

# COMING TO TERMS WITH SECRET LAW

**Dakota S. Rudesill\***

Assistant Professor

Moritz College of Law, The Ohio State University

[Rudesill.2@osu.edu](mailto:Rudesill.2@osu.edu) | 651.925.6257

*ABSTRACT. The allegation that the U.S. government is producing secret law has become increasingly common. This article evaluates this claim, examining the available evidence in all three federal branches. In particular, Congress's governance of national security programs via classified addenda to legislative reports is here given the first focused scholarly treatment, including empirical analysis that shows references in Public Law to these classified documents spiking in recent years. Having determined that the secret law allegation is well founded in all three branches, the article argues that secret law is importantly different from secrecy generally: the constitutional norm against secret law is stronger than the constitutional norm against secret fact. Three normative options are constructed and compared: live with secret law as it exists, abolish it, or reform it. The article concludes by proposing principles for governing secret law, starting with the cardinal rule of public law's supremacy over secret law.*

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## INTRODUCTION

*Intelligence Authorization Act for Fiscal Year 2015, Public Law 113-293, Joint Explanatory Statement:*<sup>1</sup> “The [classified] Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law.”

*But it is not public.*

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Secret law. The words are chilling. They sound alien and smell authoritarian. They evoke Kafka, inability to comply due to lack of notice, and liberty subordinated to state security.<sup>2</sup> They certainly do not suggest the democratic principle and American self-concept of transparent and accountable self-government of, by, and for the people.

And yet, allegations of secret law’s existence in the United States are becoming increasingly common. Unprecedented leaks by former National Security Agency (NSA) contractor Edward Snowden<sup>3</sup> – starting with a court order to a telecommunications provider to turn over call records (telephony metadata) in bulk<sup>4</sup> – and ensuing declassifications<sup>5</sup> revealed

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<sup>1</sup> Joint Explanatory Statement to Accompany the Intelligence Authorization Act (IAA) for Fiscal Year 2015, 160 CONG. REC. S6464-65 (Dec. 9, 2014) (note that the IAA was informally conference, and as of July 30, 2015, this last-in-time report inserted into the *Congressional Record* does not have a formal report number).

<sup>2</sup> See FRANZ KAFKA, *The Problem of Our Laws*, in PARABLES AND PARADOXES 155 (1961) (“it is an extremely painful thing to be ruled by laws that one does not know”); FRANZ KAFKA, THE TRIAL (1925) (fictional account of an individual tried and executed without notice of the law allegedly violated), <http://gutenberg.org/etext/7849>. Concern about Kafkaesque laws endures. See, e.g., Claire Grant, *Secret Laws*, 25 RATIO JURIS 301 (2012); Alvaro Bedoya & Ben Sobel, *Quiz: Just How Kafkaesque is the Court that Oversees NSA Spying?*, WASH. POST, May 21, 2015, <http://www.washingtonpost.com/blogs/the-switch/wp/2015/05/21/quiz-just-how-kafkaesque-is-the-court-that-oversees-nsa-spying/>.

<sup>3</sup> Snowden is usually described as a former NSA contractor but he describes himself as a senior advisor to NSA and CIA field officer. See GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE 32 (2014) (quoting Snowden to Greenwald letter).

<sup>4</sup> In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Serv., No. BR 13-80 (FISA Ct. 2013 (Vinson, J.) (order granting production), <http://epic.org/privacy/nsa/Section-215-Order-to-Verizon.pdf>.

<sup>5</sup> The media has published nearly 2,000 pages of classified documents leaked by Snowden, but this still may be less than one percent of all the pages in the Snowden files. See CRYPTOME, <http://cryptome.org/2013/11/snowden-tally.htm> (tally and compilations of Snowden documents). Intelligence agencies have declassified and published several thousand pages of documents, according to the count of Steven Aftergood, *ODNI Rethinks Secrecy and Openness in Intelligence*, SECRECY NEWS, Mar. 20, 2014, <https://fas.org/blogs/secrecy/2014/03/litt-transparency>. For a site created by the Obama

that the Foreign Intelligence Surveillance Court (FISC) has been “regularly assessing broad constitutional questions and establishing important judicial precedents” in a growing body of classified jurisprudence.<sup>6</sup> In invoking the term secret law,<sup>7</sup> however, Snowden was not original. He was contrasting it with the foundational presumption in a republic that law is public. He was also invoking a term coined in the mid-last century by Kenneth Culp Davis, and levied against unpublished federal agency rules that prompted Congress to enact sunshine laws including the Freedom of Information Act (FOIA).<sup>8</sup> A renewed allegation of secret law has been frequently made in recent years by lawmakers, legal analysts, journalists, bloggers, and activists claiming its presence in the Judicial and Executive Branches, particularly in classified FISC opinions and unpublished U.S. Department of Justice (DOJ) Office of Legal Counsel (OLC) legal opinions.<sup>9</sup> Congressional “secret laws” have been decried by the Office of Management and Budget under

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Administration on which declassified documents are posted, see OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, IC ON THE RECORD, <http://icontherecord.tumblr.com/>.

<sup>6</sup> See Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of NSA*, N.Y. TIMES, July 6, 2013, <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html>.

<sup>7</sup> See GREENWALD, *supra* note 3,(quoting letter by Snowden to Greenwald: “I will be satisfied if the federation of secret law, unequal pardon, and irresistible executive powers that rule the world that I love are revealed even for an instant”).

<sup>8</sup> Kenneth Culp Davis claims to have coined the term during his congressional testimony in 1964 regarding what would become FOIA. KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 5:18 (The Concept of “Secret Law”), 364 (2d ed. 1978). According to Davis, Congress chose not to use the term in the text of FOIA but the idea was one motivation for the law, and was later picked up by federal courts in relation to unpublished agency rules.

<sup>9</sup> See, e.g., S. REP. NO. 112-43, at 29 (2011) (statement of Sen. Ron Wyden (D-OR) and Sen. Mark Udall (D-CO), stating that intelligence agencies “should not be allowed to rely on secret laws”); Rep. James Sensenbrenner (R-WI), THE USA FREEDOM ACT (H.R. 3361 / S. 1599, 113th Cong.), <http://sensenbrenner.house.gov/legislation/theusafreedomact.htm> (the bill “will end secret laws” by requiring the Attorney General to release FISC opinions issued after July 10, 2003, that contain “a significant construction or interpretation of law”); CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 415-75 (2015) (chapter entitled “Secrecy and Secret Law,” discussing *inter alia* OLC memoranda on interrogation and targeted killings); Steven Aftergood et al., *Secret Law*, SECRECY NEWS, <https://fas.org/category/secret-law/> (Federation of American Scientists site with posts regarding secret law); Glenn Greenwald, *Obama’s Huge Test Today: Do We Believe in Secret Law?*, SALON, Apr. 16, 2009, [http://www.salon.com/2009/04/16/olc\\_memos/](http://www.salon.com/2009/04/16/olc_memos/) (invoking idea of secret law in relation to declassification of OLC interrogation memos). Several advocacy organizations maintain sites alleging secret law as well. See, e.g., *Secrecy*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/national-security/secrecy>; *Secret Law*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/federal-foia-appeals-guide/exemption-5/ii-privileges-incorporated-exemption-5/deliberative-process-2>.

Republican and Democratic presidents – and the U.S. Intelligence Community’s senior lawyer recently stated his view that Congress gives classified legislative documents the force of law.<sup>10</sup>

Pieces of the secret law puzzle have gotten attention. The legal and policy merit of the NSA intelligence collection programs have received focused analysis.<sup>11</sup> After the Second Circuit ruled against bulk telephony metadata collection in May 2015, Congress acted on surveillance as well.<sup>12</sup> Indeed, Members of Congress of both parties stated that one of the purposes of the USA FREEDOM Act reform bill is to “end secret law.”<sup>13</sup> Unpublished and classified OLC memos concerning surveillance, interrogation, targeted killings, and other national security matters have stimulated considerable debate, as well.<sup>14</sup> Secrecy critics sometimes highlight Congress’s classified legislative work.<sup>15</sup> There is also a longstanding scholarly discussion about whether law must be published to be law (the publicity principle),<sup>16</sup> and a new literature that addresses

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<sup>10</sup> See OFFICE OF MGMT. & BUDGET, EXEC OFFICE OF THE PRESIDENT, CONFERENCE LETTER REGARDING S. 1494 AND H.R. 2701, THE INTELLIGENCE ACTS FOR FISCAL YEAR 2010 (2010), at 6 (Obama Administration), available at <https://fas.org/irp/news/2010/03/omb031610.pdf> [hereinafter IAA 2010 OMB SAP]; OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY ON H.R. 2586, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2002 (Sept. 24, 2001) (George W. Bush Administration), <http://www.presidency.ucsb.edu/ws/index.php?pid=25591> [hereinafter NDAA 2002 OMB SAP]; Steven Aftergood, *ODNI: Annexes to Intelligence Bills Are Not ‘Secret Law’*, SECRECY NEWS, May 18, 2015, <https://fas.org/blogs/secrecy/2015/05/not-secret-law/> (quoting email from ODNI General Counsel).

<sup>11</sup> See, e.g., *infra* notes \_\_ & \_\_. [notes in the early 200s citing to Kadidal, Strandburg, et al; and to Donohue, Kerr, Lederman, and Kris].

<sup>12</sup> See Am. Civil Liberties Union v. Clapper, 785 F.3d 787 (2d Cir. 2015).

<sup>13</sup> Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM) Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, §§ 402, 602(a) (to be codified at 50 U.S.C. § 1872 (mandating declassification reviews of FISC opinions)).

<sup>14</sup> See, e.g., Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SEC. L. & POL’Y 507, 510-20 (2012).

<sup>15</sup> See, e.g., Steven Aftergood, *A Growing Body of Secret Intelligence Law*, SECRECY NEWS, May 4, 2015, <http://www.fas.org/sgp/news/secrecy/2015/05/050415.html>.

