comprehensively and efficiently. *Vaughn v. Rosen*, decided by D.C Circuit appeared just in time to serve such purpose.[73]

B. Vaughn v. Rosen

At the outset of the landmark case *Vaughn v. Rosen* ("*Vaughn*"), law Professor Robert Vaughn, who was conducting an intensive study of the US civil service system,[74] filed a request to the Bureau of Personnel

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[66] *See supra* notes 57-60 and accompanying text.

[67] *Vaughn*, 484 F.2d at 825.

[68] *See* Walker, *supra* note 64, at 397-99.

[69] The *in camera* inspection is undesirable because "it frustrates the statutory burden of proof requirement by shifting this burden from the agency to the courts." *See id.* at 397.

[70] *See Mink*, 410 U.S. at 93 ("[I]n some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material….")

[71] 5 U.S.C. § 552(a)(4)(B) (2018).

[72] *See* ARNOLD, *supra* note 6, at 2-3.

[73] "In recent cases, the courts have generally either conducted *in camera* inspection of the documents or adjudicated the dispute solely in reliance upon the briefs and arguments of the parties," and the Vaughn Index is to "replace[] these methods with requirements of government specificity and indexing designed to lessen reliance upon unenlightened *in camera* inspection, enhance the adversary process between citizen and government, and provide a meaningful record for appellate review." *See* Comment, *supra* note 8, at 733 (emphasis added).

[74] Robert G. Vaughn, *The Freedom of Information Act and Vaughn v. Rosen: Some Personal Comments*, 23 AM. U. L. REV. 865, 866-71 (1974) (providing personal comments on the events and the litigation from the plaintiff-author's point of view) [hereinafter *Vaughn Personal Comments*].

Management of the Civil Service Commission ("Bureau"), seeking disclosure of Evaluation of Personnel Management and some other documents.[75] The Bureau turned down his request, stating that the information sought was exempt under FOIA.[76] After Professor Vaughn brought a lawsuit in the United Stated District Court for the District of Columbia ("D.C. District Court"), the Bureau filed a motion to dismiss or, in the alternative, for summary judgment, with an affidavit of the Director of the Bureau.[77] There was no other, additional document supporting the Bureau's motion.[78] In reviewing the affidavit, the D.C. District Court found that it "did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the FOIA."[79] However, the court still granted the Bureau's motion for summary judgment.[80]

When the case was appealed to the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit Court"), the court was presented with the following issue: whether the agency had satisfied its burden of proof under FOIA by proving an affidavit which stated, generally, that the disputed information was exempt from disclosure.[81] However, faced with a "scant record," the court was at a loss in determining whether the requested information was indeed exempt from disclosure.[82] The court ruled in favor of Professor Vaughn and held that the court "will simply no longer accept conclusory and generalized allegations of exemptions."[83]

The D.C. Circuit Court recognized the inherent asymmetry of information in FOIA cases.[84] Judge Wilkey stated that, in typical FOIA litigations, only the executive agency was "in a position confidently to make statements categorizing information," and the agency's factual characterization of the withheld information "may or may not be accurate."[85] By simply contending that the requested information falls within the exemption provisions in FOIA, the agency can easily transfer the burden to the requester to rebut the government's factual characterization of the disputed information.[86] The requester, however, is in a position where he or she can neither "state that, as a matter of his knowledge, this characterization is untrue," nor state that the personal items can be separated from the disputed documents.[87] The D.C. Circuit Court further contended

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[75] *Vaughn*, 484 F.2d at 822.
[76] *Id.* at 822-23.
[77] *Id.* at 823.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *See generally Vaughn*, 484 F.2d at 820.
[82] *Id.* at 822.
[83] *Id.* at 826.
[84] *Vaughn*, 484 F.2d at 824-825.
[85] *Id.* at 823-824.
[86] Walker, *supra* note 64, at 396.
[87] *Vaughn*, 484 F.2d at 824.

that the information imbalance "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution" and stated that: "It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information."[88]

As the party holding direct access to the withheld information, the executive agency is to bear the burden of proof under FOIA.[89] The court held that the government "may not sweep a document under a general allegation of exemption," because it is possible that part of the document may be subject to disclosure,[90] but instead shall subdivide the materials into manageable sections and provide detailed justifications stating which exemption is applied to which classified material.[91] To do so, the court recommended that the agency submit an "itemizing and indexing" description that correlates each particular portion of the documents to the particular exemption relied upon by the government.[92]

Courts have subsequently acknowledged the so-called Vaughn Index and now require that agencies shall not only state the exemption for each withheld document or "merely recite the statutory standards,"[93] but shall also "explain why the exemption is relevant."[94] The case of *King v. United States Department of Justice* ("*King*") is an illustration of the adoption of the Vaughn Index, in which the court followed and further elaborated this itemizing and indexing system.[95] The *King* court recognized that substantial weight shall be given to affidavits filed by an executive agency describing the disputed material and the manner in which the material falls within the exemption claimed. [96] However, such affidavits shall "describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed."[97] Because affidavits shall "strive to correct…the asymmetrical distribution of knowledge that characterizes FOIA litigation[s]," the affidavits must fulfill the requirement of itemizing and indexing.[98] There is no set format for a Vaughn Index; however, the agency shall "disclos[e] as

[88] *Id.* at 826.
[89] 5 U.S.C. § 552(a)(4)(B) (2018).
[90] *Vaughn*, 484 F.2d at 826.
[91] *Id.* at 826-828.
[92] *Vaughn*, 484 F.2d at 827.
[93] Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 392-93 (D.C. Cir. 1987).
[94] Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979).
[95] *See generally King*, 830 F.2d at 210.
[96] *Id.* at 217.
[97] *Id.*
[98] *Id.* at 218.

much information as possible without thwarting the exemption's purpose."[99]

Vaughn is significant for first bringing the issue of the adequacy of FOIA adversary proceedings into light. Little concern, before *Vaughn*, had been given to the question of how FOIA plaintiffs could refute government agencies for denying their right to the information, when plaintiffs remained ignorant of the precise content of the information.[100] After *Vaughn*, courts have come to realize that the most effective and efficient way to determine the factual characterization of the withheld information is to shift the burden back to the agency that is claiming exemption,[101] and the Vaughn Index has been widely adopted in FOIA litigations.[102]

IV. OBSERVATION ON THE VAUGHN INDEX IN PRACTICE

Through the procedural requirements of the Vaughn Index, courts are able to remove the "blind reliance" of both plaintiffs and courts on agency affidavits, which may not accurately characterize every single portion of the information in dispute.[103] The Vaughn Index enables plaintiffs to engage in meaningful adversarial litigation and allows courts to effectively determine the factual nature of the information withheld.[104]

However, critics have shown concerns regarding the efficacy of the Vaughn Index, and some contend that the procedural tool "is often more of a hindrance than a help to requesters."[105] This article attempts to address these concerns.

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[99] *Id.* at 224. *See also* Judicial Watch, Inc. v. FDA, 449 F.3d 141, 153 (D.C. Cir. 2006); Defs. of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 88-92 (D.D.C. 2009) (finding that Defendant failed to "identify relevant information such as the originating component agency, the author, and frequently the recipient(s) of the document" and provided "only bare legal conclusions regarding the exemptions"). For an example of the Vaughn Index in judicial practice, *see* Filing of Full Vaughn Index by Dep't of Justice, Soghoian v. U.S. Dep't of Justice, 885 F. Supp. 2d 62 (D.D.C. 2012), *available at* https://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2011cv01080/148626/22/1.html.

