Reform of the Foreign Intelligence Surveillance Courts: Disclosure of FISA Opinions

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Summary

In response to the disclosure of various National Security Agency (NSA) surveillance and data collection programs, a number of legislative changes to the government's intelligence operations authority have been suggested. Under the Foreign Intelligence Surveillance Act of 1978 (FISA), the Foreign Intelligence Surveillance Court (FISC) reviews government applications to conduct surveillance and engage in data collection for foreign intelligence purposes, and the FISA Court of Review reviews rulings of the FISC. Most FISA opinions are classified by the executive branch. Some have raised concerns that this practice permits the government to rely upon "secret law" to justify its activities, and have proposed requiring the public release of legal opinions and orders issued by the FISC and the FISA Court of Review. However, others might regard these proposals as raising separation of powers questions, including the scope of the executive branch's control over national security information.

FISA opinions and orders, most of which seem to contain at least some sensitive facts pertaining to national security, involve the legal analysis of sensitive national security information. Requiring the executive branch to release them implicates Article II of the Constitution because it compels the President to disclose potentially sensitive documents, and could override the President's classification decisions. After briefly reviewing the FISC's current procedures, this report will examine the Article II implications of requiring the executive branch to disclose FISA opinions.

The Constitution assigns responsibility for the national defense to both Congress and the President. However, the extent to which Congress may regulate the President's discretion over national security matters is a contentious issue. Some argue that the President possesses a sphere of authority that exists independent of any congressional delegation of authority. While courts have not precisely determined the scope of any such power, it appears that control over access to national security information is largely shared between the legislative and executive branches, rather than belonging exclusively to one branch. For example, courts have indicated that neither one possesses absolute power over classified information. In addition, an examination of historical practice reveals that Congress and the executive branch share power in this area. Congress requires consistent disclosure of sensitive national security information to the relevant intelligence and defense committees. Congress has also regulated control over access to national security information, passing legislation such as the Classified Information Procedures Act (CIPA), FISA, and the Freedom of Information Act (FOIA). Pursuant to these statutes, courts have required the executive branch to disclose information to the public and the judiciary. In fact, no statute regulating classified information has been held by courts to improperly intrude upon the President's power as Commander in Chief.

Nevertheless, Congress's power to compel the release of information held by the executive branch might not be absolute. The Supreme Court has observed that the President enjoys some power as Commander in Chief to control access to national security information. In addition, courts have crafted common law privileges that protect the executive branch from revealing certain military secrets. Consequently, there may be a limited sphere of information that courts will protect from public disclosure.

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Introduction

In response to the disclosure of various National Security Agency (NSA) surveillance and data collection programs,[1] a number of legislative changes to the government's intelligence operations authority have been suggested. Many of these proposals include amendments to the practices and procedures of the Foreign Intelligence Surveillance Court (FISC), and the FISA Court of Review, which reviews rulings of the FISC. Currently, the government's applications for surveillance orders to the FISC are classified, as are most FISA opinions themselves.[2] While traditional federal courts also review classified information *in camera*,[3] their final opinions are rarely kept confidential.[4] FISA opinions, in contrast, are not released publicly except in special circumstances.[5] According to the FISC, traditional "courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception."[6] On the other hand, at least according to the public record, the FISA Court of Review has sat only twice; and both times the court released its opinion with sensitive information redacted.[7]

A number of proposals seek to increase government transparency by requiring public disclosure of FISA opinions. At least one group has proposed that all FISA decisions should be published in their entirety;[8] other proposals would allow the government to conduct a declassification review of the material first, substituting a summary of material when appropriate.[9] These proposals might be understood to raise separation of powers issues, namely, the scope of the executive branch's control over national security information. This report will first address current FISC procedures regarding disclosure, and will continue by analyzing the legal implications of mandating executive branch release of FISA opinions. This analysis will include an examination of judicial doctrine and statutory practice regarding control of national security information, concluding that neither branch enjoys exclusive power over the matter; rather, authority is shared between

[1] *See* CRS Report R43134, *NSA Surveillance Leaks: Background and Issues for Congress*, by (name redacted) and (name redacted).

[2] *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).

[3] *See e.g.*, Cox v. Levi, 592 F.2d 460, 463 (8th Cir. 1979); Halperin v. Dep't of State, 565 F.2d 699, 707 (D.C. Cir. 1977): Phillippi v. Cent. Intelligence Agency, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976); New York Times v. United States Dep't of Justice, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012); Silets v. Fed. Bureau of Investigation, 591 F. Supp. 490, 496 (N.D. Ill. 1984).

[4] *See* United States v. Amodeo, 71 F.3d 1044, 1048–49 (2d Cir. 1995); Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 161 (3d Cir. 1993); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Lowenschuss v. W. Pub. Co., 542 F.2d 180, 185 (3d Cir. 1976).

[5] *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 487-90 (FISA Ct. 2007); United States Foreign Intelligence Surveillance Court, Rules of Procedure at 15 (2010), *available at* http://www.uscourts.gov/uscourts/rules/FISC2010.pdf (hereinafter FISC Rules of Procedure).

[6] *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 488 (FISA Ct. 2007).

[7] PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 14 (January 23, 2014). *See In re* Sealed Case, 310 F.3d 717, 190 (FISA Ct. Rev. 2002); *In re* Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008).

[8] *E.g.*, Electronic Privacy Information Center, Letter from the Electronic Privacy Information Center to Congress (June 7, 2013), *available at* http://epic.org/FISC-NSA-domestic-surveillance.pdf.

[9] *See e.g.*, Ending Secret Law Act, H.R. 2475, 113th Cong. (2013); Ending Secret Law Act, S. 1130, 113th Cong. (2013); FISA Court in the Sunshine Act of 2013, H.R. 2440, 113th Cong. (2013); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013).

Congress and the executive branch.[10] Requiring the public disclosure of FISA opinions concerns many policy questions involving national security; this report, however, is limited to the legal implications of such a requirement.