<sup>16</sup> The publicity principle is alternatively known as the publication or promulgation principle. As discussed in Part II, is most notably attributed to Immanuel Kant. See IMMANUEL KANT, PERPETUAL PEACE 185 (— trans — 1795). There is a sizable literature. See, e.g., David Luban, *The Publicity Principle*, in ROBERT E. GOODIN (ED.), THE THEORY OF INSTITUTIONAL DESIGN 154, 180 (1998) (exploring publicity principle regarding law, nuclear weapons, and moral theory), available at <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/papers/reading/Luban.pdf>; LON L. FULLER, THE MORALITY OF LAW 39, 49-51, 91-92 (1969) (contending that law must be published, perhaps with exceptions such as funding for secret weapons); H.L.A. HART, THE CONCEPT OF LAW 22 (1961) (arguing that unpublished law is still law).

individual examples of claimed secret law or particular issues bearing on it.<sup>17</sup> Some scholars and practitioners briefly reference secret law, in the context of discussion of secrecy generally.<sup>18</sup>

In contrast, scholars and practitioners rarely grapple with secret law as a general claimed phenomenon. That is what this article is about: gathering and assessing evidence of secret law's claimed existence, constructing normative options, and proposing governing principles.<sup>19</sup>

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<sup>17</sup> See HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, ACCOUNTABILITY, AND THE U.S. CONSTITUTION 85-87, 100-06, 124-49 (2015) (conceiving of secret law as "when the executive deems it necessary to the national interest no only to circumvent a statute, but to do so in secret," and criticizing secret law as inconsistent with a substantive accountability theory of shared power under the Constitution); Christopher A. Donesa, *Is "Secret Law" Really Either? Congressional Intent, Legislative Process, and Section 215 of the USA PATRIOT Act*, 3 NATIONAL SECURITY L. J. 101 (2014) (disputing allegation that § 215 program operated on the basis of secret law), [https://www.nslj.org/wp-content/uploads/3\\_NatlSecLJ\\_101-127\\_Donesa.pdf](https://www.nslj.org/wp-content/uploads/3_NatlSecLJ_101-127_Donesa.pdf); Laura K. Donohue, *The Shadow of State Secrets*, 159 PENN. L. REV. 77, 82-83 (2010) (analyzing use of state secrets privilege, which *inter alia* has prevented court consideration of suits arising from post-9/11 interrogation and rendition programs in which secret legal authorities were operative); Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513 (2014) (criticizing the FISC's creation of secret law and arguing for Congress's to legislate a rule of narrow construction requiring resolution of statutory ambiguity by the FISC in favor of privacy and against the government); Gregory S. McNeal, *Reforming the Foreign Intelligence Surveillance Court's Interpretive Secrecy Problem*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 77 (2014) (arguing that all FISC opinions doing substantive legal interpretation should be subject to automatic appellate review and presumptively published with redaction – reforms since made in more flexible form by the USA FREEDOM Act); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing that Congress must be informed by the Justice Department of its use of constitutional avoidance canon in unpublished opinions); Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT'L L. 69 (2015) (questioning whether the post-9/11 surveillance legal architecture is meaningful, and referencing secret law in footnotes); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 594-98 (2009) (discussing how OLC has used secret law to justify and provide legal comfort to its operatives); Jack Boeglin & Julius Taranto, Comment, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189 (2015) (arguing that FISC opinions must be published to have precedential force under stare decisis doctrine); Elizabeth Goitein, *There's No Reason to Hide the Amount of Secret Law*, JUST SECURITY, June 30, 2015, <http://justsecurity.org/24306/no-reason-hide-amount-secret-law/> (arguing for a public index of FISC, OLC, and presidential legal authorities that are non-public or in the declassification process).

<sup>18</sup> See, e.g., David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010) (exploring shallow and deep secrecy, with post-9/11 OLC memoranda as one of a slate of examples of deep secrecy).

<sup>19</sup> Scholars have explored slices of the secret law problem (see *supra* note 17), but the literature lacks a general framework treatment of secret law as a current phenomenon, with both descriptive and prescriptive emphases.

In November 2013, the University of Pennsylvania School of Law held a conference with a primarily theoretical emphasis, "On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy." Papers included Brian Bix, *Secrecy and the Nature of Law* (discussing legal philosophy regarding secret law); Christopher Kutz, *The Repugnance of Secret Law*; Duncan MacIntosh,

This article defines secret law as *legal authorities that require compliance that are classified or otherwise withheld from the public*.<sup>20</sup> This definition embraces legislation manifesting Article I constitutional authority, as it does presidential orders and agency regulations grounded in Article I and Article II authorities. This definition also embraces interpretive law in the Executive and Judicial Branches that provides precedential or otherwise binding constructions of law, particularly OLC and FISC opinions.<sup>21</sup> Legal documents that represent mere advice or analysis, where there is no precedential force or other obligation to comply, are excluded.<sup>22</sup> They may be legal documents but they are not law. The article touches

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*Logically Private Laws* 1, 8-11 (arguing for space for non-publication where publication would frustrate a law of general benefit and where the laws are not intended to deter, and because people in reality do not actually know for certain what the law is); Luban, *supra* note 16; *See* Conference Schedule, Center for Ethics and the Rule of Law, *On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy* (November 22–23, 2013), <https://www.law.upenn.edu/institutes/cerl/conferences/secretlawstransparency/schedule.php>.

A journal outside the United States has published two papers exploring positivist theory and secret law: Grant, *supra* note 2 (arguing that positivism can accommodate secret law but it raises moral concerns); and Christopher Kutz, *Secret Law and the Value of Publicity*, 22 RATIO JURIS 917 (2009) (arguing that positivism that incorporates a normative element can be inconsistent with secret law, which undermines government legitimacy).

Seven years ago, secret law critic Sen. Russell Feingold (D-WI) chaired a Senate subcommittee hearing on secret law generally, although most of the focus was on OLC memos concerning interrogation, surveillance, and other subjects. *See Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 111th Cong. (April 30, 2008) [hereinafter SJC Constitution Subcommittee Hearing (2008)].

Nearly three decades ago, a legal expert at the Library of Congress's Congressional Research Service (CRS) authored a concise history of publication of law in the United States: Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97, 98 (1988). His article is descriptive rather than normative with the exception of brief closing comments.

<sup>20</sup> Others use different, usually narrower, definitions. *See, e.g.*, KITROSSER, *supra* note 17 (defining secret law as an Executive Branch phenomenon, in the context of a work focused on grappling with Executive power theories). For discussion of the definitional approach some Secret Law Thesis critics take, see this article's discussion in Part I.B.

<sup>21</sup> OLC writings are often termed memoranda and opinions, while FISC documents are referenced as orders, opinions, and memoranda. What definitionally matters for our purposes is that these documents are precedential or otherwise binding. Acting OLC head Karl Thompson in late 2015 emphasized that even OLC emails and oral advice are the binding law of the Executive Branch. *See* Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO, Nov. 5, 2015 (oral or email advice “is still binding by custom and practice....[the Executive Branch is] supposed to and [does] follow it”), <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567>. Even though FISC opinions are not technically precedential, they have had that practical effect and so this article's definition includes them. For discussion, see e.g., Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 822-24 (2014) (FISC creating precedents) [hereinafter § 215 Article].

<sup>22</sup> This definitional decision tracks FOIA's distinction between law or “working law,” and pre-decisional documents. See discussion in text and in footnotes *infra* in Part I.A.2.

on secret processes, but again is about the secrecy of the law itself. This article gives primary but not exclusive focus to literally *secret* (classified) law in the national security context.

Part I of the article collects and analyzes allegations and evidence of what we can understand as the Secret Law Thesis:<sup>23</sup> the claim that *the U.S. government is producing secret law, the phenomenon has become particularly prevalent and problematic since 9/11, and runs against the default norm of publication of the law*. Looking in turn at each branch of the federal government, I gather and appraise publically available evidence of secret law's existence.

This inquiry includes the legal literature's first in-depth study of Congress's governance of the national security apparatus via classified addenda accompanying Public Laws and their reports. I conduct an empirical analysis that shows that use of these addenda is a longstanding exception to the publication norm. The incidence of provisions in Public Law that reasonably might be read to give classified report addenda legal force in part or in full have spiked in recent years. (Part VI describes this study's methodology).

I conclude that the Secret Law Thesis is sufficiently compelling that we need to confront secret law directly as a general phenomenon. In doing so, we need to ask whether secret law is meaningfully different than secret fact. This is the focus of Part II. Some participants in the conversation about secret law draw this distinction. Most do not. Some try to define it away. In so doing, they implicitly argue that secret law is not a sufficiently distinct problem to warrant consideration separate from the longstanding debate about secrecy generally. I maintain that secret fact and secret law are importantly different. There is a stronger constitutional norm against secret law than against secret fact, reflecting what I argue is the publicity principle's lower tolerance for secret law than secret fact.

Note, however, that the publicity principle and constitutional norms arguably admit some legitimate if contested space for secret law where the fact of the law's secrecy is public – in other words, where secret law is a “shallow secret” (the existence of the secret is publically known, but not the secret itself) but not a “deep secret” (the existence of the secret is itself secret).<sup>24</sup> I

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<sup>23</sup> Note the distinction between the Secret Law Thesis I construct and that which Claire Grant terms “the secret laws thesis.” By the Secret Law Thesis I mean the claim that secret law exists, and particularly in the United States today. Grant uses similar language to mean something fairly opposite: the normative idea that legal rules must be public. *See* Grant, *supra* note 2, at 301. The terminology as I use it is more straightforward. Grant’s idea would better be termed the *anti*-secret laws thesis.

<sup>24</sup> For the leading exploration in the legal literature of the shallow versus deep secrecy distinction, see Pozen, *supra* note 18. Pozen’s definitions are that deep secrecy is a secret being kept from the public and other government officials by a small group of government officials who also keep secret the fact of the secret’s existence, while shallow secrecy is where ordinary citizens “understand they are being denied relevant information and have some ability to estimate its content.” *Id.* at 274. Pozen depicts secrecy as a spectrum of depth between these poles, determined by how many people know, which sorts of people and institutions, how much they know, and when. *Id.* at 265-73. The shallow/deep typology has its origins

identify five overarching constitutional values operative here: the rule of law (including separation of powers and checks and balances, and consistency of law), political self-government by the people in the senses of law/policy choice and public official choice (election and removal), personal self-government in the sense of ability to adjust one's conduct based on knowledge of the law, protection of classified factual information, and protection of pre-decisional deliberative space for confidential and candid discussions.

Suggesting the possibility that some amount of shallowly secret law may in concept be legitimate, and understanding the constitutional values in play, however, do not answer the normative question: *should* we tolerate secret law?

Because secret law as a general phenomenon has not been empirically documented, analyzed, and conceptually organized, the discussion to date lacks both a fulsome defense and a full reform agenda. Accordingly, in Part III this article constructs three broad options. One is “Live with the Status Quo.” I make a case for accepting the secret law documented in Part I as a limited but necessary exception to the publication norm. In our perilous digital age, one could argue that so long as we have secret fact we need secret law to govern it. Public Law alone is not up to the task. The regime for classified activities oversight is imperfect – involving a dynamic combination of investigative reporters, leakers, whistleblowers, declassification, inter-branch and intra-branch reporting and oversight – but perhaps it does a serviceable job. A second option is the abolition approach advocated by most secret law critics. This “End It” position – which has been more robustly articulated – holds that secret law is not compatible with our democratic traditions and legal values. The oversight mechanism for secret law is not working, this view holds, and cannot meet our needs. A third broad option is “Reform It.” This school of thought says that we must accept some amount of secret law as inevitable, but need to govern it better.

With ad hoc, issue-specific reform underway and getting increasing attention within all three branches of the federal government, I posit governing principles in Part IV and outline particular proposals. These address the scope, review, and publicity of secret law. I begin with the cardinal rule of public law’s supremacy over secret law.

Overall, this article makes three essential points. One is that the nation’s history reflects development of a normative default of publication of the law. Second, my positive proposition – what this article documents in Part I – is that there is a limited but important and under-studied counter-trend of secret law, one that challenges our constitutional system. In these ways, the Secret Law Thesis is correct. My third major claim is that there needs to be a richer conversation

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with sociologist KIM LANE SHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* (1988) (primarily focusing on contracts and private law), and was further developed by AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (deep secrecy undermines fairness, autonomy, oversight, deliberation, and consent in a republic).

about and more engagement with secret law as a general phenomenon. The normative paths I construct in Part III, and the reforms I posit in Part IV, are steps in that direction.

National security requires both liberty and security.<sup>25</sup> In this context, secret law is an important phenomenon, warranting greater attention by scholars, practitioners, and the public. The next administration should come in with a general approach to secret law – one that it articulates publically. We can draw a lesson from recent legislation regarding the telephony metadata program: the future of secret law is in the hands of public decisions made by the People and the government and policies they choose. We need to come to terms with secret law.