[100] Comment, *supra* note 8, at 736.

[101] Walker, *supra* note 64, at 399.

[102] *See, e.g.*, New York Times Co. v. U.S. Dep't of Justice, 762 F.3d 233 (2d Cir. 2014); *Judicial Watch, Inc.*, 449 F.3d 141; *Gardels*, 689 F.2d 1100; *Bell*, 603 F.2d 945; Founding Church of Scientology, Inc. v. NSA, 610 F.2d 824 (D.C. Cir. 1979); Mead Data Cent. v. U.S. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); *Defs. of Wildlife*, 623 F. Supp. 2d 83; Schoenman v. FBI, 604 F. Supp. 2d 174 (D.D.C. 2009).

[103] Comment, *supra* note 8, at 733.

[104] *See* Deyling, *supra* note 8, at 96-97.

[105] Kwoka, *supra* note 62, at 223.

A. "Selective" Vaughn Index

Agencies claiming exemptions under FOIA now have to undertake several steps to satisfy Vaughn Index requirements, including: segregating the withheld documents into manageable portions; describing with enough specificity each portion of the documents; and, more importantly, establishing detailed cross-references of each portion of the documents with each statement of exemption.[106] In short, segregation, specificity, and correlation are the essence of the Vaughn Index.

When discussing *in camera* inspection, it has been universally recognized that the inspection would cause an immense burden on the courts due to the huge volume of information at issue.[107] Under the Vaughn Index, the burden of proof now shifts back to the government. This may, in fact, also bring about a comparable encumbrance on the Executive. *Vaughn* itself could be an example illustrating this problem. *Vaughn* arose from the non-disclosure of 2,448 documents, which would fill "17 standard-size, five-drawer filing cabinets in the Civil Service Commission."[108] It was estimated that to itemize and index all these documents, according to the instructions and guidelines of the D.C. Circuit Court, it would require years of work and cost the government approximately $96,176.40.[109]

The question of whether FOIA exerts too much burden on the government was raised and refuted as early as the debating phase of the 1974 FOIA Amendment, and Senator Muskie replied to such concern by stating that "[t]he burden is on the agency to sustain its action."[110] Heavy as the burden might be, the underlying purposes of FOIA are sufficient to justify the requirements, and the practical burden of cost may never be an excuse for shaking off the legal burden of proof.

Having said that, courts have devised a seemingly smart way of tackling the problem. In *Vaughn*, the government, with permission of the court, only indexed nine documents that it deemed representative.[111] Such lenience helps reduce the cost tremendously, because much less information has to be segregated, specified, and indexed. In *Vaughn*, the cost plummeted to $353.89, as only nine out of 2,448 documents were presented with indexes to the court.[112] Similarly, in *Mullen v. United States Army Criminal Investigation Command* ("*Mullen*"), the court permitted the defendant to

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[106] *Vaughn*, 484 F.2d at 826-828.

[107] Delying, *supra* note 8, at 72; Comment, *supra* note 8, at 740; *see also* Walker, *supra* note 64, at 397.

[108] *Vaughn Personal Comments*, *supra* note 74, at 873.

[109] *Id.*

[110] Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 742 (2014) (alteration in original).

[111] *Vaughn Personal Comments*, *supra* note 74, at 874.

[112] *Id.*

index only a representative sample of the records.[113] The volume of documents was immense in *Mullen*, where the government "produced over 41,000 pages of responsive documents and consulted with approximately thirty federal agencies or organizations in order to do so."[114] The approach taken by the *Mullen* court is considered the "Selective" Vaughn Index.

However, whether the "Selective" Vaughn Index may be a panacea for reducing burdensome work in every case remains questionable. On the one hand, it is fortunate that, in cases like *Vaughn* and *Mullen*, most documents followed a similar format, which provided a basis for representativity.[115] But this is not true in all cases. On the other hand, a "Selective" Vaughn Index grants the government discretion regarding which documents to be selected and indexed. It is possible that agencies may opt for those documents with the strongest factual basis of applying exemptions, while leaving out those unnecessarily classified. It is likely that the latter may abate the objectives of the original Vaughn Index.

B. "Boilerplate" Vaughn Index

The problem of "Boilerplate" Vaughn Indexes has been addressed by some scholars: "When courts expect detail, agencies can deliver. When courts are unwilling to insist on a serious specification and indexing of exemption claims, by contrast, agencies take the easy route of relying on boilerplate justifications."[116]

The name "Boilerplate Vaughn Index," itself, can reveal how such an index fails to meet the requirement established in *Vaughn*. In *King*, the court stated "specificity" as the "defining requirement" of the Vaughn Index.[117] Contrarily, the term "boilerplate" indicates generality and standardization, as a boilerplate document is intended to fit into varieties of situations.[118] Generality and standardization are opposite concepts to specificity, which could explain why, in *King*, the court rejected the defendant's categorical description of the disputed documents as "clearly inadequate" under the Vaughn Index.[119]

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[113] Mullen v. U.S. Army Criminal Investigation Command, No. 1:10CV262(JCC/TCB), 2012 WL 2681300, at *2 (E.D. Va. July 6, 2012).

[114] *Id.* at *7.

[115] *See id*.; *see generally Vaughn*, 484 F.2d 820.

[116] Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 172 (2006).

[117] *King*, 830 F.2d at 219.

[118] "Boilerplate" refers to "[r]eady-made or all-purpose language that will fit in a variety of documents" or "[f]ixed or standardized contractual language that the proposing party often views as relatively nonnegotiable." *Boilerplate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[119] *King*, 830 F.2d at 224.

Unfortunately, the "Boilerplate" Vaughn Index is rather prevalent in legal practice.[120] Take *Wiener v. FBI* ("*Wiener*") as an example.[121] In *Wiener*, the FBI filed five affidavits successively, attempting to justify the withholdings in general terms.[122] The affidavits stated, in conclusory terms, why the documents should be exempt from disclosure.[123] The court deemed all the affidavits as not constituting adequate Vaughn Indexes, because the categorical description "affords Wiener little or no opportunity to argue for release of particular documents."[124] The court then concluded that only when plaintiffs were aware of the precise basis for withholding the information could they provide effective advocacy.[125]

The "Boilerplate" Vaughn Index has been clearly rejected by most courts as failing to comply with the specific requirement of *Vaughn*.[126] However, the question of how specific the affidavits should be to qualify as an adequate Vaughn Index remains unclear.

Additionally, other concerns related to the "Boilerplate" Vaughn Index are worth mentioning. With attention shifting to the question of whether a government affidavit can be recognized as a Vaughn Index, the focus of FOIA litigations has also changed. Government agencies devote a substantial amount of labor and time to formulate adequate Vaughn Indexes, while plaintiffs often respond by challenging the specificity of the indexes instead of debating on the core issue of whether the national security exemption asserted shall be applied.[127] As such, it seems likely to undermine the emphasis on values that FOIA litigations are supposed to promote. Another relevant issue is courts' tolerance after agencies submit a "Boilerplate" Vaughn Index, which is examined in the following section.