Current FISC Procedures

Under the Foreign Intelligence Surveillance Act (FISA), the FISC reviews government applications to, *inter alia*, conduct surveillance and engage in data collection for foreign intelligence purposes.[11] If an application is denied, the government may request review from the FISA Court of Review.[12] The government is usually the only party, as FISA provides that most FISC proceedings take place *ex parte*,[13] and that FISC judges enter *ex parte* orders.[14] Under FISA, most submissions to the FISC are made under seal,[15] and appeals from FISC rulings are also sent under seal to the FISA Court of Review or the Supreme Court.[16]

Pursuant to 50 U.S.C. Section 1803(c), records of the FISC and the FISA Court of Review's proceedings "shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence."[17] Under that authority, Chief Justice Warren Burger established these measures in 1979.[18] In addition, 50 U.S.C. Section 1803(g) permits the FISA courts to individually adopt whatever security procedures "are reasonably necessary to administer their responsibilities."[19] While the FISA Court of Review has not publicly released any more specific security procedures, the FISC's particular procedures took effect November 1, 2010, and specify that the court comply with various executive branch regulations governing classified material, in particular, Executive Order 13526—"Classified National Security Information."[20] In sum, according to the FISC, "the

[10] Proposals to mandate disclosure of FISA opinions might also implicate Article III concerns. *See* Miller v. French, 530 U.S. 327 (2000); Plaut v. Spendthrift Farm, 514 U.S. 211, 219 (1995); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872). The issue, however, is beyond the scope of this report. This report also does not address the scope of the operational authority bestowed on the President via the Commander-in-Chief Clause. *See* CRS Report R40888, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, by (name redacted) and (name redacted). Finally, the FISC itself has raised practical concerns with releasing the court's opinions; this report does not address these pragmatic considerations either. See Honorable John D. Bates, Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act 14 (January 13, 2014).

[11] Codified as amended at 50 U.S.C. §§1801-1885c.

[12] 50 U.S.C. §§1803(b), 1822(d).

[13] *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).

[14] 50 U.S.C. §§1805(a), 1824(a), 1842(d)(1), 1861(c)(1).

[15] *See* 50 U.S.C. §§1802(a)(3), 1822(a)(3), 1861(f)(5), 1881a(g)(1)(A), 1881a(k)(2).

[16] *See* 50 U.S.C §§1803(a)(1), 1803(b), 1822(a)(3), 1822(c), 1822(d), 1861(f)(3), 1881a(h)(6)(B), 1881a(i)(4)(D).

[17] *See* 50 U.S.C. §1803(c).

[18] Security Procedures Established Pursuant to P.L. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (May 18, 1979), *reprinted in* H.R. Rep. No. 96-558, at 7-10 (1979). The procedures establish a position for a court-appointed security officer, direct the court clerk to work with the security officer to mark all records with the relevant security classifications, and mandate that all court records must remain on the premises unless removal is permitted under FISA. *Id*. at 9.

[19] 50 U.S.C. §1803(g).

[20] FISC Rules of Procedure, *supra* note 5, at 1. In addition, the clerk of the FISC may not release any court records without an explicit court order to do so, except for providing copies of the opinion to parties of the litigation at issue. (continued...)

collective effect of these provisions is that applications, orders, and other records ... whether in the possession of the FISC, the Court of Review, [or] the Supreme Court ... shall, as a rule, be maintained in a secure and nonpublic fashion."[21]

While the FISC usually sits *ex parte*, at least two exceptions apply. Recipients of production orders under Section 215 of the USA PATRIOT Act and directives under Section 702 of FISA may petition the court.[22] In the event of a contested hearing, FISA permits *ex parte* and *in camera* review of classified information upon motion by the government.[23]

Under the FISC's procedures, disclosure of the court's opinions is permitted only in a limited number of situations, all of which require compliance with Executive Order 13526. First, a judge who wrote an opinion may *sua sponte* or by motion of a party publish the opinion.[24] The FISC has discretion in this situation to direct the executive branch to redact the opinion for classified information.[25] Recently, at least one FISC judge has released an opinion in this manner, "[b]ecause of the public interest" in the bulk metadata collection program.[26] Second, the presiding judge may provide copies of court records to Congress on his own volition.[27]

Finally, the FISC's rules also provide that the executive branch may provide copies of court records to Congress without prior notification to the court. The executive branch must, however, notify the court "contemporaneously" when it does so.[28] The executive branch recently argued that this provision prevented it from complying with Freedom of Information Act (FOIA)[29] requests—without FISC approval—for FISC records in the government's possession.[30] The FISC,

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Id. at 15.

[21] *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 490 (FISA Ct. 2007). FISC orders and opinions are not automatically placed under seal, but the government may request that any records be placed under seal. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109, at 3 (FISA Ct. August 29, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

[22] For example, a telecommunications provider that receives an order under Section 215 of the USA PATRIOT Act to produce telephone records could challenge the legality of that order by petitioning the FISC. 50 U.S.C. §1861(f)(2)(a)(i) [§215 of the USA PATRIOT Act]. Likewise, an electronic communication service provider that receives a directive to produce information under Section 702 of FISA may petition to "modify or set aside" the directive. 50 USC §1881a(h)(4)(A) [§702 of FISA]. The FISC judges who reside in the District of Columbia, or other judges designated by the Chief Judge of the FISC, comprise a pool which reviews petitions. All petitions challenging compliance with such orders must be filed under seal. *See* 50 U.S.C. §1861(f)(C)(3)[§215 of the USA PATRIOT Act]; 50 USC §1881a(k)(2)[§702 of FISA]. The FISA Court of Review has also accepted amicus briefs from the American Civil Liberties Union and the National Association of Criminal Defense Lawyers. *In re* Sealed Case, 310 F.3d 717, 190 (FISA Ct. Rev. 2002).