## I. THE SECRET LAW THESIS: EVIDENCE AND APPRAISAL

The law is presumed to be public: available to the public, debatable by the public, and changeable by the public through accountable officials responsive to an informed citizenry. Because of popular sovereignty, law is legitimate only because the public has notice and controls its content. The positive law written at the federal level by the elected Congress that concerns government activities and the relationship between the government and private individuals is appropriately called *Public Law*. It has the ability to revise the *common law* developed by the less accountable courts. For individual relief Congress writes a smaller corpus of *Private Law*.<sup>26</sup> It shares a name with the larger body of *private law* that cross-cuts Public Law and common law and is concerned with contracts, business transactions, and other interactions among non-government parties.<sup>27</sup> Critics of *secret law* allege that the U.S. government is producing a fourth category of non-published public law. They claim that this phenomenon has become particularly prevalent and problematic since 9/11, and runs against the default norm of publication of the law. We can understand this as the *Secret Law Thesis*.

How credible is this claim? To date, most attention has focused on a limited number of alleged examples of secret law, particularly OLC memos in the Executive Branch and FISC

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<sup>25</sup> In contrast to the conventional zero-sum view, some argue for the importance of both liberty and security. *See, e.g.*, PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD 43-46 & 49 (2013), (making this point, and conceptualizing security as embracing protected liberty); JAMES E. BAKER, IN THE COMMON DEFENSE 2-5 (2007) (liberty and the rule of law are national security values).

<sup>26</sup> *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383-84 (1998) (early history of legislated private law).

<sup>27</sup> *See* John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

surveillance opinions in the Judicial Branch. The secret law claim has not been fully assessed overall.<sup>28</sup> Congress's classified legislative work has not received focused scholarly inquiry.

Part I.A collects and evaluates allegations and evidence of secret law in each branch, together with further plausible evidence my research has identified. A centerpiece of this section is empirical study of Congress's production of classified legal authorities. Part I.A also reviews each branch's actions to manage secret law in the other two, both explicitly and implicitly. My overall appraisal of the evidence, set out in I-B, is that claims of secret law's existence are sufficiently compelling that its implications warrant focused attention and normative consideration. I will focus mainly on literally *secret* law – i.e., law found in classified documents – but will also discuss the history of the publication norm and relevant non-classified non-published legal authorities as well.

### A. Secret Law in the Three Branches

My order of inquiry – Legislative, Executive, Judicial – reflects the placement of the branches in the text of the Constitution, notions of the comparative legitimacy of each branch as a lawmaking entity, and reverse order of the extent to which each branch's alleged secret legal authorities have been analyzed. Review of allegations and evidence of creation and management of secret law shows three phases. A Formative Era from the nation's founding into the last century came first, during which a norm against secret law developed, albeit imperfectly. Next, an Industrial Era saw the rise of the administrative state and advent of the Cold War and enactment in response of sunshine laws. Since the late 1970s we have lived in what I term the Post-Church-Pike / Millennial Era, named both for the congressional inquiries that revised inter-branch relationships regarding classified programs, and for the Millennial Generation with which this era is contemporaneous – and in whose hands the secret law question resides.

#### 1. Legislative Branch

##### a. *Formative Era: Emergence of the Publication Norm, and Four Secret Statutes*

Prior to independence and under the Articles of Confederation, statutes and other legal authorities were intermittently published.<sup>29</sup> In contrast, the country's early legislative history

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<sup>28</sup> Aftergood provided one of the few collections of varieties of secret law in his testimony to Congress seven years ago. *See* Aftergood, SJC Constitution Subcommittee Hearing (2008), *supra* note 19, at 17-18. Over the course of their papers, participants in the 2013 University of Pennsylvania Law School conference touched briefly on examples in each branch. *See, e.g.*, Kutz, *supra* note 19.

<sup>29</sup> *See* Relyea, *supra* note 19, at 98 (history of publication). The Colonies relied overwhelmingly on the laws of England, a practice that continued for some time in some areas after independence. Proceedings of the Confederation Congress were published with some frequency in newspapers, including draft legislation, but Relyea notes that the most important information the national legislature produced – the final statutory text – “have proven to be rather elusive, suggesting they might not have been very widely disseminated after their adoption.”

under the Constitution is one of growing transparency: weakening of a norm of secret process and emergence of a norm of publication of the law itself. Four secret statutes around the time of the War of 1812 were a notable exception.

In terms of process, the new Senate, like the Continental and Confederation Congresses before it, met entirely in closed session until the second session of the Third Congress. Both the Senate and House often met in secret for another decade.<sup>30</sup> They did so with the blessing of the Constitution's Journal Clause, which requires each chamber to keep and publish "a Journal of its Proceedings" but – in the Constitution's sole textual reference to secrecy – explicitly excepts "such parts as may in their Judgment require Secrecy."<sup>31</sup> Both chambers soon saw political and normative benefit to open sessions. Prevention of "jealousies arising in the public mind from secret legislation" was cited in a resolution calling for open doors.<sup>32</sup> By 1800, open session was not the rule but was the default. Thereafter the House and Senate retained rules allowing for secret or closed sessions to consider confidential information and presidential messages, treaties, and nominations, but non-public proceedings were generally rare in the 19<sup>th</sup> and 20<sup>th</sup> Centuries.<sup>33</sup> More common were closed committee sessions. That general pattern of legislative process continues to this day: open full chamber sessions to debate and pass the law, with periodic full chamber closed sessions and regular closed committee work to consider non-public information.

In terms of statutes, the plain text of the Constitution has no explicit command for publication of legislated law, but the Framers did include nods in that direction, albeit ambiguous ones. The Journal Clause's text left the contents ("proceedings") and timing ("from time to time") of publication of Congress's journals ambiguous.<sup>34</sup> Additionally, only "Appropriations

<sup>30</sup> See Clive Parry, *Legislatures and Secrecy*, 67 HARV. L. REV. 737, 743-45 (1954) (discussion of secrecy in the British Parliament, with brief comparative discussion of the U.S. Congress). Parry draws upon the classic official presentations of congressional history and precedent by ASHER C. HINDS, 5 HINDS PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 1094 (1907), and CLARENCE CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 334 (1935).

<sup>31</sup> U.S. CONST., art. I, § 5, cl. 3. See also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892) (interpreting Clause to leave Congress great flexibility in how and how extensively records are kept); Pozen, *supra* note 18, at 306-07 (discerning in Clause's requirements evidence of a constitutional principle against deep secrets); Adrian Vermuele, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410-22 (2004) (discussing the Clause).

<sup>32</sup> See, e.g., Resolution Moved by Senator Martin (Ending Secret Session of the Senate) (Jan. 16, 1794), in U.S. SENATE, PRECEDENTS RELATING TO THE PRIVILEGES OF THE SENATE OF THE UNITED STATES 5 (1893). This resolution to open the Senate except where secrecy was necessary passed the next month.

<sup>33</sup> See House Rule XXIX and Senate Rule XXXV. Discussed in Parry, *supra* note 30, at 744 & n.21.

<sup>34</sup> U.S. CONST., art. I, § 5, cl. 3.

made by Law" can draw money from the Treasury, and "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," considerations that read together reasonably if imprecisely suggest that spending law must be published.<sup>35</sup> The text offered no insight on what "publication" or "time to time" specifically meant.<sup>36</sup> Starting in 1789,<sup>37</sup> Congress in the nation's early years began to fill the gap with a series of statutes requiring publication of journals and of laws at the end of each Congress, if not sooner.<sup>38</sup> Publication methods included newspapers and printing copies for the public and

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<sup>35</sup> U.S. CONST., art. I, § 9, cl. 7.

<sup>36</sup> Banks and Raven-Hansen argue that the text of the Appropriations and Statement and Account Clauses and Framer understanding suggest at least eventual publication of funding for classified matters. *See* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 100-08 (1994); *see also* Fisher, 47 GEO. WASH. L. REV. at 349-51. Frequency and granularity remain open questions. The Supreme Court has provided the government latitude under the Clause, and in dictum has stated "Congress has plenary power to exact any reporting and accounting requirement." *See* United States v. Richardson, 418 U.S. 166, 166, 178 n.11 (1972). For a reading of the Statement and Accounts Clause's origins and normative force suggesting more publication regarding classified spending, see Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 LOYOLA CHI. L. J. 1, 12-59 (2015).

<sup>37</sup> *See, e.g.*, Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (requiring publication in three papers in each state, and delivery to Congress, and to the states, but did not specify a timeline); Act of March 3, 1795, ch. 50, 1 Stat. 443 (requiring publication at the end of each Congress); Act of Dec. 21, 1796, ch. 1, 1 Stat. 496 (approving printing of the laws of the current session if affordable); Act of March 2, 1799, ch. 30, 1 Stat. 724 (requiring publication as soon as convenient and additional publication as needed to ensure extensive promulgation). *See also* Act of Nov. 21, 1814, ch. 6, 3 Stat. 145 (authorizing publication in territories); Act of Apr. 20, 1818, ch. 80, 3 Stat. 439 (ordering publication of statutes as they are enacted and as soon as possible in newspapers, and publication of the Statutes at Large at the end of every session). For discussion, see Relyea, 5 GOV'T INFO. Q., *supra* note 19, at 98-100 (noting also that before publication of all laws became regularized Congress would often pass a publication requirement specific to each of its laws); and Charles J. Zinn, *Secret Statutes of the Eleventh Congress*, 156 U.S. CONG. & ADMIN. NEWS 2475, 2484-85 (1952).

<sup>38</sup> *The Annals of Congress* (also known as the *Debates and Proceedings in the Congress of the United States*) (1789–1824), the *Register of Debates in Congress* (1824–1837), and the *Congressional Globe* (1833–1873) preceded the *Congressional Record*. *See* N. David Bleisch, Comment, *The Congressional Record and the First Amendment: Accuracy is the Best Policy*, 12 B.C. ENVT. AFF. L. REV. 341, 344 n.15 (1985). The *Record* has been published since 1873, starting with Congress's instruction in the Act of Apr. 2, 1872, ch. 79, 17 Stat. 47, ordering the printing of debates in Congress. *See* Bleisch, *supra*, at 344-45. The modern statute is codified at 44 U.S.C. § 901 *et seq.* (2012). The *Record* before 1989 and its antecedents are available at: [www.memory.loc.gov](http://www.memory.loc.gov). The *Record* is available since 1989 at [www.congress.gov](http://www.congress.gov). Technically the journals of the House and Senate are separate from the *Record*, but the *Record* also includes information on votes, in addition to transcripts of floor proceedings, the full text of all filed proposed legislation, amendments, and reports, and messages from the President and other materials submitted to the *Record* by Members. *See* 44 U.S.C. §§ 901, 904, 905 (2012).

Governors. Debates referenced publication as warranted for reasons of popular sovereignty, accountability, and detection of abuse of authority and “maladministration of public office.”<sup>39</sup>

In this context, the young country’s brief experience with deliberately withheld secret statutes stands as an exception to the emerging norm of Public Law being *public* law.

In 1811, on the threshold of the War of 1812, Congress in secret passed and President James Madison signed a resolution authorizing “temporary occupation” of the eastern part of West Florida, a territory in dispute with Spain and Britain.<sup>40</sup> Also passed was a bill to enable the President “to take possession” by force if necessary. It appropriated \$100,000 for expenses.<sup>41</sup> Third, another resolution required that the package of laws “not be printed or published, until the end of the next session of Congress, unless directed by the President.”<sup>42</sup> A fourth secret statute was enacted in 1813 authorizing occupation by force of the western part of West Florida, and appropriating \$20,000 more for expenses.<sup>43</sup>

This was hard law: the 1811-13 enactments concerned sovereignty, appropriations, and war regarding a disputed territory in which thousands of U.S. citizens were alleged to be in peril. The four secret statutes resulted from national security concern, constitutional and statutory ambiguity about when law had to be published, and likely too from the fact that the request from the President for legal authority was itself confidential. The secrecy case for keeping these laws buried, however, appears questionable. President Madison in late 1810 had proclaimed the U.S. intent to occupy and administer the territory, actions of which the British were complaining.<sup>44</sup>

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<sup>39</sup> See, e.g., Resolution Moved by Senator Martin, *supra* note 32.