C. "Multiple" Vaughn Index

A "Boilerplate" Vaughn index alone poses limited threats to the objectives of the original Vaughn Index, because courts are often acute in

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[120] *See, e.g.*, Knight First Amendment Inst. at Columbia Univ. v. U.S. Dep't of Homeland Sec., 407 F. Supp. 3d 334 (S.D.N.Y. 2019); Protect Democracy Project, Inc. v. U.S. Dep't of Health & Human Servs., 370 F. Supp. 3d 159 (D.D.C. 2019); Center for Biological Diversity v. Office of Mgmt. & Budget, 625 F. Supp. 2d 885 (N.D. Cal. 2009).

[121] *See generally* Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991).

[122] *Id.* at 977.

[123] *Id.* at 978-79.

[124] *Id.* at 979.

[125] *Id.* The court further addressed the purpose of Vaughn Index: "[T]he purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Id.*

[126] *See, e.g.*, *Wiener*, 943 F.2d 972; *Knight First Amendment Inst. at Columbia Univ.*, 407 F. Supp. 3d 334; *Protect Democracy Project, Inc.*, 370 F. Supp. 3d 159; *Center for Biological Diversity*, 625 F. Supp. 2d 885.

[127] Kwoka, *supra* note 62, at 223.

detecting and rejecting them.[128] Nonetheless, more attention should be paid to its subsequent consequences, the so-called "Multiple Vaughn Index."[129]

Under FOIA, government agencies shall bear the burden to prove that the withheld documents at issue have been, in fact, classified according to the criteria in Executive orders.[130] It is safe to say that, once agencies fail to satisfy this burden of proof, they undertake the risks of losing. However, as in *Wiener* and many other cases, it is quite common that agencies are given multiple chances to sustain their burden of justifying nondisclosure.[131] Despite the dearth of specificity and adequacy, courts would still allow defendants to provide supplemental Vaughn submissions, adding more detailed descriptions of the documents withheld.[132] The extra chances and time for agencies to sustain their burden of proof will inevitably result in unfairness for requesters, because such delay might render requesters more likely to give up pursuit of the information and might also extinguish the need and intended use of the disputed information.[133]

Another reason for allowing defendants to amend or resubmit Vaughn Indexes is courts' awareness of the "sheer magnitude" of requests and documents.[134] Courts recognize burdens arising from the "sheer magnitude" of requests and have stated that it would be "unrealistic to expect that a *Vaughn* index would be a work of art or contain the uniform precision that a substantially smaller universe of requested documents would entail."[135] In *American Management Services, LLC. v. Department of the Army*, there existed inconsistencies between contents of the documents

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[128] *See* Fuchs, *supra* note 116, at 171-172 ("The fact that the agency's affidavit failed to meet the standard for specificity ranks as the most likely reason for a circuit court to reverse the judgment of a district court in favor of the agency in a FOIA case involving national security information. For these reasons, it is incumbent on the courts to enforce true specificity, separation, and indexing requirements in government affidavits.").

[129] "Multiple Vaughn Index" is not a legal or academic term, but it is adopted in this article to describe the situation when government agencies are permitted by courts to present new affidavits or indexes when the original submissions fail to comply with requirements of Vaughn Index.

[130] 5 U.S.C. § 552(a)(4)(B) (2018).

[131] *See generally Wiener*, 943 F.2d 972. Patrick Ward noticed that, in *Mobil Oil Corp. v. FTC*, it took four years for the defendant to eventually satisfy its burden of proof after repeated requests to submit adequate, sufficient facts to justify exemption ordered by the court. *See* Ward, *supra* note 32, at 1021-1027; *see also* Mobil Oil Corp. v. FTC, 430 F. Supp. 849 (S.D.N.Y. 1977); Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976).

[132] In *Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*, the court recognized that the Vaughn index originally submitted was "vague, conclusory and inadequate" and that, even after *in camera* review, several exemption claims remained unresolved, and the court required Defendant to submit a supplemental Vaughn index. Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec., 648 F. Supp. 2d 152, 157-62 (D.D.C. 2009).

[133] Ward, *supra* note 32, at 1026.

[134] *See* Am. Mgmt. Servs., LLC. v. Dep't of the Army, 842 F. Supp. 2d 859, 870 (E.D. Va. 2012) (citing Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 370 (4th Cir. 2009).

[135] *Rein*, 553 F.3d at 370.

requested and the Vaughn Index.[136] The court, holding that the inconsistencies were insufficient to manifest bad faith, stated that "[i]t is well to recall that there were almost a thousand pages of documents gathered by the Army" and that "some fall-off from perfection" shall be expected.[137]

Granting a second or even more chances for government agencies, to quote Margaret Kwoka, may be a form of courts "unspoken deference."[138] By unreasonably giving one party multiple chances and delaying indefinitely the possible negative outcomes for agencies, not only are courts defeating the purposes of the Vaughn Index, they also frustrate congressional mandates set in FOIA.

Such leniency of courts displays their fear, especially in cases concerning the national security exemption. As Judge Wald claims, courts may be "approaching too timidly" the question of "whether national security claims override traditional constitutional rights or liberties."[139] The danger resulting from erroneous decisions explains judges' timidity. If a judgment against government agencies is wrongly decided, possible catastrophic consequences might arise.

Despite the above derivatives, the original Vaughn Index, fashioned by the D.C. Circuit Court in *Vaughn*, continues to be the most widely adopted tool for defendant agencies to meet the burden of proof under FOIA.[140] China, also facing the lack of adversariness in state secret exemption cases, may be able to draw lessons from this US procedural creation.

V. ENLIGHTENMENT FOR JUDICIAL PRACTICE IN CHINA

Many scholars in China, when discussing solutions to improve judicial review of open government information cases concerning state secret exemptions, have been referring to the Vaughn Index as a template.[141] By recognizing the significance of this procedural creation,

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[136] *Am. Mgmt. Servs., LLC.*, 842 F. Supp. 2d at 870.
[137] *Id.*
[138] Kwoka, *supra* note 62, at 211. "Unspoken deference" refers to "a set of procedural practices developed uniquely for FOIA cases…which produce significant litigation advantages to the government and effectively result in deference to the government's position." *Id.*
[139] Patricia M. Ward, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 764 (1988).
[140] *United States Department of Justice Guide to the Freedom of Information Act*, DOJ at 82, https://www.justice.gov/oip/page/file/1205066/download, (last updated Feb. 18, 2020).
[141] YANG, *supra* note 13, at 246-48. *See generally* Zheng Chunyan (郑春燕), *Zhengfu Xinxi Gongkai yu Guojia Mimi Baohu* (政府信息公开与国家秘密保护) [*Open Government Information and State Secret Protection*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.], no. 1, 2014, at 144, 155-56; Cheng Xiezhong (成协中), *Xinxi Gongkai Linian xia de Dignmi Yiyi yu Sifa Shencha* (信息公开理念下的定密异议与司法审查) [*The Objection to Classifying State Secrets and Judicial Review under the Idea of Information Openness*], HAERBIN GONGYE

they have shown interest in transplanting the Vaughn Index in China. This article will next assess: Is transplanting the Vaughn Index a feasible solution to the current problems of Chinese practice?