[23] *See* 50 U.S.C. §§1803(e)(2), 1805b(j)-(k).

[24] *Id*. at 16. *See, e.g.*, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109, at 29 (FISA Ct. August 29th, 2013); *In Re* Orders of this Court Interpreting Section 215 of the PATRIOT Act, No. Misc. 13-02 (FISA Ct. September 13th, 2013).

[25] FISC Rules of Procedure, *supra* note 5, at 15.

[26] *See, e.g.*, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109, at 29 (FISA Ct. August 29th, 2013) *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

[27] FISC Rules of Procedure, *supra* note 5, at 15.

[28] *Id*.

[29] 5 U.S.C. §552.

[30] *In re* Motion for Consent to Disclosure of Court Records or, In the Alternative, A Determination of the Effect of the (continued...)

however, rejected this proposition, explaining that the provision was intended to "stop the government's practice of filing what the Court viewed as unnecessary motions for unsealing before fulfilling its statutory obligations."[31] The court explained that FISA regulated the disclosure of opinions "in the possession of the FISC," but did not regulate the disclosure of opinions already in the possession of the executive branch.[32]

Therefore, opinions and orders in the possession of the executive branch may be released to the public without seeking the FISC's permission. However, most filings made to the FISC are classified as Secret or Top Secret by the executive branch before being sent to the court,[33] and the FISC's orders and opinions in the possession of the executive branch are similarly classified.[34] While most classified information is subject to automatic review at 25 years, "FISA files" are not automatically reviewed until after 50 years.[35] The executive branch can, however, choose to declassify portions of opinions, or entire opinions and release them to the public. It has done so in certain instances since the disclosure of the NSA data collection programs.[36]

Potential Article II Separation of Powers Issues

Legislation that requires the executive branch to publicly disclose FISA opinions might raise separation of powers questions. Both Congress and the executive branch claim some power in this area.[37] The central issue is the extent to which Congress may regulate control over access to national security information, including mandating that the executive branch disclose specific materials—a question not definitively resolved by the courts.[38]

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Court's Rules on Statutory Access Rights, No. 13-01 (FISA Ct. June 12, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf.

[31] *Id*.

[32] *Id*. at 6.

[33] AUDIT OF THE DEPARTMENT OF JUSTICE'S IMPLEMENTATION OF AND COMPLIANCE WITH CERTAIN CLASSIFICATION REQUIREMENTS, U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL 23 (2013) *available at* http://www.justice.gov/oig/reports/2013/a1340.pdf; RICHARD A. CLARKE, ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD, REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 206 (2013) (hereinafter REPORT OF THE PRESIDENT'S REVIEW GROUP].

[34] REPORT OF THE PRESIDENT'S REVIEW GROUP, *supra* note 33, at 206.

[35] *Id*.

[36] *See, e.g.*, Press Release, Office of the Director of National Intelligence, DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (November 18, 2013); Press Release, Office of the Director of National Intelligence, DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA) (August 21, 2013).

[37] *See, e.g.*, United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977).

[38] *See* Nixon v. General Services Administration, 433 U.S. 425, 429 (1977) (recognizing congressional power to regulate information held by the executive branch); *cf.* Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (noting some executive branch authority to protect national security information).

Implicating Article II

A preliminary question concerning the public disclosure of FISA opinions is why releasing court opinions—a product of an Article III entity—implicates the power of the President under Article II. Legislation that compels the executive branch to release FISA opinions in its possession directs the President to take specific action with respect to documents he may intend to keep secret, and thus implicates his Article II powers. For example, in the FOIA context, legislation compelling the release of agency records includes judicial opinions in the possession of the executive branch. In *United States Department of Justice v. Tax Analysts*, the Supreme Court ruled that the location in which specific documents originated was irrelevant in determining whether materials qualified as agency records. Instead, two requirements applied.[39] First, the agency must "create or obtain" the materials; second, the agency must have control of the materials when the FOIA request is made.[40] The government argued that it did not control the opinions because district courts could always modify them. However, the Supreme Court rejected this assertion, explaining that the proper inquiry was "on an agency's possession of the requested materials, not on its power to alter the content."[41] The Court thus held that district court decisions in the possession of the executive branch qualified as agency records.[42]

Similarly, FISA opinions are retained by the executive branch as a party to the litigation, and remain in the control of the executive branch. Legislation directing the executive branch to release FISA orders may be analogous to FOIA's applicability to court opinions in the possession of the executive branch. Once the executive branch receives a FISA opinion, that opinion becomes an agency record. Most are then classified as either Top Secret or Secret.[43] A number of FOIA cases have been filed seeking FISA opinions from the executive branch.[44]

Shared Power over National Security

The Constitution assigns responsibility for the national defense to both Congress and the President. Article II provides that the President is Commander in Chief of the armed forces and instructs him to take care that the laws are faithfully executed.[45] The Supreme Court has been somewhat deferential to the executive branch in matters of national security, noting that the power vested in the President in Article II bestows a "vast share of responsibility for the conduct of foreign relations,"[46] including "a degree of independent authority to act."[47] The Supreme Court

[39] 492 U.S. 136 (1989)

[40] *Id*. at 145 (quoting Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 182 (1980)).

[41] *Id*. at 147.

[42] *Id*. at 157.

[43] REPORT OF THE PRESIDENT'S REVIEW GROUP, *supra* note 33, at 206.

[44] *See, e.g.*, Electronic Frontier Foundation v. Dep't of Justice, Status Report, Case. No. 4:11-cv-05221-YGR (D. N.Cal. 2013) *available at* https://www.eff.org/document/justice-department-status-report-re-releasing-secret-patriot-act-interpretation-documents; ACLU v. FBI, No. 11 Civ. 7562 (S.D.N.Y. October 26, 2011).

[45] U.S. CONST. art. II §2, cl. 1; art. II, §3.

[46] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurther, J. concurring)).