<sup>40</sup> Resolution Relative to the Occupation of the Floridas, Jan. 15, 1811, 3 Stat. 471, reprinted and discussed in Zinn, *supra* note 37, at 2482-83. The United States had purchased the Florida peninsula from Spain, and in dispute were lands to the west near the Gulf Coast.

<sup>41</sup> Act Relative to the Occupation of the Floridas, Jan. 15, 1811, 3 Stat. 471 (enabling the President under certain contingencies “to take possession of the country lying east of the river Perdido” in Florida), reprinted and discussed in Zinn, *supra* note 37, at 2482-83.

<sup>42</sup> Act Concerning an Act to Enable the President of the United States...to Take Possession of the Country Lying East of the River Perdido...and the Declaration Accompanying the Same, March 3, 1811, 3 Stat. 472, reprinted and discussed in Zinn, *supra* note 37, at 2482-83. Detailed day-by-day legislative history of these pieces of legislation is provided by DAVID H. MILLER, DEP’T OF STATE, SECRET STATUTES OF THE UNITED STATES: A MEMORANDUM 3-44 (1918).

<sup>43</sup> Act Authorizing the President of the United States to Take Possession of a Tract of Country Lying South of the Mississippi Territory and West of the River Perdido, Feb. 12, 1813, 3 Stat. 472, *discussed in* Zinn, *supra* note 37, at 2483.

<sup>44</sup> For the text of Madison’s announcement of U.S. intervention and the British formal diplomatic protest, see President James Madison, Presidential Proclamation (Oct. 27, 1810: President James Madison,

Congress's three secret statutes of 1811 were not published as stipulated at the end of the 11<sup>th</sup> Congress in 1813. Instead, all four laws surfaced in 1818 in connection with a new statute reaffirming the requirement of "the publication of the laws of the United States."<sup>45</sup> Over the next century, Congress's efforts to create an institutional mechanism for professional, regularized publication of its work and that of the rest of the federal government proceeded in fits and starts, beset by partisanship and scandal.<sup>46</sup> Today, the modern incarnation of the "Promulgation of Laws" statutes is appropriately found in the first volume of the U.S. Code.<sup>47</sup> The Government Printing Office (GPO) first created in 1860 has published the *Congressional Record* since 1874, including votes and the full text of debates and legislation. As an arm of the Legislative Branch, GPO continues to superintend publication of materials for all three branches.<sup>48</sup> Most notably for our purposes, the strength of the legislative publication norm is apparent in the evident lack of enactment of any further secret statutes after 1813, despite challenging times: war with Mexico, the Civil War, wars with Native Americans, war with Spain, and several economic panics.

*b. Industrial Era: The Legislative Publication Norm Holds*

National security concerns only became more acute and the capacity of the government to create and protect secrets dramatically expanded during what we can label the Industrial Era. During this period spanning the start of the Twentieth Century through the late 1970s, the United States rose to global security leadership and created a modern administrative state. Within the Executive Branch, production of secret facts and other non-public documents exploded. Allegedly secret law grew as well, as is discussed below in Part I.A.2.

The available evidence suggests that Congress did not follow suit likely both for high minded reasons (namely, the publication norm itself) and for reasons including the self-interest of Members of Congress in maintaining plausible deniability of knowledge of clandestine activities that might go sour; Members deriving scant political value from work they cannot

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Annual Message to Congress (Dec. 5, 1810); and Letter from John Philip Morier, British Charge d'Affairs, to President James Madison (Dec. 15, 1810) *in* Zinn, *supra* note 37, at 2477-80.

<sup>45</sup> 3 Stat. 439 (1818), referenced in 3 Stat. 471 (1818). For discussion, see Zinn, *supra* note 37, at 2483-84. The delay in publishing the appropriations may have been a violation of the Constitution's Appropriations Clause. See LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 226 (2014) (arguing it was a violation).

<sup>46</sup> See Relyea, 5 GOV'T INFO. Q., *supra* note 19, at 98-103.

<sup>47</sup> 1 U.S.C. § 106a (2012). Sibling provisions require publication of constitutional amendments, presidential proclamations, and international agreements. See 1 U.S.C. §§ 106b, 112, 112a (2012).

<sup>48</sup> See Government Printing Office, <http://www.gpo.gov>. GPO works with the Library of Congress, which through its Congress.gov website makes proposed and enacted legislation and legislative materials globally available online. For discussion, see Relyea, 5 GOV'T INFO. Q., *supra* note 19, at 103.

discuss in public and cannot leverage for patronage or campaign money; the practical reality that the Executive Branch had expansively taken responsibility for secret activities; deference to the “imperial presidency” of the Cold War; and high public trust in government before Vietnam, Watergate, and the intelligence abuses investigated by the Church-Pike committees.

Operative too was a mostly informal, often ad hoc system of oversight by Congress. Congress would pass broadly worded and generally permissive Public Laws, such as the National Security Act of 1947 and Central Intelligence Act of 1949, to organize the national security apparatus.<sup>49</sup> Meanwhile, Members and staff would communicate with the Executive Branch behind the scenes about how to transfer and spend in secret the money provided in broad language in annual Department of Defense (DOD) Appropriations Acts (both explicitly in transfer funds or silently buried in various accounts).<sup>50</sup> The Manhattan Project that produced the atomic bomb during World War II is a notable example of how this budget process could allow expenditure of enormous appropriated sums for the most sensitive national security matters while protecting secret programs from public disclosure.<sup>51</sup> Into the 1970s, a centerpiece of congressional oversight of classified activities was sealed letters from the Appropriations Committees explaining what money was intended for which programs.<sup>52</sup> In this way, the usual

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<sup>49</sup> See National Security Act, Pub. L. 80-253, 61 Stat. 495 (1947) (reorganizing national security apparatus after World War II), Central Intelligence Agency Act, Pub. L. 81-110, 63 Stat. 208 (1949) (exempting CIA from usual administrative procedures and providing other authorities concerning intelligence). An example of broad language in these framework statutes to authorize clandestine activities is Congress’s ratification of covert covert action authority for CIA “to perform such other functions and duties related to intelligence affecting the national security” as the President and NSC may direct. See National Security Act of 1947, § 102(d)(5), codified at 50 U.S.C. 403 (1982). For discussion, see W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 118-19 & n.18 (1992).

<sup>50</sup> For discussion of the history of this overall arrangement, including use of confidential funds and other transfer accounts provided in legislation starting in 1790 and special certificates inside the Executive Branch, see BANKS & RAVEN-HANSEN, *supra* note 36, at 102-05, 176; LOUIS FISHER, PRESIDENTIAL SPENDING POWER 205-13 (1975); Louis Fisher, *Confidential Spending and Government Accountability*, 47 GEO. WASH. L. REV. 347, 347-49, 354-65 (1979); Relyea, 5 GOV’T INFO. Q., *supra* note 19, at 111.

<sup>51</sup> See Fisher, 47 GEO. WASH. L. REV. at 361-62 (Manhattan Project funding buried in engineering and production accounts).

<sup>52</sup> For a rare contemporary public record reference to these letters – and defense of them – see DOD Appropriations Act for 1976, H.R. REP. NO. 94-517 at 22 (1975) (report of the House Appropriations Committee): the classified letter “is comparable in scope and depth to the report which is prepared on other DOD activities. However, because of the sensitivity of these activities, this classified letter cannot be made public. The Committee does assure its colleagues in the Congress that the classified letter is hard-hitting, it holds the intelligence community to high standards....” See also DOD Appropriations Act for 1977, H.R. REP. NO. 94-1231, at 15 (1976) (report of the House Appropriations Committee): “The Committee will expect the same degree of compliance with this classified letter as with unclassified Appropriations Committee reports.” For discussion of the letters, see L. BRIT SNIDER, THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS, 1946-2004 (2008) at 160-61, 180-82 (study commissioned by the CIA’s Center for the Study of Intelligence). Some years featured considerable

dual stages of authorization and appropriation of money via separate annual bills – intended to separate policy and funding decisions, and to distribute oversight power in Congress – were often effectively collapsed into a single appropriations legislative stage.<sup>53</sup> The Armed Services Committees – the authorizing committees focused on the Pentagon, which has a massive military intelligence program – were involved via closed hearings and informal consultations.

For decades there was an effective consensus this arrangement was working. The legislative publication norm held despite the enormous secrecy incentives created by two World Wars, the Great Depression, Red Scares, wars in Korea and Vietnam, and the Cold War.<sup>54</sup>

*c. Post-Church-Pike / Millennial Era: The Advent of Classified Addenda to Public Laws*

Is Congress now again creating secret law, 160 years after publication in 1818 of the four secret statutes? Secrecy critics who pay attention to Congress say yes. They claim that during what this article terms the Post-Church-Pike / Millennial Era – the last decade of the Cold War, the 1990s interregnum, and post-9/11 period to date – Congress is again producing secret law. The allegation is not that Public Laws themselves are secret as were the 1811 and 1813 statutes. Rather, the claim is that Congress is writing “secret intelligence law” via classified addenda to annual Intelligence Authorization Acts (IAAs).<sup>55</sup>

Congressional secrecy is under-studied.<sup>56</sup> If we are to come to terms with secret law as a phenomenon, we need to inform ourselves by conducting a focused analysis.

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dialogue and disagreement among members of the Armed Services and Appropriations Committees and the CIA, while others did not. One year, the CIA Director testified during a closed subcommittee meeting for seven hours – long by any measure. Another year, the Senate Appropriations Committee Chairman “told the Agency he was too busy” and they should talk instead to committee staff, who raised “no questions...of any substance.” ID. at 172, 167. Some years CIA’s budget was hiked by Congress, others cut, but usually its budget request was approved. ID. at 165-79.

<sup>53</sup> For discussion, see JESSICA TOLLESTUP, CONGRESSIONAL RESEARCH SERVICE, APPROPRIATIONS REPORT LANGUAGE: OVERVIEW OF DEVELOPMENT, COMPONENTS, AND ISSUES FOR CONGRESS 1 (2015), <https://fas.org/sgp/crs/misc/R44124.pdf>. Authorization for intelligence programs was usually provided by a single line in appropriations acts.

<sup>54</sup> Zinn made a similar point six decades ago. *See* Zinn, *supra* note 37, at 2485.

<sup>55</sup> *See* SJC Constitution Subcommittee Hearing (2008), *supra* note 19, at 87 (Statement of Steven Aftergood); Aftergood, *A Growing Body of Secret Intelligence Law*, SECRECY NEWS, May 4, 2015, <http://www.fas.org/sgp/news/secrecy/2015/05/050415.html>.

<sup>56</sup> *See* Pozen, *supra* note 18, at 274 (“Congressional secrecy is a seriously understudied subject”).

This article’s close reading and empirical study of public legislative references to classified addenda show that, if anything, critics of secret law significantly understate the Legislative Branch’s production of what may be reasonably termed secret law.