A. Current Legislation in China

In 2007, the State Council of China promulgated the Open Government Information Regulation ("OGIR"), which is intended to enhance openness and transparency of administrative agencies.[142] Though the OGIR has not established the "right to know" and the presumption favoring disclosure, it is undeniably an important milestone in the course to pursuing the ideal of a law-based government.[143]

Unlike FOIA, the OGIR has enumerated seemingly fewer exemptions from disclosure, which can be further divided into two categories, including absolute exemptions and non-absolute exemptions.[144] Absolute exemptions cover state secrets; information on internal matters; and information that may harm national security, public security, economic

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DAXUE XUEBAO (SHEHUI KEXUE BAN) (哈尔滨工业大学学报(社会科学版)) [J. OF HARBIN INST. of TECH. (SOC. SCI. ED.)], no. 3, 2013, at 54, 58; Jiang Bixin & Li Guangyu (江必新&李广宇), *Zhengfu Xinxi Gongkai Xingzheng Susong Ruogan Wenti Tantao* (政府信息公开行政诉讼若干问题探讨) [*Discussion on Issues Concerning Litigation of Open Government Information*], ZHENGZHI YU FALV (政治与法律) [POL. SCI. & L.], no. 3, 2009, at 12, 20; Xu Lianli (许莲丽), *Zhengfu Xinxi Gongkai Susong Zhong de Mimi Shencha Zhidu* (政府信息公开诉讼中的秘密审查制度：美国的实践) [*In Camera Inspection in FOIA Litigations: American Practice*], HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL L. REV.], no.3, 2011, at 92, 93.

[142] *See generally* Zhengfu Xinxi Gongkai Tiaoli (政府信息公开条例) [Open Government Information Regulation] (promulgated by the St. Council, Apr. 5, 2007, rev'd Apr. 3, 2019, effective May 15, 2019), *available at* http://www.gov.cn/zhengce/content/2019-04/15/content_5382991.htm [hereinafter *Open Government Information Regulation*]. Note that the Open Government Information Regulation was revised very recently in 2019, which mainly targets the abuse of right to government information and vexatious litigation concerning government information disclosure. *See* Jiang Bixin & Liang Fengyun (江必新&梁凤云), *Zhengfu Xinxi Gongkai yu Xingzheng Susong* (政府信息公开与行政诉讼) [*Disclosure of Governmental Information and Administrative Litigation*], FAXUE YANJIU (法学研究) [CHINESE J. of L.], no.5, 2007, at 21, 21.

[143] *See generally Open Government Information Regulation*, *supra* note 142. "A law-based government" or "government under the rule of law," together with "a law-based country" and "a law-based society," are core concepts and goals of China's legal construction, which refers to a government whose public is regulated according to law. *See* Jiang Mingan (姜明安), *Lun Fazhi Guojia, Fazhi Zhengfu, Fazhi Shehui Jianshe de Xianghu Guanxi* (论法治国家、法治政府、法治社会建设的相互关系) [*On the Interrelationship among the Building-up of a Country, a Government, and a Society under the Rule of Law*], FAXUE ZAZHI (法学杂志) [L. SCI. MAGAZINE], no.6, 2013, at 1, 1-2. *See also* Ma Huaide (马怀德), *Woguo Fazhi Zhengfu Jianshe Xianzhuang Guancha: Chengjiu yu Tiaozhan* (我国法治政府建设现状观察：成就与挑战) [*Observation on the Status Quo of Lawful Government Construction in China: Achievement and Challenge*], GUOJIA XINGZHENG XUEYUAN XUEBAO (国家行政学院学报) [J. OF CHINESE ACADEMY OF GOVERNANCE], no.5, 2014, at 21, 21.

[144] *See Open Government Information Regulation*, *supra* note 142, arts. 14-16.

security and social stability.[145] Absolute exemptions are known as the "three security and one stability" exemptions. Trade secrets and individual privacy are non-absolute exemptions, which can be disclosed with the consent of relevant third parties or when the administrative agencies consider that withholding such information would "materially affect public interest."[146] Administrative law enforcement files and information generated in the process of performing administrative tasks are also within the range of non-absolute exemptions, whose disclosure is subject to requirements of any laws, regulations, or rules.[147]

With regard to the state secret exemption, the OGIR only presents a very conclusory provision and does not have a final say as to what may constitute a "state secret."[148] This is due to legal hierarchy. OGIR is an administrative regulation issued by the State Council, the legal validity of which is lower than that of laws implemented by the National People's Congress and its Standing Committee.[149] As a result, the determination of a "state secret" that shall be withheld from disclosure is subject to the Law of the People's Republic of China on Guarding State Secret ("Law Guarding State Secret"), in particular Article 2 and Article 9.[150] Pursuant to Article 2 of the Law Guarding State Secret, information shall satisfy the following elements to be determined to be a state secret: a) matters relevant to national security and interest; b) having undergone statutory procedures; and c)

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[145] "Government information that is determined as state secrets according to the law, or whose public disclosure is prohibited by any law or administrative regulation, or that may harm national security, public security, economic security, or social stability, shall not be disclosed to the public." *Id.* art. 14. "An administrative agency may withhold information on its internal matters, including personnel management, logistics management, and internal work flow." *Id.* art. 16.

[146] "For government information relating to a trade secret, individual privacy or the like whose public disclosure would harm the lawful rights and interest of any third party, an administrative agency shall not disclose to the public such government information, unless the third party consents to its public disclosure, or the administrative agency deems that its withholding would materially affect the public interest." *Id.* art. 15.

[147] Article 16 also provides that "an administrative agency may withhold deliberative records, pre-decisional documents, consultation communications, requests for instructions and reports, and other pre-decisional information generated in the process of its performance of government administration functions and information on administrative law enforcement files, unless otherwise required by any law, regulation or rule." *Id.* art. 16.

[148] ZHOU HANHUA (周汉华), ZHENGFU XINXI GONGKAI TIAOLI ZHUANJIA JIANYI GAO: CAOAN, SHUOMING, LIYOU, LIFA LI (政府信息公开条例专家建议稿——草案·说明·理由·立法例) [EXPERTS PROPOSED RULE OF THE OPEN GOVERNMENT INFORMATION REGULATION: DRAFTS, EXPLANATIONS, REASONS AND LEGISLATIONS] at 112-15 (2003).

[149] *See* Lifa Fa (立法法) [Legislation Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000, rev'd Mar. 15, 2015), art. 78, *available at* http://www.npc.gov.cn/wxzl/gongbao/2015-05/07/content_1939105.htm.

[150] Baoshou Guojia Mimi Fa (保守国家秘密法) [Law on Guarding State Secret] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1988, rev'd Apr. 29, 2010, effective Oct. 1, 2010), arts. 2, 9, *available at* http://www.npc.gov.cn/wxzl/gongbao/2010-08/04/content_1587728.htm [hereinafter *Law on Guarding State Secret*].

access to the information shall be vested in a limited scope of persons during a given period of time.[151] Article 9 has been widely criticized as extremely broad and vague,[152] covering seven categories ranging from matters relating to foreign affairs and defense to those involved in economic, social, and scientific development.[153] Nonetheless, Article 9 is significant in that it also presents the standard of determining state secrets, the "harm standard," which is similar to that provided in Executive Orders of the United States.[154]

B. Judicial Review on State Secret Exemption Cases in China

The OGIR allows requesters to apply for administrative reconsideration or bring lawsuits against government agencies that refuse to disclosure information.[155] This article, by conducting a study of state secret exemption cases in China from 2015 to 2019, attempts to depict an overview of the current judicial practice in China.