[47] *Id.* at 414; *see* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp, 333 U.S. 103, 109 (1948). In *United States v. Curtiss-Wright Corp*., for example, the Court, expressing a very broad view of executive power, noted that the proposition that the government is limited to acting within constitutionally enumerated powers "is categorically true only in respect of our internal affairs." 299 U.S. 304, 315-16 (1936).

has indicated that the "grant of [the] war power includes all that is necessary and proper for carrying these powers into execution,"[48] and has noted that the Commander-in-Chief Clause gives the President the power to "direct the movements of the naval and military forces at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[49] At the same time, Article I grants Congress considerable power over national security and foreign affairs.[50] Indeed, the Supreme Court has recognized that—"out of seventeen specific paragraphs of congressional power [in the Constitution], eight of them are devoted in whole or in part to specification of powers connected with warfare."[51] Additionally, the Court has noted that the President "may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers."[52] Likewise, the Supreme Court noted in *Hamdi v. Rumsfeld*, that even during times of conflict, the Constitution "most assuredly envisions a role for all three branches when the rights of individuals are at stake."[53]

Leaving aside the disclosure of sensitive national security information or information subject to a valid claim of privilege, it is well established that Congress may require an agency to release its documents. Congress enjoys the power to create and regulate federal agencies. In exercising its powers to legislate under Article I, sec. 8 and other provisions of the Constitution, Congress may provide for the execution of those laws by officers appointed pursuant to the Appointments Clause.[54] The Necessary and Proper Clause allows Congress to create and locate offices, establish their powers, duties, and functions, determine the qualifications of officeholders, and promulgate standards for the conduct of their offices.[55] The Supreme Court has recognized broad congressional discretion to structure administrative agencies.[56] Congress can thus create federal agencies, create officers to oversee them, and can impose duties on those officers.[57] Therefore, Congress can generally require federal agencies to disclose their records.[58] The Supreme Court has explicitly recognized Congress's power to require the "mandatory disclosure of documents in the possession of the Executive Branch."[59]

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[48] Johnson v. Eisentrager, 339 U.S. 763, 788 (1950).

[49] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[50] *See, e.g.*, "[t]o declare war," U.S. CONST. art. I, §8, cl. 11; "[t]o raise and support armies," art. I, §8, cl. 12; "[t]o Lay and collect Taxes [to] provide for the common Defence," art. I, , §8, cl. 1; "[t]o regulate Commerce with foreign nations," art. I, §8, cl. 3; "[t]o make rules for the government and regulation of the land and naval forces," art. I, §8, cl. 14; "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." art. I, §8, cl. 18.

[51] Johnson v. Eisentrager, 339 U.S. 763, 788 (1950).

[52] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006).

[53] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).

[54] *See* U.S. Const. article II, sec. 2 cl. 2.

[55] Myers v. United States, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation—all except as otherwise provided by the Constitution"); *see* Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988); Buckley v. Valeo, 424 U.S. 1, 134-35 (1976).

[56] *See* Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Commission v. Schor, 473 U.S. 833 (1986); Lewis v. United States, 244 U.S. 1345 (1917); Crenshaw v. United States, 134 U.S. 99, 105-06 (1890).

[57] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§551 *et seq*.).

[58] 5 U.S.C. §552 (2006).

[59] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 445 (1977). The Court pointed to the Freedom of Information Act, 5 (continued...)

However, requiring the disclosure of sensitive national security information might raise Article II concerns. The executive branch has argued that the Commander-in-Chief Clause bestows the President with independent power to control access to national security information.[60] As such, according to this line of reasoning, Congress's generally broad ability to require disclosure of agency documents may be constrained when it implicates national security.

Potential Conflict Between Congress and the President

Perhaps the leading case exploring the tension between congressional and presidential power is the *Steel Seizure Case*.[61] President Harry Truman, claiming power as Commander in Chief, ordered the seizure of domestic steel mills that threatened to cease production during the Korean War.[62] The Supreme Court declared this action unconstitutional because Congress had rejected legislation authorizing such action and other statutory options were available.[63] Justice Jackson's famous concurrence—which has become the most influential opinion in this context[64]—outlined three analytical categories as a framework for examining the scope of presidential power. In the first, the President acts with express congressional authorization and is accorded broad authority. In the second, when the President acts where Congress has been silent, historical practice may sometimes serve as a "gloss" on presidential power.[65] Therefore, even if Congress and the President share power over an area, congressional inaction can "enable, if not invite" presidential action.[66] In the third, the President's activity is inconsistent with congressional will—here the President's power is at its "lowest ebb."[67] In this situation, if Congress regulates according to its constitutional powers, and the President defies a congressional statute, his action will be

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U.S.C. §552, the Privacy Act of 1974, 5 U.S.C. §552(a), the Government in the Sunshine Act, 5 U.S.C. §552b, and the Federal Records Act, 44 U.S.C. §§2101 *et seq*.

[60] Letter from Michael Mukasey, Att'y Gen., to Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary 2–3 (March 31, 2008).

[61] Youngstown Sheet and Tube Co. (Steel Seizure Case) v. Sawyer, 343 U.S. 579, 586 (1952).

[62] *Id*. at 582.

[63] *Id*. at 586.

[64] *See* Medellin v. Texas, 552 U.S. 491, 524 (2008); Dames & Moore v. Regan, 453 U.S. 654, 661 (1981); Michael Stokes Paulsen, Youngstown Goes to War, 19 Const. Comment. 215, 224 (2002); Harold H. Bruff, Judicial Review & the President's Statutory Powers, 68 Va. L. Rev. 1, 11-12 (1982).

[65] *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

[66] *Id*. at 637 (Jackson, J., concurring).