Exclusion from publication of classified *facts* discussed at closed congressional hearings is simple and well precedented. It finds safe harbor in the secrecy exception in the Constitution’s Journal Clause, and in the lack of specificity of the Appropriations and Statement and Account Clauses about precisely how much information about secret activities must be published in spending legislation.<sup>57</sup> In contrast, Congress faces a *legal* dilemma: how does Congress wield its legal instrument of Public Law to exercise its exclusive power of the purse and oversee the Executive Branch, when the activities funded and managed must not be disclosed?

The answer that had worked for many decades – generally worded Public Law and informal dialogue behind closed doors – was no longer tenable as trust in government declined due to Vietnam and Watergate, and especially due to mid-1970s revelation by congressional committees headed by Senator Frank Church (D-ID) and Representative Otis Pike (D-NY) of alarming intelligence abuses of authority.<sup>58</sup> The final Pike Committee report assailed Congress’s intelligence budget oversight as ranging between “cursory and nonexistent,” and suggested Congress was being misled.<sup>59</sup> Although the Appropriations Committees pushed back,<sup>60</sup> the

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<sup>57</sup> U.S. CONST., art. I, § 5, cl. 3 & 7.

<sup>58</sup> See Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Foreign, and Military Intelligence, S. REP. NO. 94-755 (1976) [hereinafter the Church Committee Report]; REP. OTIS PIKE, CIA: THE PIKE REPORT (ed. 1997) [hereinafter the PIKE COMMITTEE REPORT]. The committees documented covert actions, infiltration, and other operations intended to influence U.S. politics; suspicionless surveillance targeted domestically; surveillance of war protestors, civil rights leaders, feminists, and students based on First Amendment-protected political speech and free association; opening of private mail of U.S. persons without a warrant; human experimentation without informed consent; assassination attempts against foreign leaders; and lax programmatic and budgetary oversight.

<sup>59</sup> Quoted in SNIDER, *supra* note 52, at 178. Snider sees pre-1970s oversight as often “cursory at best.” ID., at 189. The report was intended to remain classified but was leaked. See PIKE COMMITTEE REPORT, *supra* note 58, at 127.

<sup>60</sup> For example, one of the first DOD Appropriations bills produced after the Church-Pike inquiries and the forging of the “accommodation” was accompanied by a report that read:

THE HOUSE APPROPRIATIONS COMMITTEE CONDUCTS VIGOROUS OVERSIGHT OF THE INTELLIGENCE BUDGET. There has been a widespread public impression that a detailed line item review of the intelligence budget has not been made in prior years. This inference is without foundation. The House Appropriations Committee review of intelligence programs is probably more sweeping and intensive in relationship to the total expenditures involved than the review of other programs of comparable magnitude in the DOD appropriation bill.

DOD Appropriations Act for 1978, H.R. Rep. 95-451, at 40 (1977) (report of the House Appropriations Committee). The Senate committee in its report agreed and noted that the Executive Branch submitted “17 volumes and over 3,000 pages” of budget request justifications. S. Rep. 95-325, at 103-4 (1977).

Church-Pike inquiries led many across the political spectrum to believe that trust in the Executive Branch and in informal congressional oversight had been misplaced. A landmark new constitutional “accommodation” on intelligence was forged between the Executive and Legislative Branches. Its purpose was to allow detailed, legally binding congressional oversight and legislative regulation while protecting classified information. (As discussed in coming sections, the courts were also involved in the adjustment of inter-branch relations via the Foreign Intelligence Surveillance Act (FISA) of 1978).

A central innovation of the post-Church-Pike “accommodation” was classified addenda.<sup>61</sup> Starting with fiscal year 1979, newly created congressional intelligence committees<sup>62</sup> began governing intelligence programs – and particularly what is now called the National Intelligence Program (NIP) – via an annual Intelligence Authorization Act (IAA).<sup>63</sup> The IAAs have usually involved fairly brief Public Law text and short associated committee reports about CIA pensions and other matters of public record, plus classified report addenda regulating classified programs in depth. Because they share jurisdiction over intelligence, the defense committees also began writing classified addenda. During the same session of Congress in which the first classified addendum was created in connection with an IAA, the Appropriations Committees also began including classified addenda with their annual DOD Appropriations Act.<sup>64</sup> This largest of

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<sup>61</sup> I use the term addenda to include the several types of documents referenced in Public Laws and reports: classified *annexes, reports, appendices, schedules of authorizations or appropriations, and supplements*. Sometimes these terms as contextually used support an inference that they have distinct meanings. In other cases their precise meanings are opaque or the usage is inconsistent across bills, committees, and time. We can employ the working assumption that a classified schedule is the term most often used to denote a particular kind of addendum: a table or other listing of budget and personnel numbers, with some level of description, one that is contained in or otherwise explained by an annex, report, appendix, or supplement. *See IAA for 1985, H.R. Rep. 98-743, at 2 (1984)* (HPSCI writes that “The schedule of authorizations lists the amounts of dollars and personnel ceilings” (emphasis added)); *IAA for 1983, H.R. Rep. 97-779, at 17-18 (1982) (conf. Rep.)* (“a classified annex to this joint explanatory statement serves as a guide to the classified Schedule of Authorizations by providing a detailed description of program and budget authority contained therein as reported by the Committee of Conference. The actions of the conferees on all matters at difference between the two Houses (stated in the classified annex accompanying the House bill, and the classified report and appendix that accompanied the Senate amendment) are shown below or in the classified annex to this joint statement.”); *IAA for 1994, S. Rep. 103-115, at 2 (SSCI “has prepared a classified supplement to this Report, which contains (a) the classified annex to this Report and (b) the classified schedule of authorizations which is incorporated by reference in the Act and has the same legal status as a public law....The classified annex has the same status as any Senate Report, and the Committee fully expects the Intelligence Community to comply”*).

<sup>62</sup> The Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI). The common pronunciation of their acronyms – “sissy” and “hipsy” – has not been an asset to them.

<sup>63</sup> *See SNIDER, supra* note 52, at 179-81.

<sup>64</sup> Based on the public record of Public Law text and committee reports, it might appear as though the appropriators started producing classified addenda in connection with legislation a year earlier (FY 1978)

Congress's annual appropriations bills provides money for both the NIP and MIP. With their 1983 bill, the Armed Services Committees appear to have gotten into the practice of including classified addenda with their annual National Defense Authorization Act (NDAA). The NDAA is a massive policy bill that governs the Defense Department, including what is now called the Military Intelligence Program (MIP) supporting military operations, and authorizes funding subject to later appropriation.<sup>65</sup> When they produce classified addenda, all three varieties of committees inform all Members of Congress that they may arrange a reading session in a secure room. Very few Members read the addenda because of the time commitment and their inability to talk in public about what they read.<sup>66</sup> Some Members may prefer plausible deniability.

The practical rationale for these classified addenda is clear. As one former intelligence committee lawyer recalls, the new intelligence committees saw no good alternative means of doing substantive, detailed, binding legislative regulation of classified activities.<sup>67</sup> But as a matter of law, classified legislating is inevitably problematic.

Constitutional text, structure, and history, inter-branch interaction generally, and separation of powers doctrine as applied by the courts, are in accord: the law that Congress writes is found in bill text that becomes Public Law. The statutory text must satisfy bicameralism (passage by both houses in identical form) and presentment (signature or acquiescence by the President, with a congressional option for veto over-ride).<sup>68</sup> Reports and any other addenda written by standing committees or conference committees are separate documents, not within the four corners of the statute. Reports include prose and tables. Reports typically contain section-by-section explanatory discussion of a bill, along with other original and reproduced documents (such as bill drafts, letters, and testimony), and sometimes the additional comments of particular Members. House and Senate committees issue reports in

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than the intelligence committees (FY 1979). In reality, both kinds of committees started writing classified addenda in calendar year 1977, but the IAA for 1978 did not reach the President's desk. *See SNIDER, supra* note 52, at 179-81. This empirical study excludes materials associated with unenacted bills, and therefore materials for an IAA for 1978 are not reflected in Tables 1 and 2.

<sup>65</sup> The first reference in an NDAA statute or report appears to be in H.R. Rep. No. 97-749 (1982) (conf. report), at 97 & 104 (JES for NDAA for 1983). The Armed Services Committees did earlier write reports in connection with IAAs that reference addenda. *See, e.g.*, S. Rep. No. 95-1028, at 5 (1978) (report of the Senate Armed Services Committee regarding the IAA for 1979).

<sup>66</sup> *See SNIDER, supra* note 52, at 188; *see also* AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 103 (2011) (less than half of *intelligence committee Members* may review classified materials).

<sup>67</sup> Author interview with former General Counsel, SSCI, July 31, 2015.

<sup>68</sup> *See U.S. CONST.*, art. I, § 7, cl. 2 & 3; INS v. Chadha, 462 U.S. 919, 946 (1983) (striking down legislative veto as violation of bicameralism and presentment); Clinton v. City of New York, 524 U.S. 417, 427-29 (1998) (striking down line-item veto as violation of bicameralism and presentment).

connection with their bill drafts, but these committee reports are not voted on by the full House or Senate. Last-in-time reports are sent to the President at presentment, and most commonly take the form of a joint explanatory statement (JES) of the conferees included with a conference report's final legislative text, or increasingly often a "managers' statement" placed in the *Congressional Record* or printed by a committee after an informal House-Senate conference on differing versions of a bill.<sup>69</sup> The President signs the bill's legislative text, not the JES, nor any other report. The reports do not go into the Statutes at Large or U.S. Code. Reports are, however, enormously important in the legislative process. Congress expects that report language explaining statutory provisions and providing direction to agencies will be followed. Generally, compliance is high. Agencies know that Congress can respond to non-compliance with statutory provisions or funding restrictions. Statutory interpretation doctrine regards a conference report's JES, in particular, as often the most authoritative legislative history.<sup>70</sup> House and Senate committee reports on earlier versions of the bill are authoritative as well, provided that the bill text with which they are associated is not changed later in the legislative process, and provided that report language later in the legislative process (such as in a JES) does not supersede it.<sup>71</sup> Use of legislative history and especially reports are famously contested by textualists because these materials are not part of the statutory text,<sup>72</sup> but virtually all statutory interpreters (even textualists) use them.<sup>73</sup>

*Secret* legislative history presents a special problem. Considerations cut both ways.

On the one hand, one could argue that secret legislative history ought to be given less weight than usual because it is not public. The textualist argument that committee reports should be disfavored because Members usually do not read them would be especially strong because rank-and-file Members have even less incentive than usual to read reports they cannot access in

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<sup>69</sup> See, e.g., Explanatory Statement Regarding the Consolidated and Further Continuing Appropriations Act for 2015 (containing the 2015 DOD Appropriations Act), Cong. Rec. H9307-H10003 (Dec. 11, 2014) (example of last-in-time report not coming from a formal conference or issued by a committee).

<sup>70</sup> See \_\_\_\_

<sup>71</sup> Congress in national security legislation articulates this interpretive principle. See, e.g., 160 Cong. Rec. S6,464-65 (Dec. 9, 2014) (JES for the IAA for 2015, stating that "congressionally directed actions described in the [Senate and House reports and their classified annexes] should be carried out to the extent they are not amended, altered, substituted, or otherwise specifically addressed in either this [JES] or in the classified annex to this Statement").

<sup>72</sup> See, e.g., *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring, providing textualist critique of legislative history).