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[151] "State secrets refer to matters which relate to the national security and interests as determined under statutory procedures and to which access is vested in a limited scope of persons during a given period of time." *Id.*, article 2.

[152] Wang Xixin (王锡锌), *Zhengfu Xinxi Gongkai Yujing xia de "Guojia Mimi" Tantao* (政府信息公开语境下的"国家秘密"探讨) [*Discussion of "State Secret" under the Context of Open Government Information*], ZHENGZHI YU FALV (政治与法律) [POL. SCI. & L.], no. 3, 2009, at 2, 7; Zhang Jiangsheng (章剑生), *Zhengfu Xinxi Gongkai Tiaoli zhong de "Guojia Mimi" zhi Jieshi* (《政府信息公开条例》中的"国家秘密"之解释) [*"State Secrets" in Government Information Disclosure*], JIANGSU DAXUE XUEBAO (SHEHUI KEXUE BAN) (江苏大学学报(社会科学版)) [J. of JIANGSU U. (SOC. SCI. ED.)], no. 14, 2012, at 7, 7-8; Zhan Zhongle & Su Yu (湛中乐&苏宇), *Lun Zhengfu Xinxi Gongkai Paichu Fanwei de Jieding* (论政府信息公开排除范围的界定) [*On Definition of Exemptions of Government Information Publicity*], XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.], no. 4, 2009, at 36, 37.

[153] "The following matters which relate to the national security and interests and the leakage of which may damage the national security and interests in the field of politics, economy, national defense, foreign affairs, etc. shall be determined as state secrets: (1) Classified matters involved in the key policy decisions on state affairs; (2) Classified matters involved in the national defense construction and armed force activities; (3) Classified matters involved in the diplomatic and foreign affair activities and classified matters involved in the state's international obligation of secrecy; (4) Classified matters involved in the national economic and social development; (5) Classified matters involved in science and technology; (6) Classified matters involved in the activities of maintaining national security and investigating criminal offences; and (7) Other classified matters as determined by the state secrecy administrative department. A political party's classified matters which conform to the provisions of the preceding paragraph shall be state secrets." *Law on Guarding State Secret*, *supra* note 150, art. 9.

[154] *Id.*

[155] Requesters who have been denied disclosure can resort to filing report or complaint, applying for administrative reconsideration, or filing lawsuits. *See Open Government Information Regulation*, *supra* note 142, art. 51.

i. A General Study of State Secret Exemption Cases in China

Below is empirical research into open government information cases concerning the state secret exemption in recent years.[156] 2,114 cases were collected using two important judicial decision databases in China.[157] The search conditions were as follows: a) "state secret" as the keyword; b) "administrative case" as the litigation type; c) "second-instance, retrial and others" as the inquisition stages;[158] d) May 1, 2015 to December 31, 2019 as the time limit.[159] By reviewing every search result and filtering cases that are repetitive and uncorrelated, 340 cases are ultimately valid search results, as shown in the following chart.

YEAR	2015	2016	2017	2018	2019	TOTAL
PRELIMINARY SEARCH RESULT	107	606	490	494	417	2114
FINAL SEARCH RESULT	26	38	48	70	158	340

Chart 1 – Search Results

Among the above search results, requesters prevailed in 48 cases, accounting for approximately 14.12%, slightly better than that of the US.[160] As with the situation in the United States, state secret exemptions in China, while being used as powerful protection for national security, have also been adopted as shields against disclosure.[161] Both the FOIA of the US and

[156] The closing date of the search is February 26, 2020. The author takes sole responsibility for the accuracy of the statements made regarding search results and this general study of state secret exemption cases in China.

[157] *See* PKULaw (北大法), http://pkulaw.cn/Case/; Itslaw (无讼案例), https://www.itslaw.com/.

[158] Excluding first-instance cases is because such cases are tried by fairly low-level courts and are very likely to be appealed and due to its pending validity, it shall not be included. However, this article also recognizes that such exclusion may embody certain inaccuracy, as a very small amount of first-instance cases that are final are not studied.

[159] May 1, 2015 was the time when the amended Administrative Litigation Law of the People's Republic of China took effect. The amendment has had profound impact on China's administrative litigation system. For instance, the amendment established a case registration system and abandoned the former case-filing review system which originally barred numerous cases from being heard by courts. *See generally* Ma Huaide & Kong Xiangwen (马怀德&孔祥稳), *Zhongguo Xignzheng Fazhi Sishi Nian: Chengjiu, Jingyan yu Zhanwang* (中国行政法治四十年：成就、经验与展望) [*40 Years of China's Rule of Administrative Law: Achievements, Experience and Perspectives*], FAXUE (法学) [L. SCI.], no.9, 2018, at 34.

[160] *See supra* notes 49-54 and accompanying text.

[161] WANG WANHUA (王万华), ZHIQINGQUAN YU ZHENGFU XINXI GONGKAI ZHIDU YANJIU (知情权与政府信息公开制度研究)[THE RIGHT TO KNOW AND OPEN GOVERNMENT INFORMATION] at 151-54 (2013).

the Administrative Litigation Law of China have provided for fairly strict standards for reviewing cases concerning non-disclosure of national security information or state secrets, but judicial review in practice are in fact much more lenient.

ii. Ex Parte Evidence Examination

Scholars have reached a consensus that state secret exemption cases in China are tried differently than other open government information cases.[162] One core difference is that government agencies only need to submit "peripheral evidence," instead of revealing to the court the disputed classified information.[163] Peripheral evidence is evidence "surrounding" the withheld information, which enables courts to conduct judicial review of procedural aspects of the non-disclosure and classification decisions of the withheld information.[164] Such evidence may include the first page of the relevant documents (bearing the classification level signs),[165] classification review forms,[166] state secret approval forms,[167] power of attorney of classification,[168] and statements of situation.[169] Only when peripheral

[162] *See* Jiang & Liang, *supra* note 142, at 34. LIANG FENGYUN (梁凤云), XIN XIGNZHENG SUSONG FA JIANGYI (新行政诉讼法讲义) [LECTURES ON THE NEW ADMINISTRATIVE LAW] at 236-37 (2015). Cheng Hu (程琥), *Xin Tiaoli Shishi hou Zhengfu Xinxi Gongkai Susong Rugan Wenti Tantao* (新条例实施后政府信息公开行政诉讼若干问题探讨) [*Discussion of a Number of Questions about Administrative Litigation of Government Information Disclosure after Implementation of the New Regulation*], XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.], no.4, 2019, at 13, 27.

[163] Jiang & Liang, *supra* note 142, at 34; LIANG, *supra* note 162, at 236-37; Cheng, *supra* note 162, at 26-28.

[164] Jiang & Liang, *supra* note 142, at 34; LIANG, *supra* note 162, at 236-37; Cheng, *supra* note 162, at 27.