[67] *Id*. at 638 (Jackson, J., concurring). *See* David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008). Some commentators have asserted that Article II bestows broad authority on the President to operate independently of congressional control. *E.g*., Michael Stokes Paulsen, The Emancipation Proclamation and the Commander in Chief Power, 40 Ga. L. Rev. 807, 825–29 (2006); John Yoo, Transferring Terrorists, 79 Notre Dame L. Rev. 1183, 1201–02 (2004). According to this view, Congress has limited constitutional authority to regulate the Commander-in-Chief Clause. However, this view is arguably overdrawn. The Supreme Court has upheld legislation relating to the President's Commander-in-Chief power on a number of occasions. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (striking down the Bush Administration's military commissions because the procedures used were in contravention of statute); Loving v. United States, 517 U.S. 748 (2006) (recognizing that the Commander-in-Chief Clause provided inherent authority to establish rules for court-martials, but nonetheless requiring the President to comply with regulations once Congress acted); *Youngstown*, 343 U.S at 637 (Jackson, J., concurring) (invalidating presidential action taken under the guise of the Commander-in-Chief Clause because it contradicted congressional will); Little v. Barreme, 6 U.S. (2 Cranch) 170, 176–78 (1804) (ruling that the President did not have authority to seize ships in contravention of statute).

invalidated unless it is based on constitutional powers that exist independent of congressional control. For example, in *Hamdan v. Rumsfeld*, the Supreme Court invalidated the Bush Administration's military commissions because they were inconsistent with statutes.[68] Absent congressional action, the President had power to establish them; however, once Congress legislated, the President had to comply.[69] In contrast, in *Zivotofsky v. Secretary of State*, the D.C. Circuit ruled that the President did not have to comply with legislation that the court determined "impermissibly intrudes on the President's recognition power."[70]

Control over Access to National Security Information

While courts have not clearly delineated the scope of presidential power that exists independent of congressional control, it appears that control over access to national security information is largely shared between the legislative and executive branches, rather than belonging exclusively to either one. Supreme Court jurisprudence does not establish absolute power by any branch over classified information,[71] and recognizes room for Congress to impose classification procedures.[72] In addition, an examination of historical practice reveals that Congress and the executive branch share power in this area. Congress, pursuant to its oversight function, requires consistent disclosure of sensitive national security information to the relevant intelligence and defense committees. Congress has also regulated control over access to national security information, passing legislation such as the Classified Information Procedures Act (CIPA),[73] FISA,[74] and the Freedom of Information Act (FOIA).[75] Pursuant to these statutes, courts have required the executive branch to disclose information to the public and the judiciary.[76] In fact, no statute regulating classified information has been held by courts to improperly intrude upon the President's power as Commander in Chief. As a result, Congress appears to have substantial power to regulate in this area.

Nevertheless, Congress's power to compel the release of information held by the executive branch might have limits. The executive branch has typically exercised discretion to determine what particular information should be classified; and the Supreme Court has observed in dicta that the President is Commander in Chief, and his "authority to classify and control access to information bearing on national security ... flows primarily from this Constitutional investment of power in the President and exists quite apart from any explicit congressional grant."[77] In addition, courts have crafted common law privileges that protect the executive branch from revealing

[68] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[69] *Id*. at 567.

[70] Zivotofsky ex rel. Zivotofsky v. Sec'y of State, 725 F.3d 197, 220 (D.C. Cir. 2013).

[71] *See* Dep't of Navy v. Egan, 484 U.S. 518 (1988); Nixon v. General Services Administration, 433 U.S. 425 (1977); Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948).

[72] EPA v. Mink, 410 U.S. 73, 83 (1973).

[73] 18 U.S.C. app. 3 §§1–16 (2006).

[74] 50 U.S.C. §§1801–1811.

[75] 5 U.S.C. §552.

[76] United States v. Hanna, 661 F.3d 271, 280 (6th Cir. 2011) (CIPA); United States v. Ott, 827 F.2d 473, 476 (9th Cir. 1987) (FISA); Silets v. Fed. Bureau of Investigation, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (FOIA).

[77] Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988).

certain military secrets.[78] Consequently, there may be a limited sphere of information that courts will protect from public disclosure.

Court Rulings

Judicial analysis addressing the scope of Congress's power to regulate access to national security information is somewhat limited. What little there is, however, supports the position that Congress and the executive branch share power over the matter. For example, the Supreme Court has upheld statutes regulating information held by the executive branch. In *Nixon v. General Services Administration*, the Court upheld a statute that directed an executive branch official to collect President Nixon's papers and tape recordings and issue regulations governing public access to them.[79] The Court noted the "congressional power ... [and] abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch."[80] In addition, while most classification procedures arise from Executive Orders, the Court has indicated the Congress could "certainly" establish classification procedures—"subject only to whatever limitations the Executive Privilege may be held to impose on such congressional ordering."[81]

The executive branch has relied on two cases that it views as supporting expansive presidential control over national security information.[82] The first, *Department of the Navy v. Egan*, is invoked for its statement in dicta that "the authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."[83] To be sure, the Court recognized that the executive branch makes decisions about what information to classify, and has authority to issue security clearances. However, the case does not indicate support for absolute presidential power in this area. In the case, the Federal Circuit Court of Appeals ruled that the Merit Systems Protection Board could review the substance—not just the procedures—of the Department of the Navy's security clearance determination.[84] The Supreme Court reversed, explaining that it would not assume that one agency had power to review the merits of another's security clearance determination without specific congressional direction.[85] The Court explained that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," "unless Congress has specifically provided otherwise."[86] In a recent case in the Northern District of California, the executive branch relied on *Egan* to support its argument that allowing Congress to regulate the state secrets privilege would "raise

[78] *E.g.*, United States v. Reynolds, 345 U.S. 1 (1953); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

[79] Nixon v. General Services Administration, 433 U.S. 425, 429 (1977).

[80] *Id.* The Court cited the Freedom of Information Act, 5 U.S.C. §552, the Privacy Act of 1974, 5 U.S.C. §552(a), the Government in Sunshine Act, 5 U.S.C. §552b, and the Federal Records Act, 44 U.S.C. §2101, for support.