<sup>73</sup> See Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 70 (2012) (everyone, even textualists, uses legislative history); see also *King v. Burwell*, 135 S. Ct. 2480 (2015) (notable Roberts Court case relying extensively on legislative history); Christopher J. Walker, *What King v. Burwell Means for Admin. Law*, YALE J. REG BLOG (Jun. 25, 2015), <http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker> (discussing *King*'s use of legislative history).

their office nor talk about in public.<sup>74</sup> If, as Justice Scalia wrote in his *Bock Laundry* concurrence, statutory text means not what a handful of Members (on committees) think “but rather [the meaning] most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it),”<sup>75</sup> then classified report addenda can have no interpretive relevance because the “whole Congress” and the people are unaware of their contents.

Textualism would suggest that we pay no mind to Senate intelligence committee report language saying that “the intelligence community shall comply fully with the guidelines and directions contained therein.”<sup>76</sup> The role of staff in writing reports – also decried by textualists – is only stronger in the case of secret reports: intelligence committee staff are the most cloistered in Congress, and tend to get greater deference from Members because of their specialized knowledge and the complexity of intelligence issues and classification’s opacity. Finally, the Office of Management and Budget has advised that addenda are “not readily accessible to the President” at presentment, deepening concern about their legal status under the Constitution’s Presentment Clause.<sup>77</sup>

On the other hand, however, Congress could reply that this presentment problem is partially one of the President’s own making, and that what matters is that the statutes and reports often direct that classified addenda be shared with the President and agencies.<sup>78</sup> Note also who is

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<sup>74</sup> This dynamic was an important element of controversy in recent years over whether Congress effectively ratified the bulk collection of telephony metadata under § 215 of the USA PATRIOT Act when it reauthorized § 215 in the years before the 2013 leak of its aggressive interpretation by the FISC. Materials explaining that interpretation and the collection program’s operation were available to Members for review in a secure room. The leadership of the intelligence committees and critics such as Senator Wyden urged (without reference to specifics) Members to read them. The Second Circuit did not see this as sufficient notice of Congress or the more generally unaware public and rejected the ratification argument. *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 819-21 (2d Cir. 2015).

<sup>75</sup> *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring).

<sup>76</sup> IAA for 1979, S. Rep. 95-744 at 2 (1978); *accord*, DOD Appropriations Act for 1980, H.R. Rep. 96-450, at 464 (1979) (House Appropriations Committee report stating that the “classified annex...has the same force of law as the public report”).

<sup>77</sup> See IAA 2010 OMB SAP, *supra* note 10; U.S. CONST., art. I, § 7, cl. 2 (Presentment Clause). OMB was referencing an IAA. It is not clear why this unavailability happens or why it would not be inconsistent with the flexible view of the Presentment Clause adopted by OLC to allow remote electronic presentment, signature, and return of legislation. See OFFICE OF LEGAL COUNSEL, WHETHER BILLS MAY BE PRESENTED BY CONGRESS AND RETURNED BY THE PRESIDENT BY ELECTRONIC MEANS (2011) (electronic means are permissible, despite Congress’s statutory reference to paper, but also recommending explicit statutory action and inter-branch agreement to allow it); Brian Resnick, *When a Robot Signs a Bill*, NAT. J., Jan. 3, 2013, <http://www.nationaljournal.com/whitehouse/when-a-robot-signs-a-bill-a-brief-history-of-the-autopen-20130103> (discussing history of non-human signatures and controversy over President Obama’s approving bills while in Europe and Hawai’i).

<sup>78</sup> Standard statutory language in national security acts specifies that the classified addenda be shared with the President and that the President distribute the classified addenda as necessary within the Executive

doing classified statutory interpretation: Executive Branch agencies with access to the classified legislative history, rather than the courts that have created the sunlight-assuming statutory interpretation doctrines, and that are unlikely ever to see a case involving a classified legislative addendum due to the state secrets doctrine and other barriers to adjudication of classified matters. Further, a powerful argument for imbuing classified addenda with greater weight than normal legislative history is grounded in a purposivist reading of the record, namely the four decade Legislative-Executive project of allowing detailed legislative regulation of programs and spending without endangering classified information. Congressional management of secret programs can be more granular and therefore more effective in secret. If legal and programmatic details cannot effectively be engaged legislatively in public nor in secret, then the Legislative-Executive constitutional “accommodation” on classified activities falls apart. Congress’s oversight and constitutional power of the purse will suffer. If their elected Members of Congress cannot do classified legislative work, the people will become less self-governing regarding classified activities. In turn, the legitimacy of classified activities will suffer.<sup>79</sup>

The strongest argument for giving classified addenda legal effect or otherwise usually strong weight is textual. It arises from a remarkable statutory innovation, one that sets this

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Branch. *See, e.g.*, IAA for 2014, Pub. L. No. 113-126, 128 STAT. 1390 § 102(b) (2013). The reports have at times been adamant about the classified addenda accompanying the bill to the President and therefore being rightly viewed as an integral part of it. *See, e.g.*, DOD Appropriations Act for 1993, S. Rep. No. 102-408, at 349-50 (1992) (Senate Appropriations Committee report stating that “the classified annex … will be presented together with the unclassified portion of the bill to the President. They will be enacted, vetoed, or fail of enactment as one piece of legislation. The Committee expects the executive branch to comply with the annex as it would any enacted law”).

<sup>79</sup> One can infer for reasons of necessity that lawyers inside government have been having a conversation about statutory interpretation, secret law, and secret legislative history. The discussion here is a first step in a needed conversation in public. Interesting questions include how to construe together public law (of all sources) and public legislative history, together with secret law and secret legislative history. Also, what does secret legislative history mean for dynamic statutory interpretation theory? Within the intelligence world, could the addenda together comprise a sort of secret “super statute”? How could statutory interpreters without security clearances follow the principles that statutory interpretation should proceed in reverse and focus on key decisions by legislators, when the record of those decisions is largely classified? Does compartmentalization of classified information, in denying statutory interpreters (both without and perhaps with security clearances) access to all law, implicitly challenge our assumptions about legal interpretation, and particularly ideas of normative jurisprudence? Can the usual canons of statutory interpretation be applied without modification to secret legislative history? For discussion (in their non-secret law context) of some of the ideas referenced here, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1986-1987); William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); Nourse, 122 YALE L.J., *supra* note 73, at 98-108 (2012); ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION (2011); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

legislative practice apart from the classic bill text versus report language distinction: *Public Law designation of classified addenda outside the four corners of the statute as law.*

The text of annual national security statutes have not simply noted the existence of classified report addenda. Rather, virtually all annual IAAs stipulate in § 102 that funding authorizations and personnel ceilings “are those specified in the classified Schedule of Authorizations” prepared by a committee.<sup>80</sup> The most expansive incorporation language was found in the statutory text of the DOD Appropriations Acts (1991-95) and NDAs (1991-2002).<sup>81</sup> These defense Acts stated that their entire addenda were “hereby incorporated” into the statute,<sup>82</sup> in response to inconsistent agency compliance and President George H.W. Bush’s previous signing statement indicating that reports cannot have legal effect.<sup>83</sup> In the case of all three kinds of annual national security bills, report language has often underscored the point that the statutory text has “incorporated” classified addenda or significant portions thereof into statute.<sup>84</sup> Finally, in addition to the *explicit and en bloc* statutory incorporation of entire annexes

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<sup>80</sup> Standard statutory incorporation provision has been enacted in all but one IAA to date.

<sup>81</sup> And also the very first enacted IAA: it incorporated the entire classified annex into law, while subsequent IAAs incorporated only the classified schedule of authorizations. *See* IAA for 1979, Pub. L. No. 95-370, 92 Stat. 626 (1978), § 101(b).

<sup>82</sup> This initial version of a standard incorporation statutory provision (including slightly differing language in the Acts for 1991 – the annexes “shall have the force and effect of law as if enacted into law” – but identical effect) was enacted 12 times in NDAs (1991 through 2002), and five times to date in DOD Appropriations Acts (1991 through 1995).

<sup>83</sup> *See* BANKS & RAVEN-HANSEN, *supra* note 36, at 65 (1994) (Bush statement led to the first defense Act incorporation provision). The Senate Appropriations Committee explained that their “clear purpose and intent is to eliminate any ambiguity or uncertainty as to the binding legal effect” of the annexes and deny agencies an effective “line-item veto” that Congress could not over-ride via Public Law without blowing secrets. *See* DOD Appropriations Act for 1992, S. Rep. No. 102-154, at 383-85 (1991) (Senate Appropriations Committee report). *See also* DOD Appropriations Act for 1991, S. Rep. No. 101-521, at 265-66 (1990) (id.); DOD Appropriations Act for 1993, S. Rep. No. 102-408, at 349-50 (1992) (id.).

<sup>84</sup> Incorporation *report* language has been included in last-in-time reports associated with enacted bills 43 times (see Column G in Tables 1 and 2). Every enacted IAA except three (for 1979, 1985 2005) has had such a provision in a last-in-time report, for a total of 29 provisions: IAA for 1980, H.R. Rep. 96-512 (1979); IAA for 1981, H.R. Rep. 96-1350 (1980); IAA for 1982, H.R. Rep. 97-332 (1981); IAA 1983, H.R. Rep. 97-779 (1982); IAA for 1984, H.R. Rep. 98-569 (1983); IAA for 1986, H.R. Rep. 99-373 (1985); IAA for 1987, H.R. Rep. 99-952 (1986); IAA for 1988, H.R. Rep. 100-432 (1987); IAA for 1989, H.R. Rep. 100-879 (1988); IAA for 1990, H.R. Rep. 101-367 (1989); IAA for 1991, H.R. Rep. 101-928 (1990) (JES associated with vetoed bill); IAA for 1991, H.R. Rep. 102-166 (1991) (JES associated with enacted bill); IAA for 1992, H.R. Rep. 102-327 (1991); IAA for 1993, H.R. Rep. 102-963 (1992); IAA for 1994, H.R. Rep. 103-377 (1993); IAA for 1995, H.R. Rep. 103-753 (1994); IAA for 1996, H.R. Rep. 104-427 (1995); IAA for 1997, H.R. Rep. 104-832 (1996); IAA for 1998, H.R. Rep. 105-350 (1997); IAA for 1999, H.R. Rep. 105-780 (1998); IAA for 2000, H.R. Rep. 106-457 (1999); IAA for 2001, H.R. Rep. 106-969 (2000); IAA for 2002, H.R. Rep. 107-328 (2001); IAA for 2003, H.R. Rep. 107-789 (2002); IAA for 2004, H.R. Rep. 108-381 (2003); IAA for 2010, S. Rep. 111-223 (2010); IAA for 2011, H.R. Rep. 112-72 (2010); IAA for 2012, H.R. Rep. 112-87 (2011); IAA for 2013, S. Rep. 112-192

or schedules into law, the annual national security Acts have included a shifting array of one-time and repeating statutory provisions that may be reasonably read implicitly to *give the force of law to specific provisions of classified addenda*.