[165] *See* Wang Ruilan Su Beijing Shi Shenji Ju He Zhonghua Renmin Gonghe Guo Shenji Shu (王瑞兰诉北京市审计局和中华人民共和国审计署) [Wang Ruilan v. Beijing Municipal Bureau of Audit & Nat'l Audit Office of the People's Republic of China], Lawinfochina (Beijing 2d Interm. People's Ct. Feb. 28, 2019); Tang Jinkang Su Beijing Shi Gongan Ju Dongcheng Fenju (唐金康诉北京市公安局东城分局) [Tang Jinkang v. Dongcheng Div. of Beijing Municipality Pub. Security Bureau], Lawinfochina (Beijing 2d Interm. People's Ct. Feb. 26, 2019).

[166] *See* Si Xiuqing Deng Ren Su Neimenggu Zizhi Qu Renmin Zhengfu (司秀清等人诉内蒙古自治区人民政府) [Si Xiuqing et al. v. People's Gov't of Inner Mongolia], Lawinfochina (Inner Mongolia Higher People's Ct. Nov. 2, 2018); *see also* Beijing Shi Yudu Meixin Cekong Dianqi Youxian Gongsi Su Beijing Shi Shijingshan Qu Renmin Zhengfu (北京市誉都美心测控电器有限公司诉北京市石景山区人民政府) [Beijing Yudu Meixin Appliance Measurement & Control Co. Ltd. v. Shijingshan Dist. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Nov. 29, 2017) [hereinafter *Yudu Meixin*].

[167] *See* Wu Yazhen Su Beijing Shi Fengtai Qu Renmin Zhengfu He Beijing Shi Renmin Zhengfu (武亚珍诉北京市丰台区人民政府和北京市人民政府) [Wu Yazhen v. Fengtai Dist. People's Gov't & Beijing Mun. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Sept. 20, 2018) [hereinafter *Wu Yazhen*]; Zhong Yanhua Su Shangdong Sheng Shenj Ting (仲衍华诉山东省审计厅) [Zhong Yanhua v. Audit Office of Shandong Province], Lawinfochina (Jinan Interm. People's Ct. Aug. 15, 2017); *see also Yudu Meixin*, *supra* note 166.

[168] *See Wu Yazhen*, *supra* note 167.

evidence is insufficient to support that the information has been classified, or when courts assume that there exists separable non-classified information, may courts require submission of the disputed information.[170] Peripheral evidence submitted beyond the statutory period may still be admitted by courts.[171] Under article 37 of the Provisions of the Supreme People's Court on Several Issues Concerning the Evidence in Administrative Litigations ("Supreme People's Court Evidence Provisions"), any evidence that is relevant to state secrets shall not be presented in court and cross examined.[172] As a result, peripheral evidence is treated similarly to the classified information and is also kept away from plaintiffs.[173]

Requesters in China are in an inferior position due to ignorance of the disputed information, similar to those in the US. However, the asymmetry of information is aggravated in China due to the special treatment of peripheral evidence, as described above. In many cases, plaintiffs cannot access the content of the peripheral evidence, nor are they informed of the name, producer, or time of production of the peripheral evidence.[174] This is described as "vacuum isolating."[175] Very rarely will

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[169] *See* Lu Zhanyun Su Zhonghua Renmin Gognhe Guo Shenji Shu (卢占云诉中华人民共和国审计署) [Lu Zhanyu v. Nat'l Audit Office of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Apr. 3, 2019); Zhu Yuzhen Su Anhui Sheng Guotu Ziyuan Ting He Anhui Sheng Renmin Zhengfu (朱玉珍诉安徽省国土资源厅和安徽省人民政府) [Zhu Yuzhen v. Nat'l Land & Res. Office of Anhui Province & People's Gov't of Anhui Province], Lawinfochina (Hefei Interm. People's Ct. Nov. 5, 2018); E Xiuyun Su Shenyang Shi Renmin Zhengfu Waishi Bangong Shi (鄂秀云诉沈阳市人民政府外事办公室) [E Xiuyun v. Foreign Affairs Office of Shenyang Municipality], Lawinfochina (Shenyang Interm. People's Ct. May 29, 2018).

[170] *See* Jiang & Liang, *supra* note 142, at 34-35; Jiang & Li, *supra* note 141, at 19-20.

[171] *See* Jiang & Li, *supra* note 141, at 19-20; *see also* He Shaohuan Su Panzhihua Shi Ziran Ziyuan He Guihua Ju (贺绍欢诉攀枝花市自然资源和规划局) [He Shaohuan v. Dep't of Nat. Res. & Planning of Panzhihua City], Lawinfochina (Panzhihua Interm. People's Ct. Aug. 20, 2019).

[172] *See* Zuigao Renmin Fayuan Guanyu Xingzheng Susong Zhengju Ruogan Wenti De Guiding (最高人民法院关于行政诉讼证据若干问题的规定) [The Provisions of the Supreme People's Court on Several Issues Concerning the Evidence in Administrative Litigations] (promulgated by the Sup. People's Ct. June 4, 2002, effective Oct. 1, 2002), art. 37, *available at* https://www.chinacourt.org/article/detail/2002/07/id/9003.shtml [hereinafter *Supreme People's Court Evidence Provisions*]; Zuigao renmin fayuan guanyu zhonghua renmin gongheguo minshi susong fa de shiyong xing (最高人民法院关于中华人民共和国民事诉讼法的适用性) [Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China] (promulgated by the Judicial Comm. of the Sup. People's Ct. Dec. 18, 2014, effective Feb. 4, 2015) art. 103, *available at* https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf [hereinafter *Supreme People's Court Interpretations*].

[173] LIANG, *supra* note 162, at 236-37.

[174] *See* Zheng Minjie Su Zhonghua Renmin Gonghe Guo Gognye He Xinxi Hua Bu (郑敏杰诉中华人民共和国工业和信息化部) [Zheng Minjie v. Ministry of Industry and Info. Tech. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Nov. 21, 2017); *see also* Ma Yafen Su Zhognhua Renmin Gonghe Guo Ziran Ziyuan Bu

courts provide clues to peripheral evidence, as in the case of *Zhu Fuxiang v. Beijing Municipal People's Government*, in which the court stated that the peripheral evidence submitted was a classified document concerning internal structure and personnel quotas of the Beijing Municipal Public Security Bureau.[176]

The Supreme People's Court Evidence Provisions only prohibits peripheral evidence from being presented and cross-examined, but does not specify how the evidence can be reviewed otherwise.[177] In practice, courts have developed "review after court"[178] and "direct review,"[179] with regard to peripheral evidence and the withheld information.[180] Despite the difference in expressions, both methods, aforementioned, are in fact *ex*

(马亚芬诉中华人民共和国自然资源部) [Ma Yafen v. Ministry of Nat. Res. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Dec. 24, 2018); Bai Wanyong Deng Si Ren Su Zhonghua Renmin Gonghe Guo Guojia Fazhan He Gaige Weiyuan Hui (白万勇等4人诉中华人民共和国国家发展和改革委员会) [Bail Wanyong et al. v. Nat'l Dev. & Reform Comm'n of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Dec. 10, 2019).

[175] *See* Zheng, *supra* note 141, at 153-54.