[81] EPA v. Mink, 410 U.S. 73, 83 (1973).

[82] *See e.g.*, Mukasey Letter, *supra* note 60, at 2-3; Redacted, Unclassified Brief for United States on Rehearing En Banc at 16, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693) (quoting *El-Masri*, 479 F.3d at 303); Brief for the United States in Opposition at 11, Mohamed v. Jeppesen Dataplan, Inc., 131 S. Ct. 2442 (2011) (No. 10–778) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 527 (1998)).

[83] Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988).

[84] *Id.* at 525.

[85] *Id.*

[86] *Id.* at 530.

fundamental constitutional problems which should be avoided."[87] The court, however, rejected this assertion, remarking that "*Egan* recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch."[88]

Similarly, the executive branch has relied on *Chicago & Southern Air Lines v. Waterman Steamship Corp.*[89] as recognizing a broad role for the executive branch in this area.[90] This case, while not even concerning the disclosure of information, arguably recognizes shared power over national security secrets. Congress had provided via statute that the President could deny applications for foreign air travel.[91] The Supreme Court declined to review a challenge to such a decision because to do so would, in the Court's opinion, violate congressional intent.[92] Consequently, neither *Egan* nor *Southern Air Lines* demonstrates that the executive branch has absolute power in this area.

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has made explicit that control over access to classified information is shared.[93] In 1976, the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee issued a subpoena to the American Telephone and Telegraph Company (AT&T) seeking information concerning warrantless wiretapping by the executive branch.[94] Citing the potential danger to national security if the information were released, the Department of Justice sought an injunction that would prevent AT&T from complying with the subpoena.[95] On appeal to the D.C. Circuit, the legislative branch argued that its subpoena power "cannot be impeded by the Executive";[96] while the executive branch argued that because "the President retains ultimate authority to decide what risks to national security are acceptable," the judiciary should defer to the executive branch.[97] The court, however, rejected both claims, noting that the congressional subpoena power was indeed broad, but not "absolute in the context of a conflicting constitutional interest asserted by a coordinate branch of government."[98] Likewise, the court noted, while the judiciary is sometimes deferential to the executive branch in the area of national security, Supreme Court jurisprudence does "not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers."[99] The court ultimately declined to rule on the merits of the injunction, and remanded the case to the district court, urging the parties to continue negotiating.[100]

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[87] *In re* Nat'l Sec. Agency Telecommunications Records Litig., 564 F. Supp. 2d 1109, 1120 (N.D. Cal. 2008).

[88] *Id*. at 1121.

[89] 333 U.S. 103 (1948).

[90] Mukasey Letter, *supra* note 60, at 3 (quoting Chi. & S. Air Lines, 333 U.S. at 111).

[91] *Southern Air lines*, 333 U.S. at 106.

[92] *Id*. at 106-09.

[93] CRS Report RL30240, *Congressional Oversight Manual*, by (name redacted) et al., 64-67.

[94] United States v. AT&T, 551 F.2d 384, 385 (D.C. Cir. 1976) (hereinafter *AT&T I*). The case concerned Congress's oversight power.

[95] *Id*. at 388.

[96] *AT&T I,* 551 F.2d at 391.

[97] *Id*. at 392.

[98] *Id.* at 392 (citing United States v. Nixon, 418 U.S. 683, 706 (1974)).

[99] *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948)).

[100] *Id*. at 395.

Those negotiations again reached an impasse, and the parties soon returned to the D.C. Circuit. As before, both sides made broad assertions of authority. The executive branch argued that its duty to protect national security trumped the congressional subpoena power.[101] However, the court again rejected this assertion, explaining that the two branches shared power over national security:

> the executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.[102]

The court also noted that the executive branch's concern about the improper release of national security information was "entirely legitimate,"[103] but the scope of the executive branch's authority in this matter "is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions."[104]

Similarly, Congress argued it had broad powers in this area, claiming that the Speech or Debate Clause precluded judicial intervention into a congressional subpoena. The court rejected this assertion as well, noting that the congressional subpoena power is not absolute.[105] The court again declined to rule on the merits, and aimed to construct a compromise that would either encourage more negotiations or permit the district court to adequately mediate the remaining issues of contention.[106] In sum, *AT&T* rejects the absolute claims of the executive branch to control over national security information, as well as Congress's absolute claim to access.

Statutorily Required Disclosure to Courts

Historical practice also supports the notion of shared power over national security information. Various statutory regimes regulate access to national security information, including mandating disclosure to the courts. During criminal trials involving classified information, CIPA provides procedures for courts to use to determine whether classified information will be discoverable by the defendant or admissible at trial.[107] If the government refuses to comply by releasing information for *in camera* review, courts have authority to dismiss prosecutions. The executive branch has complied with these provisions, submitting classified information to the judicial branch for *in camera* review.[108] Of course, if the government finds the cost of disclosure to outweigh the costs of not prosecuting, it can exercise prosecutorial discretion and decline to bring a case.

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[101] United States v. AT&T, 567 F.2d 121, 127 n.17 (D.C. Cir. 1977) (hereinafter *AT&T II*).

[102] *Id.* at 128.

[103] *Id*.

[104] *Id*.

[105] *Id*. at 130.

[106] *Id*. at 130-32.

[107] 18 U.S.C. app. III, §4 (2006).

[108] *See, e.g*., United States v. Hanna, 661 F.3d 271, 280 (6th Cir. 2011); Bostan v. Obama, 674 F. Supp. 2d 9, 26 (D.D.C. 2009).