Congress's efforts to transform classified extra-statutory materials into Public Law have had some success in the view of the agencies they regulate. The Intelligence Community's top lawyer, ODNI General Counsel Robert Litt, wrote to an anti-secrecy blog in May 2015 to state that the classified Schedules that IAA § 102 provisions give the status of law are indeed regarded by intelligence agencies as law, with the other parts of classified addenda viewed as report language.<sup>85</sup> Regarding other provisions in IAAs and defense Acts, the Office of Management and Budget under both Republican and Democratic presidents has objected to "the continuing Congressional practice of enacting secret law."<sup>86</sup>

The Senate Appropriations Committee defended statutory designation of addenda as law by observing that such provisions have "been used on dozens of occasions to provide legally binding status, incorporating by reference matter outside of an unclassified statutory bill."<sup>87</sup> One

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(2012); IAA for 2014, S. Rep. 113-120 (2013); IAA for 2015, 160 CONG. REC. S6464-65 (daily ed. Dec. 9, 2014). Incorporation report language has been included in last-in-time reports for 12 NDAAAs: NDAA for 1991, H.R. Rep. 101-923 (1990); NDAA for 1992, H.R. Rep. 102-311 (1991); NDAA for 1993, H.R. Rep. 102-966 (1992); NDAA for 1994, H.R. Rep. 103-357 (1993); NDAA for 1995, H.R. Rep. 103-71, at 740; NDAA for 1996, H.R. Rep. 104-450 (1995); NDAA for 1997, H.R. Rep. 104-724, at 217; NDAA for 1998, H.R. Rep. 105-340, at 248; NDAA for 1999, H.R. Rep. 105-736, at 197; NDAA for 2000, H.R. Rep. 106-301, at 227; NDAA for 2001, H.R. Rep. 106-945, at 258; NDAA for 2002, H.R. Rep. 107-333, at 192. Incorporation report language has been included in two last-in-time reports associated with DOD Appropriations Acts: DOD Appropriations Act for 1991, H.R. Rep. 101-938 (1990); DOD Appropriations Act for 1993, H.R. Rep. 102-1015 (1992).

<sup>85</sup> Aftergood, *ODNI: Annexes to Intelligence Bills Are Not 'Secret Law'*, *supra* note 10, quotes email from ODNI General Counsel Robert Litt:

Each year's [IAA] contains a provision — usually Section 102 in recent years — that provides that the amounts authorized to be appropriated are those set out in the schedule of authorizations in the classified annex. It is only that schedule of authorizations that has the force of law. The remainder of the annex is report language...followed as a matter of comity, but does not have the force of law.

Litt goes on to quote IAA for 2015 § 102 and related incorporation language in the last-in-time report that accords with his reading. Note, however, that Litt does not address the NDAAAs and DOD Appropriations Acts, nor other provisions in the IAAs that one might reasonably read to give part or all of classified addenda the force of law.

<sup>86</sup> See, e.g., IAA 2010 OMB SAP, *supra* note 10, at 6 (Obama Administration, objecting to "secret laws" that inter alia require reports); NDAA 2002 OMB SAP, *supra* note 10 (George W. Bush Administration, using language quoted here in main text to object to statutory incorporation provision).

<sup>87</sup> See DOD Appropriations Act for 1992, S. Rep. No. 102-154, at 383 (1991). *Accord*, JESSICA TOLLESTUP, APPROPRIATIONS REPORT LANGUAGE: OVERVIEW OF DEVELOPMENT, COMPONENTS, AND ISSUES FOR CONGRESS, 2 (2015), available at <https://fas.org/sgp/crs/misc/R44124.pdf> ("in some cases, report language in the JES may be enacted by reference in the appropriations law that it accompanies, giving it statutory effect").

sees cross-references in other law, as well. For example, President Obama's 2009 interrogation Executive Order provides that the list of acceptable procedures is found in the U.S. Army Field Manual, an administrative handbook posted on the Defense Department website (a requirement and reference Congress recently codified into statute).<sup>88</sup> Judicial opinions similarly find facts and adopt definitions in dictionaries and other extrinsic materials. A statute blessing a classified addendum as law is different, however, precisely because of secrecy. Annual national security Public Laws point to a classified safe inside a secure room and say "the law is in there."

Even where statute does *not* attempt this legal maneuver, one can reasonably conclude that considerable influence is exerted by the portions of classified addenda that Congress does not designate as Public Law. Unclassified reports explain Congress's intentions and provide guidance, and make clear that classified reports do much the same work.<sup>89</sup> Unclassified report language also buttresses the classified addenda by stating that the classified addenda provide "directions" that must be followed.<sup>90</sup> The general perception within the national security community is that agency compliance with classified report language is high.<sup>91</sup>

How widespread has this classified addenda practice been, and how does it now operate? Close reading and empirical analysis of 36 years of references to classified addenda in Public Laws and reports shows that the extent of Congress's classified legislative work is much larger than commonly understood. Scholarly mentions of Congress's use of classified addenda are scarce, do not do empirical analysis, and do not capture how congressional practice has evolved.<sup>92</sup> The public record has sizable gaps because to date none of the classified addenda

<sup>88</sup> Exec. Ord. 13491, § 3(b) (2009); DEP'T OF THE ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), <http://fas.org/irp/DODdir/army/fm2-22-3.pdf>; NDAA for 2016, Pub. L. No. 114-92, § 1045a (2015).

<sup>89</sup> E.g., "Due to the classified nature of intelligence and intelligence-related activities, a classified annex to this joint explanatory statement serves as a guide to the classified Schedule of Appropriations by providing a detailed description of program and budget authority contained therein." H.R. REP. NO. 102-327 at 21-22 (1991) (Joint Explanatory Statement in connection with IAA for 1992).

<sup>90</sup> See, e.g., Explanatory Statement Regarding the Consolidated and Further Continuing Appropriations Act for 2015, Cong. Rec. H9307-H10003, at H9609 (Dec. 11, 2014) (last-in-time report language regarding DOD Appropriations Act for 2015).

<sup>91</sup> Interview with former General Counsel, SSCI, July 31, 2015. For discussion of intelligence and the power of the purse, see also SNIDER, *supra* note 52, at 187-91.

<sup>92</sup> See BANKS & RAVEN-HANSEN, *supra* note 36, at 52, 65 (1994) (discussing notable specific uses of the addenda in the 1980s and early 1990s); Donesa, *supra* note 17, at 111-12 (brief mention of current practice); Kutz, *supra* note 19, at 19-20 (brief survey of history); Relyea, 5 GOV'T INFO. Q., *supra* note 19, at 110-11 ("Congress has only recently succumbed to the secrecy predilection of the national security state"). Loch Johnson, a political scientist, presents data about the average duration of a congressional response to a shocking intelligence revelation, but does not study the addenda. See LOCH K. JOHNSON, SUPERVISING AMERICA'S FOREIGN POLICY: A SHOCK THEORY OF CONGRESSIONAL OVERSIGHT (2008)

have surfaced.<sup>93</sup> (Indeed, Congress has often tried to bar the President from publically disclosing classified Schedules).<sup>94</sup> However, we know enough to conclude that important classified legislative work is done, to draw conclusions on that basis, and to inform the normative work later in this article.

As the basis for analysis, I constructed a dataset for each two-year Congress since the 95<sup>th</sup> Congress (1977-78) – when classified addenda were first written – to completion of the most recent Congress, the 113<sup>th</sup>, in 2014. The data is presented in summary in Table 1 immediately below, and in detail in Table 2, found in Part VI’s methodological appendix. This study includes the three annual statutes in connection with which Congress consistently writes classified report addenda: IAAs, NDAAAs, and DOD Appropriations Acts.<sup>95</sup> The dataset focuses first on statutes, and then on reports with associated classified addenda (moving left to right in Tables 1 and 2).

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[hereinafter JOHNSON, SHOCK THEORY]. Other political scientists have done valuable empirical studies of congressional oversight of foreign policy and intelligence but do not analyze the content of intelligence legislation nor focus on the addenda. *See* LINDA L. FOWLER, WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS 1-170 (2015) (historical and empirical study of Senate Armed Services and Foreign Relations Committee hearings showing decline); ZEGART, *supra* note 66, at 32-34, 65-72, 97-100 (2011) (empirical study of intelligence oversight as measured by quantity of hearings, bills, and staff), *reviewed by* Kenneth Anderson, LAWFARE, Oct. 17, 2011 (book lacks focus on law; a “serious structural and institutional account for why Congress has so few incentives to take up intelligence oversight”), <https://www.lawfareblog.com/eyes-spies-amy-b-zegart>.

<sup>93</sup> *See* Steven Aftergood, *A Growing Body of Secret Intelligence Law*, SECRECY NEWS, May 4, 2015, <http://www.fas.org/sgp/news/secrecy/2015/05/050415.html> (stating that none of the secret committee report annexes have become public). The other branches these days must be jealous.

<sup>94</sup> It appears to be a year-by-year ban. *See* IAA for 2012, Pub. L. No. 112-87, 125 Stat. 1876 (2011), § 102(b)(3); IAA for 2013, Pub. L. No. 112-277, 126 Stat. 2468 (2012), § 102(b)(3); IAA for 2014, Pub. L. No. 113-126, 128 Stat. 1390 (2014), § 102(b)(3). The main exception to the ban is Congress’s permission for disclosure of the total budget request for the National Intelligence Program (NIP), in 50 U.S.C. § 415c. Congress’s efforts to regulate the President’s control of classified information inevitably raise questions about intrusion into the President’s constitutional powers in this area. *See* Dep’t of the Navy v. Egan, 484 U.S. 518 (1988). On the other hand, the Supreme Court has also recognized congressional authority to regulate publication of information under the Statement and Account Clause. *See* Richardson, *supra* note 36.

<sup>95</sup> IAAs are fairly short laws, focusing every time on pension funds and occasionally on amendments to the framework statute, the National Security Act of 1947, to change the Intelligence Community’s organization and authorities. IAAs can be short because the agencies part of the NIP (e.g., CIA) do virtually all their work in secret, and because the IAA’s most consequential work is done in the classified addenda. The NDAAAs and DOD Appropriations Acts also can be inferred to be doing vitally important work in their classified addenda, considering the even larger scope and dollar cost of the classified activities of DOD and its Military Intelligence Program (MIP) compared to the NIP agencies. However, the majority of the activities of DOD are not classified, and therefore are much more amendable to congressional regulation via the annual NDAA and DOD Appropriations Acts, which are large in terms of length and funding concerned.

First, the study tabulates *the number of Public Laws* that one can reasonably read to give a classified addendum in whole or in part the status of law (Column C). Second, I tabulate the *number of provisions* in these Public Laws that might reasonably be read as doing this secret law creation work (Column D). Some Acts have more than one such provision. Third, to zero in on arguably the most consequential statutory provisions, I track the use of *statutory incorporation provisions*: the number of times statutes use often standard language to endeavor to incorporate en bloc into the statute or otherwise put the force of law behind a classified addendum in full or in inferentially sizable part (Column E). Moving on to reports and their classified addenda, this study fourth tallies use of similar *incorporation report language* in last-in-time reports (Column G), usually Joint Explanatory Statements associated with conference reports of enacted laws. (The study excludes legislation that does not become law). Fifth, on the basis of references in statute and reports, I tabulate the *number of last-in-time reports with associated classified addenda* (Column H). Sixth, I tabulate the *number of committee reports with classified addenda coming earlier in the legislative process* (Column J). Finally, Table 2 totals these latter two categories to yield the *grand total number of reports with classified addenda* associated with bills that become law (Column H plus Column J equals Column L), again based on references in statutes and reports.