[176] *See* Zhu Fuxiang Su Beijing Shi Renmin Zhengfu (朱福祥诉北京市人民政府) [Zhu Fuxiang v. Beijing Mun. People's Gov't], Lawinfochina (Beijing Higher People's Ct. Sep. 29, 2017). *See also* Ruan Jibao Su Beizhen Shi Guotu Ziyuan Ju (阮吉宝诉北镇市国土资源局) [Ruan Jibao v. Bureau of Nat'l Land & Res. of Beizhen Municipality], Lawinfochina (Jinzhou Interm. People's Ct. Sept. 28, 2015) (Defendant submitted two pieces of classified evidence, including documents produced by the National Development and Reform Commission of the People's Republic of China and Minutes of Meeting of Governor of Liangning Province, both with "CONFIDENTIAL" marks.).

[177] *See Supreme People's Court Evidence Provisions*, *supra* note 172, art. 37; *Supreme People's Court Interpretations*, *supra* note 172, art. 103.

[178] In *Li Shuiqing v. Chendu Municipal Public Security Bureau*, the defendant submitted the disputed information and the court reviewed the information after a court hearing, which was later referred to as "review after court (庭后审查)" in the judicial opinion. *See* Li Shuiqing Su Chengdu Shi Gongan Ju He Sichuan Sheng Gonganting (李水清诉成都市公安局和四川省公安厅) [Li Shuiqing v. Chengdu Mun. Pub. Sec. Bureau & Pub. Sec. Dep't of Sichuan Province], Lawinfochina (Chengdu Interm. People's Ct. Mar. 19, 2018).

[179] In *Wu Jinrong v. Tianjian Municipal Planning Bureau*, the defendant submitted a response letter concerning the withheld information by the Tianjin Municipal National Administration of State Secrets Protection, and the court reviewed the evidence without presence of the parties, which was later referred to as "direct review (径行审查)" in the judicial opinion. *See* Wu Jinrong Su Tianjin Shi Guihua Ju (武金荣诉天津市规划局) [Wu Jinrong v. Tianjin Mun. Planning Bureau], Lawinfochina (Tianjin Higher People's Ct. Sept. 11, 2015).

[180] *See* Song Baojiang Su Beijing Shi Gongan Ju Fengtai Fenju (宋保江诉北京市公安局丰台分局) [Song Baojiang v. Fengtai Div. of Beijing Mun. Pub. & Sec. Bureau], Lawinfochina (Beijing 2d Interm. People's Ct. Mar. 27, 2019); Shen Meili Su Zhonghua Renmin Gonghe Guo Nongye Bu (沈美丽诉中华人民共和国农业部) [Shen Meili v. Ministry of Agric. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. July 20, 2017); Mei Mincai Su Luxian Guotu Ziyuan Ju (梅民才诉泸县国土资源局) [Mei Mincai v. Luxian Nat'l Land & Res.], Lawinfochina (Luzhou Interm. People's Ct. May 17, 2017).

parte examination of the relevance, veracity, and legality of evidence, without the participation of plaintiffs.

The *ex parte* evidence examination may be reminiscent of the *in camera* inspection used in the United States, as discussed above. The two methods bear certain resemblances and distinctions, as seen in *Chart 2* below.

	***Ex Parte* Evidence Examination**	***In Camera* Inspection**
Content	Peripheral evidence (rarely includes the withheld information)	The withheld information
Condition of Application	Upon submission of peripheral evidence	Upon choice of courts[181]
Question to be Resolved	Whether the peripheral evidence can reveal that the withheld information has in fact been classified ◆ RELEVANCE OF EVIDENCE ◆ VERACITY OF EVIDENCE ◆ LEGALITY OF EVIDENCE	Whether the withheld information can be exempt under the national security exemption ◆ HAS THE WITHHELD INFORMATION IN FACT BEEN CLASSIFIED? ◆ IS THE CLASSIFICATION IN LINE WITH PROCEDURAL AND SUBSTANTIVE REQUIREMENTS IN EXECUTIVE ORDERS?
Characteristics	Method of reviewing evidence	Method of reviewing disputed issue

Chart 2 – Comparison of Ex Parte Examination and In Camera Inspection

As discussed *infra*, under the *in camera* inspection in the United States, several defects can be identified, including the heavy encumbrance upon courts, the fairly low burden of proof from the government agencies' side, and the lack of adversariness. Despite the distinctions illustrated in the *Chart 2*, the *ex parte* examination in China and *in camera* inspection in the US share similar problems. For one thing, under both methods, government agencies can easily satisfy their burden of proof, even without submitting the withheld information. It is common that courts may rule in favor of government agencies that only submit legal rules or documents upon which

[181] *See Ray*, 587 F.2d at 1195.

classification decisions rely, instead of peripheral evidence.[182] Additionally, plaintiffs can neither access the withheld information nor be informed of the content of peripheral evidence, which contributes to an even more obvious lack of adversariness.

The US has introduced the creative procedural tool of the Vaughn Index to address to the above-mentioned problems. Similarities, especially in the defects shared by the *ex parte* examination and the *in camera* inspection, provide the grounds for drawing enlightenment in China from the Vaughn Index.

iii. Lessons from the Vaughn Index

Before proceeding to discuss how the Vaughn Index could be introduced to China, this article seeks to elaborate on one distinct feature of Chinese judicial review on state secret exemption cases.

Theoretically speaking, in cases concerning the state secret exemption (or the national security exemption in the US), the core issue at dispute is whether the information may be withheld under the exemption. This issue can be further divided into three sub-issues: 1) whether the disclosure is made in accordance to procedural requirements of the OGIR; 2) whether the withheld information is in fact classified; and 3) whether the information is properly classified. Unlike in the US, courts in China are not in a position to review the last issue, the legitimacy and justifiability of the classification decisions. The People's Supreme Court has held that legitimacy of classification is beyond the scope of court's functions and powers,[183] and, given the special expertise of administrative agencies, as

[182] *See* Shen Huili Su Shanghai Shi Yangpu Qu Zhufang Baozhang He Fangwu Guanli Ju (沈惠丽诉上海市杨浦区住房保障和房屋管理局) [Shen Huili v. Yangpu Dist. Hous. Sec. & Hous. Auth. Bureau of Shanghai Municipality], Lawinfochina (Shanghai 2d Interm. People's Ct. Nov. 14, 2018); Sun Lanying Su Zhengzhou Shi Guancheng Huizu Qu Zhufang Baozhang Zhongxin He Zhengzhou Shi Guancheng Huizu Qu Renmin Zhengfu (孙兰英诉郑州市管城回族区住房保障中心和郑州市管城回族区人民政府) [Sun Lanying v. Guancheng Hui Nationality Dist. Hous. Sec. Ctr. of Zhengzhou Municipality & Guancheng Hui Nationality Dist. People's Gov't of Zhengzhou Municipality], Lawinfochina (Zhengzhou Interm. People's Ct. May 18, 2017).