FOIA's history and operation also supports the notion of shared power between Congress and the executive branch over national security information. Under FOIA, courts review sensitive national security information *in camera*. Prior to 1973, the precise scope of judicial review for FOIA exemption claims based on classified information was unsettled.[109] In *Environmental Protection Agency v. Mink*,[110] the Supreme Court attempted to clarify this question. In response to a FOIA claim concerning an underground nuclear explosion, the executive branch claimed the materials were exempt as properly classified materials. The plaintiffs argued that courts should closely examine classification orders, but the Court ruled that the FOIA statutory exemption did not authorize *in camera* review of classified material.[111] Subsequently, Congress amended FOIA and expressly overruled *Mink* by permitting *in camera* review of classified material.[112] Since then, courts have routinely reviewed classified information *in camera* to ensure that agencies claim the national security exemption properly.[113]

Statutorily Mandated Disclosure to the Public

In addition to allowing courts to review classified information *in camera*, FOIA provides the public with a statutory right of access to government records outside of the prosecutorial context, and provides courts with discretion to order the public release of information held by the executive branch. The executive branch can claim a number of statutory exemptions from disclosure, including properly classified information.[114] When disputes arise, courts reviewing the executive branch's privilege claims do so *de novo*, but only to determine if the relevant information logically falls within the exemption.[115] They may review materials *in camera* to ensure that the information is actually sensitive.[116] Courts are also to ensure that the government does not claim exemptions too broadly, by ordering the government to provide all "reasonably segregable" non-classified information.[117] If the information is properly classified by the executive branch, courts will not order its disclosure. However, if the court is not convinced that the material is properly classified, it can order the government to disclose the materials.[118] Courts may "enjoin the agency from withholding agency records and ... order the production of any

[109] John A. Bourdeau, What Matters Are Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. §552(b)(1)) as "Specifically Authorized Under Criteria Established by an Executive Order to Be Kept Secret in the Interest of National Defense or Foreign Policy," 169 A.L.R. Fed. 495, 512 (2001).

[110] 410 U.S. 73 (1973).

[111] *Id*. at 84.

[112] *See* S. Rep. No. 93-1200, at 9 (1974) (Conf. Rep.).

[113] *See, e.g.*, Cox v. Levi, 592 F.2d 460, 463 (8th Cir. 1979); Ray v. Turner, 587 F.2d 1187, 1194 (D.C. Cir. 1978); Halperin v. Dep't of State, 565 F.2d 699, 707 (D.C. Cir. 1977); New York Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012).

[114] 5 U.S.C. §552 (2006); *see generally* CRS Report R41406, *The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws* , by (name redacted)

[115] *See, e.g.*, Wilner v. Nat'l Security Agency, 592 F.3d 60, 68 (2d Cir. 2009).

[116] 5 U.S.C. §552(a)(4)(B) (2006).

[117] 5 U.S.C. §552(b)(1); *see, e.g.*, Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative, 505 F. Supp. 2d 150, 158 (D.D.C. 2007).

[118] *See, e.g.*, American Civil Liberties Union v. Central Intelligence Agency, 710 F.3d 422 (D.C. Cir. 2013) (rejecting the CIA's *Glomar* response—*i.e.*, declining to confirm or deny the existence of records—to a FOIA request for records on drones); Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 806 (9th Cir. 1995).

agency records improperly withheld,"[119] and may hold employees who refuse to comply in contempt.[120]

On the one hand, courts do not often force public disclosure of material the executive branch insists is properly classified,[121] and the executive branch has received criticism for its insufficient responses to FOIA requests.[122] On the other, courts do sometimes require public disclosure of material the government objects to releasing, and will narrow the scope of broad exemption claims made by the government. In *ACLU v. CIA*, for example, the D.C. Circuit rejected the Central Intelligence Agency's (CIA) FOIA response as overly broad and remanded the case to the district court.[123] In that case, the ACLU brought a FOIA claim seeking access to CIA records concerning—but not necessarily about the agency's own use of—drones.[124] The CIA replied with a "*Glomar* response"—"declining to either confirm or deny the existence of any responsive records."[125] *Glomar* responses are acceptable government responses to FOIA requests in situations where even the confirmation or denial of information would cause harm under a FOIA exemption.[126] However, *Glomar* responses are trumped—the agency cannot claim an exemption—when "an agency has officially acknowledged otherwise exempt information."[127] The CIA claimed that disclosure of the "existence or nonexistence of CIA records responsive to this request ... is a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security."[128] The D.C. Circuit noted that the issue before it was not whether the CIA itself operated drones, but rather "whether it has any documents at all about drone strikes."[129] In particular, "'whether it is logical or plausible' for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency 'at least has an intelligence interest' in such strikes."[130] The court pointed out that given that the executive branch had made public remarks about the existence of a drone program already, "the answer to that question was no."[131] Therefore, the court remanded the case to the district court to determine if the "*contents*—as distinguished from the *existence*—of the officially acknowledged records may be protected from disclosure."[132]

[119] 5 U.S.C. §552(a)(4)(B).

[120] 5 U.S.C. §552(a)(4)(G).

[121] Bourdeau, *supra* note 109, at 514-15; Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 937 (D.C. Cir. 2003) (Tatel, J., dissenting).

[122] *See, e.g.*, Christina E. Wells, CIA v. Sims: Mosaic Theory and Government Attitude, 58 Admin L. Rev. 845, 854 (2006); David E. Pozen, Note, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 Yale L. J. 628, 632, 654 (2005).

[123] American Civil Liberties Union v. Central Intelligence Agency, 710 F.3d 422 (D.C. Cir. 2013).

[124] *Id*. at 425.

[125] *Id*. at 425-26.

[126] *Id*. at 426. The opinion points to Roth v. U.S. Dep't of Justice, 642 F.3d 1161, 1178, 395 U.S. App. D.C. 340 (D.C. Cir. 2011) Miller v. Casey, 730 F.2d 773, 775-78, 235 U.S. App. D.C. 11 (D.C. Cir. 1984); Gardels v. CIA, 689 F.2d 1100, 1103, 223 U.S. App. D.C. 88 (D.C. Cir. 1982) for examples of the operation of *Glomar* responses.