[183] In *Gao Ruihua v. Jixian People's Government*, the Supreme People's Court stated "the power to determine state secrets and the power to adjudicate disputes over state secrets are exclusive. Gao Ruihua's request concerning whether the withheld information shall be classified was beyond the scope of court's power in administrative litigations." Gao Ruihua Su Tianjin Shi Jixian Renmin Zhengfu (高瑞华诉天津市蓟县人民政府) [Gao Ruihua v. Jixian People's Gov't of Tianjin Municipality], Lawinfochina (Sup. People's Ct. June 24, 2016); *see* Cai Xun Su Zhognhua Renmin Gonghe Guo (蔡迅诉中华人民共和国) [Cai Xun v. Ministry of Justice of the People's Republic of China], Lawinfochina (Sup. People's Ct. Mar. 26, 2019). *See also* Zheng Hong Su Shanghai Shi Zhufang He Chengxiang Jianshe Guanli Weiyuan Hui (郑洪诉上海市住房和城乡建设管理委员会) [Zheng Hong v. Shanghai Mun. Comm'n of Hous. & Urban-Rural Dev.], Lawinfochina (Shanghai 1st Interm. Ct. May 9, 2016).

long as classifications are made pursuant to statutory procedures, courts shall respect the agencies' classification decisions.[184]

The inability of Chinese courts to review the legitimacy of classification decisions is significant, because it renders it fairly useless to require government agencies to submit a detailed explanation of the exemption. However, what China can learn from the Vaughn Index is that a defendant's burden of proof shall be increased as to the description of the withheld information, which would contribute to reviewing the second sub-issue aforementioned.

Under current judicial practice in China, government agencies need only submit peripheral evidence and sometimes even a mere legal basis for classification would suffice.[185] Rarely do government agencies submit supplemental statements further addressing the classification status and legal basis for classification.[186] By increasing the burden of proof of government agencies and requiring the provision of more detailed descriptions regarding the withheld information, plaintiffs will not only receive more factual bases, with regard to the classification procedures and status of the withheld information, but also will be able to formulate rebuttals focusing on whether the information has been classified and whether classification has been in conformity to statutory procedural requirements. Some scholars have proposed a discussion on authorizing courts to have the power to review the legitimacy of classifications.[187] Transplantation of the Vaughn Index might be functioning to the largest extent if such ideal were realized, because administrative agencies would then be required to provide explanations of why the information is classified, instead of just proving the mere fact of classification and that the classification has been conducted in accordance to procedural requirements of relevant laws and regulations. Nonetheless, in light of the current legal

[184] In *LiuShuhua v. Ministry of Housing and Urban-Rural Development*, the Supreme People's Court stated: "Though the Administrative Litigation Law has established the standard of comprehensive review, due to agencies' expertise and natural advantage over the their services, as long as the state secrets were determined in accordance to statutory procedural requirements, courts shall respect the classification decisions." Liu Shuhua Su Zhonghua Renmin Gonghe Guo Zhufang He Chengxiang Jianshe Bu (刘淑华诉中华人民共和国住房和城乡建设部) [Liu Shuhua v. Ministry of Hous. & Urban-Rural Dev. of the People's Republic of China], Lawinfochina (Sup. People's Ct. Nov. 1, 2016).

[185] *See supra* note 136 and accompanying text.

[186] Ren Bulin Su Huaian Shi Renmin Zhengfu (任步林诉淮安市人民政府) [Ren Bulin v. Huaian Mun. People's Gov't], Lawinfochina (Jiangsu Higher People's Ct. July 31, 2018) (Defendant submitted a statement for proving that the working map used in the existing land use map requested by Plaintiff was the product of the country's first land-use survey, and the working map along with its derivative products are within the scope of state secrets.); *see also* Zhang Daichun Su Zhonghua Renmin Gonghe Guo Ziran Ziyuan Bu (张代春诉中华人民共和国自然资源部) [Zhang Daichun v. Ministry of Nat. Res. of the People's Republic of China], Lawinfochina (Beijing Higher People's Ct. Jan. 22, 2019).

[187] *See generally* Cheng, *supra* note 162.

framework concerning the state secret exemption, what China can absorb is the essence of the Vaughn Index – raising defendants' burden of proof.

Due to the comparatively low volume of requested information in China, it is unlikely that the "Selective" Vaughn Index would be troublesome. Nonetheless, both the "Boilerplate" Vaughn Index and the "Multiple" Vaughn Index might also be troubling for China. The gloom of the "Boilerplate" Vaughn Index might be mitigated by requiring administrative agencies to provide descriptions of information and reasons for withholding the information that are as detailed as possible, instead of simply stating relevant legal provisions. Courts shall also require administrative agencies to strictly follow rules on terms of adducing evidence to prevent circumstances similar to the "Multiple" Vaughn Index.

VI. CONCLUSION

As President John F. Kennedy once wrote:

> The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.[188]

Despite the openness of American democracy, public officials sometimes keep bowing towards secrecy. The incentive for concealing error and embarrassment, and for eliminating skepticism and disagreement, is deeply rooted in bureaucracy. "They own their desks and they own their file cabinets, and they own the papers that are in them."[189] Such vivid depiction of the attitudes of government officials demonstrates precisely how pervasive and rooted secrecy is. Excessive secrecy will always be a constant. The Executive has every incentive to maintain national security secrecy, either for legitimate causes or for bureaucratic needs. The US Congress, however, has demonstrated clear intention to curb extensive secrecy, while the Judiciary has been struggling between serving as an effective check, as mandated by Congress, and bowing to government classification decisions for lack of expertise and fear of endangering national interests. The dynamics of the three US branches of government in FOIA litigations have revealed that the ideal result is not the elimination of government secrecy, which remains rather unrealistic. Indeed, what the FOIA scheme strives to achieve is an "acceptable world,"[190] where secrecy

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[188] ARNOLD, *supra* note 6, at 14.

[189] Harrison Wellford, *Rights of People: The Freedom of Information Act*, *in* None of Your Business: Government Secrecy in America, 209, 209 (Norman Dorsen & Stephen Gillers, ed., 1974).

[190] ARNOLD, *supra* note 6, at 19-21.

occurs within a reasonable, and probably predictable, range, but not because of the Executive's desire to conceal incompetence or wrongdoings.

In *Vaughn*, the D.C. Circuit Court devised a procedural tool that has been widely adopted and highly praised. This creative instrumentality is helpful to both courts and plaintiffs in FOIA litigation. By shifting the burden of proof back to government agencies and raising the standard of justifying exemptions, it mends the lack of adversariness and solves the dilemma faced by courts in FOIA cases, especially those concerning the national security exemption. Additionally, it may also serve as an incentive to compel the government to disclose information, because the cost of justifying nondisclosure can be much higher than disclosure. Nonetheless, benign as it may be, the Vaughn Index has evolved and bred some derivatives that might hinder its objectives as a procedural tool and contribute to defeating Congress' intention to keep an informed citizenry and enable democratic participation and citizen oversight.

China, a latecomer in open government initiatives, has been accelerating open government information legislation in the past two decades. While recognizing China's incentive to and efforts in propelling openness and transparency of government, it should be noted that problems similar to those of the US can be found in China's judicial practice. The Vaughn Index, though a procedural creation emerging from a different legal system, is of some reference value. Lessons that Chinese courts can learn from the Vaughn Index are restricted by the fact that courts in China remain unauthorized to review legitimacy of classification decisions. However, adopting the Vaughn Index could still help Chinese courts. By adopting the core mechanism of raising the burden of proof with regard to classification conformity to be a procedural requirement, it is likely that, to some extent, the imbalance of information can be mitigated and the lack of adversariness can be mended.

The Vaughn Index, by imposing a stricter burden of proof on government agencies, surely has contributed to the "acceptable world," but its various forms of derivatives may offset its positive effects, which both the US and China should beware of. In the end, what remains certain is that the system of Vaughn Index is a valuable tool that is far from perfect and needs further elaboration in the long run.