[127] *Id*. at 426.

[128] *Id*. at 428 (quoting Declaration of Mary Ellen Cole par.15).

[129] *Id*. at 428.

[130] *Id*. at 428-29 (quoting Wolf v. CIA, 473 F.3d 370, 375 (D.C. Cir. 2007)).

[131] *Id*. at 429.

[132] *Id*. at 432 (quoting Wolf v. CIA, 473 F.3d 370, 375 (D.C. Cir. 2007)) (italics in original).

Courts have also rejected the executive branch's privilege claims, as well as ordered the executive branch to segregate classified from non-classified information and release the latter. In a case in the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) brought by plaintiffs seeking information about the FBI's investigation of student movements at Berkeley, the government sought to claim exemptions from disclosure based on national security.[133] The district court ordered the government to release some information completely and segregate other parts.[134] The Ninth Circuit affirmed as to both orders.[135] As to the first group, the Ninth Circuit explained that "general assertions" that disclosure would harm national security were not enough to carry the government's burden of claiming an exemption.[136] Instead, the government must show with particularity why specific documents would harm national security. Since the government did not do so, those documents must be released.[137] As to the second group of documents—those the district court ordered to be segregated—the court noted that the district court's decision to order the release of documents, but allow the government to redact references to the identity of a source, sufficiently accommodated the government's security concerns.[138]

Common Law and Constitutional Limits to Disclosure

Nevertheless, courts have recognized the dangers of requiring the executive branch to release classified information.[139] Under the common law doctrine of the state secrets privilege, courts have declined to compel the executive branch to reveal sensitive national security information in cases brought against the government. For example, courts have completely dismissed claims brought against the government based on espionage contracts at the pleadings on the theory that any litigation on the matter would reveal sensitive information.[140] Even in civil claims brought against the government under federal statutes,[141] courts will remove evidence from a case if there is a reasonable danger that its inclusion poses harm to national security.[142] Finally, if the "very subject matter" of a claim against the government is a state secret—for example, the extraordinary rendition program—some courts will dismiss the case entirely.[143] The U.S. Court of Appeals for the Fourth Circuit has explained that this practice is necessary in order to avoid the "constitutional conflict that might [occur if] the judiciary demanded that the Executive disclose highly sensitive military secrets."[144] On the other hand, other courts have based the privilege on

[133] Rosenfeld v. United States Department of Justice, 57 F.3d 803, 806-08 (9th Cir. 1995).

[134] *Id*. at 806.

[135] *Id*.

[136] *Id*. (quoting Wiener v. FBI, 943 F.2d 972, 981 (9th Cir. 1991)).

[137] *Id*. at 807.

[138] *Id*.

[139] In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court rejected the President's wide ranging claims of immunity from complying with a judicial subpoena to turn over information. However, the Court noted that it would accord greater deference in the case of "military, diplomatic, or sensitive national security secrets." *Id*. at 706.

[140] Tenet v. Doe, 544 U.S. 1 (2005); Totten v. United States, 92 U.S. 105 (1875).

[141] *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1078–79 (9th Cir. 2010) (plaintiff's claims under 28 U.S.C.S. §1350 dismissed on state secrets grounds); El-Masri v. United States, 479 F.3d 296, 296, 306 (4th Cir. 2007) (same).

[142] United States v. Reynolds, 345 U.S. 1 (1953).

[143] *Jeppesen Dataplan*, 614 F.3d at 1078–79; *El-Masri*, 479 F.3d at 306; Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1243 (4th Cir. 1985); Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 919-20 (N.D. Ill. 2006).

[144] *El-Masri*, 479 F.3d at 315.

the prudential concern of protecting national security, rather than the constitutional question of infringing on presidential power.[145] To the extent the privilege is a common law doctrine, it may be altered by statute. However, the executive branch would likely object that, at some point, such legislation intrudes on the President's power as Commander in Chief to protect national security information.

Conclusion

Congress and the President thus share power over access to national security information. Congress enjoys power to regulate access to classified information; however, the President generally makes the specific determination about what particular information is classified. FISA opinions and orders, most of which contain at least some sensitive facts pertaining to national security, are a mixture of legal reasoning and sensitive national security information. Proposals that allow the executive branch to first redact classified information from FISA opinions before public release[146] appear to be on firm constitutional ground. Such laws, in line with statutes like FOIA, allow the executive branch to protect sensitive information and likely satisfy the executive branch's view of its constitutional obligations under Article II.[147] In addition, these proposals largely coincide with the protections accorded by courts via the state secrets privilege. In contrast, a proposal that mandated all past FISA opinions be released in their entirety—without any redactions by the executive branch—might raise a separation of powers issue. The executive branch has historically enjoyed some protection from releasing properly classified information—via statutory exemptions and the common law. Legislation ignoring these protections would likely invite constitutional objections from the executive branch. Finally, a law that applied retroactively—compelling the release of past FISA decisions—might raise different questions than a law that applied only prospectively. In the former case, many past FISA decisions that contain classified information would be affected. In the latter, the executive branch could conceivably alter its strategy of what information to include in applications to the FISC, thus alleviating concerns about compelling the release of classified information; although such an effect might raise separate constitutional questions of its own.[148]

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[145] *See, e.g.*, *In re* Sealed Case, 494 F.3d 139, 151 (D.C. Cir. 2007).

[146] *See, e.g.*, Ending Secret Law Act, H.R. 2475, 113th Cong. (2013); Ending Secret Law Act, S. 1130, 113th Cong. (2013); FISA Court in the Sunshine Act of 2013, H.R. 2440, 113th Cong. (2013); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013).

[147] *See* Mukasey Letter, *supra* note 60, at 2-3.

[148] The operational discretion afforded the President under the Commander-in-Chief Clause of Article II is beyond the scope of this report. *See supra*, note 10.