**TABLE I**  
**TRACKING CONGRESS'S LIBRARY OF SECRET LAW: TOTALS EACH CONGRESS**

<i>Column A</i> <b>Congress (calendar year)</b>	<i>Column B</i> <b>Total Number of Laws Enacted</b>	<i>Column C</i> <b>Statutes creating secret law: Number of <u>Public Laws</u> reasonably read to give a classified addendum in part or in full the status of law</b>	<i>Column D</i> <b>Instances of creation of secret law: Number of <u>times</u> <u>Public Law</u> can reasonably be read to give a classified addendum in part or in full the status of law</b>	<i>Column E</i> <b>Instances of en bloc creation of secret law: Number of <u>times</u> <u>Pub. L.</u> <u>incorporates</u> entire classified Schedule, Annex, or large part thereof into statute</b>	<i>Column G<sup>96</sup></i> <b>Number of <u>times</u> controlling report language references <u>incorporation</u> of entire classified Schedule, Annex, or large part thereof into statute</b>
<b>TOTAL</b>	<b>10,082</b>	<b>68</b>	<b>124</b>	<b>61</b>	<b>43</b>
95 <sup>th</sup> Cong. (1977-1978)	804	1	1	1	0
96 <sup>th</sup> Cong. (1979-1980)	736	2	4	3	2
97 <sup>th</sup> Cong. (1981-1982)	529	2	4	4	3
98 <sup>th</sup> Cong. (1983-1984)	677	2	2	2	1
99 <sup>th</sup> Cong. (1985-1986)	687	2	3	2	3
100 <sup>th</sup> Cong. (1987-1988)	761	2	4	2	2
101 <sup>st</sup> Cong. (1989-1990)	665	4	6	3	3
102 <sup>nd</sup> Cong. (1991-1992)	610	7	7	7	4
103 <sup>rd</sup> Cong. (1993-1994)	473	6	9	6	4
104 <sup>th</sup> Cong. (1995-1996)	337	4	7	4	3
105 <sup>th</sup> Cong. (1997-1998)	404	4	6	4	4
106 <sup>th</sup> Cong. (1999-2000)	604	4	6	4	4
107 <sup>th</sup> Cong. (2001-2002)	383	3	6	3	3
108 <sup>th</sup> Cong. (2003-2004)	504	4	14	2	1
109 <sup>th</sup> Cong. (2005-2006)	483	2	4	0	0
110 <sup>th</sup> Cong. (2007 - Jan. 2009)	460	4	4	1	0
111 <sup>th</sup> Cong. (2009-2010)	385	2	2	1	1
112 <sup>th</sup> Cong. (2011 - Jan. 2013)	284	6	16	5	3
113 <sup>th</sup> Cong. (2013 - Jan. 2015)	296	7	19	7	2

<sup>96</sup> Column designations in Table 1 track Table 2. Table 1 omits Column F of Table 2.

Based on qualitative and quantitative analysis, this study’s overarching conclusion is that *Congress for three and a half decades has been endeavoring to create what can reasonably be described as secret law*. As discussed below, these efforts have been longstanding and extensive, have been a bipartisan practice, have shown consistency and change over time, and are grounded in Congress’s power of the purse.

*First, the data is clear that Congress’s classified legislative work is a limited but longstanding and significant exception to the norm of publication of legislated law.* Over 36 years and 18 Congresses during which 10,082 laws were enacted, Congress wrote 68 Public Laws reasonably read to give classified materials legal force. At least one such Act was enacted every Congress and at most seven, and on average more than three per year. In those 68 Public Laws, Congress wrote 124 provisions that reasonably appear to create secret law: at least one per Congress and at most 19, and on average more than three per year. Three different annual bills have been involved, six standing committees, and six presidents and 37 congressional majorities of both parties.<sup>97</sup> About half (61 of 124) of the instances of creation of secret law involve en bloc incorporation into law of an entire classified Schedule or annex, or otherwise grant the status of law en bloc to some inferentially sizable part of a classified addendum.

Meanwhile, the statutory and report texts associated with the three annual intelligence and defense Acts show references to classified addenda associated with 94 last-in-time reports (see Columns H and I in Table 2). When committee reports coming earlier in the legislative process are included (see Columns J and K in Table 2), the total rises to at least 271 reports with classified addenda since 1978 – at most 19 per Congress, and on average more than seven per year (see Column L in Table 2). Part VI.A.3’s methodological discussion explains why the true total number of classified addenda created by Congress is somewhat higher, due to gaps in the public record and this study’s conservative methodology.

Without question, Congress has for nearly four decades been endeavoring to do classified legislating. Whether we should decide that Congress has succeeded in creating law in the classified addenda as a formal matter is a question of statutory interpretation, admitting multiple reasonable views, and varying across the wide variety of provisions this study has identified.<sup>98</sup> Textualists might be satisfied by explicit statutory language giving addenda legal force, especially incorporation provisions. Textualists may leave to the side ambiguous provisions that purposivist considerations grounded in the four decade Legislative/Executive “accommodation”

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<sup>97</sup> Each numbered Congress has a majority in each chamber, so 18 Congresses means 36 majorities. We count 37 chamber majorities here because the Senate during the 107th Congress had two majorities: first a Republican majority in a 50-50 Senate that depended on Republic Vice President Dick Cheney’s tie breaking vote, and then a Democratic majority after Sen. Jim Jeffords of Vermont switched to the Democratic caucus in mid-2001.

<sup>98</sup> See Part II for mention of lines of thought about the “what is law” question.

might read more strongly. On the other hand, many interpreters might decide none of these provisions technically create law in the addenda due to bicameralism and presentment concerns, or due to discomfort with secret law as inconsistent with the constitutional norm against secret law (see Part II for discussion). As explained in greater depth in Part VI.A's methodological discussion, this study has excluded many ambiguous references, but in view of the practical legal effect of the addenda, to allow for a variety of readings of the statutory text, and to capture the data for further analysis, this study has scored statutory provisions where the statutory text may reasonably be read facially together with purposivist considerations to give addenda provisions legal force.

*A second major conclusion of this study is that use of classified addenda has been a bipartisan project without evident partisan correlation.* Enactment of statutory provisions reasonably read to give legal force to the addenda (as shown in Column D) has spiked highest during sole Republican control of both the Presidency and Congress (14 provisions enacted in 2003-04), under a Democratic President and divided Congress (16 provisions enacted 2011-13), and under a Democratic President and a Republican Congress (19 provisions enacted 2013-15). Similarly, enactment of statutory provisions reasonably understood as creating secret law was at its lowest levels under both Democratic and Republican presidents (1 provision enacted 1977-78 under a Democratic President, and 2 provisions enacted in 1983-84 under a Republican President and in 2009-10 under a Democratic President), under sole Democratic control of Congress (1 provision in 1977-78, and 2 provisions in 2009-10), and under divided control of Congress (2 provisions in 1983-84). There was a somewhat higher level of enactments but still a noticeable dip under sole Republican control of the presidency and Congress (4 provisions enacted in 2005-06, down from 14 in 2003-4). There is not one party that plainly correlates pro or con with legislative secret law, nor one formula for unified or divided control of the Legislative and Executive Branches.

*Third, looking deeper than the 1979-2014 totals and beyond partisan control, there is both consistency and change, with Congress accelerating its designations of portions of classified addend as law in recent years, and in terms of scope using the classified addenda for more than regulating intelligence programs.*

Consistency has marked the work of the intelligence committees via their IAAs. Every enacted IAA but one has carried a statutory provision giving a classified Schedule of Authorizations en bloc the force of law (and two IAAs included two such provisions).<sup>99</sup> Of those

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<sup>99</sup> This standard incorporation statutory provision has been enacted every year since the IAA for 1979 with the exception of the IAA for 2010 and four years for which no IAA was enacted (2006-09). The provision is in § 101 in IAAs for 1979 and 1980 and § 102 thereafter. The language is slightly different and more limited in the 1979 IAA (“The classified annex...shall be deemed to reflect the final actions of Congress with respect to the authorization of appropriations”) than in all enacted IAAs thereafter that contain the provision (“The amounts authorized to be appropriated under this Act, and the authorized personnel ceilings...are those specified in the classified Schedule of Authorizations”). Meanwhile, in two

32 IAAs, the vast majority also were accompanied by unclassified last-in-time report language emphasizing that § 102 of the IAA makes the classified Schedule incorporated into the statutory text, or otherwise indicating that the Schedule provides budget authority.<sup>100</sup> (Here again, for some IAAs the last-in-time reports have multiple passages doing incorporation work). The primary disruption to the regularity of the IAAs was the lack of enactment of an IAA for 2006

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IAAs, for 1982 and 1983, Congress included an additional statutory incorporation provision – § 401 – that authorized additional sums for the preceding fiscal year as “as specified for that purpose in the classified Schedule of Authorizations.” *See* IAA for 1979, Pub. L. No. 95-370, 92 Stat. 626 (1978), § 101(b); IAA for 1980, Pub. L. No. 96-100, 93 Stat. 783 (1979), § 101(b); IAA for 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980), § 102; IAA for 1982, Pub. L. No. 97-89, 95 Stat. 1150 (1981), secs. 102 & 401; IAA for 1983, Pub. L. No. 97-269, 96 Stat. 1142 (1982), secs. 102 & 401; IAA for 1984, Pub. L. No. 98-215, 97 Stat. 1473 (1983), § 102; IAA for 1985, Pub. L. No. 98-618, 98 Stat. 3298 (1984), § 102; IAA for 1986, Pub. L. No. 99-169, 99 Stat. 1002 (1985), § 102; IAA for 1987, Pub. L. No. 99-569, 100 Stat. 3190 (1986), § 102; IAA for 1988, Pub. L. No. 100-178, 101 Stat. 1009 (1987), § 102(b); IAA for 1989, Pub. L. No. 100-453, 102 Stat. 1904 (1988), § 102; IAA for 1990, Pub. L. No. 101-193, 103 Stat. 1701 (1989), § 102; IAA for 1991, Pub. L. No. 102-88, 105 Stat. 429 (1991), § 102; IAA for 1992, Pub. L. No. 102-183, 105 Stat. 1260 (1991), § 102; IAA for 1993, Pub. L. No. 102-496, 106 Stat. 3180 (1992), § 102; IAA for 1994, Pub. L. No. 103-178, 107 Stat. 2024 (1993), § 102; IAA for 1995, Pub. L. No. 103-359, 108 Stat. 3423 (1994), § 102; IAA for 1996, Pub. L. No. 104-93, 109 Stat. 961 (1995); IAA for 1997, Pub. L. No. 104-293, 110 Stat. 3461 (1996), § 102; IAA for 1998, Pub. L. No. 105-107, 111 Stat. 2248 (1997), § 102; IAA for 1999, Pub. L. No. 105-272, 112 Stat. 2396 (1998), § 102; IAA for 2000, Pub. L. No. 106-120, 113 Stat. 1606 (1999), § 102; IAA for 2001, Pub. L. No. 106-567, 114 Stat. 2831 (2000), § 102; IAA for 2002, Pub. L. No. 107-108, 115 Stat. 1394 (2001), § 102; IAA for 2003, Pub. L. No. 107-306, 116 Stat. 2283 (2002), § 102; IAA for 2004, Pub. L. No. 108-177, 117 Stat. 2599 (2003), § 102; (no IAA was enacted for 2006-9); (IAA for 2010 lacked the provision); IAA for 2011, Pub. L. No. 112-18, 125 Stat. 223 (2011), § 102; IAA for 2012, Pub. L. No. 112-87, 125 Stat. 1876 (2011), § 102(a); IAA for 2013, Pub. L. No. 112-277, 126 Stat. 2468 (2012), § 102; IAA for 2014, Pub. L. No. 113-126, 128 Stat. 1390 (2014), § 102; IAA for 2015, Pub. L. No. 113-293, 128 Stat. 3990 (2014), § 102.

<sup>100</sup> The IAA’s standard “incorporation” last-in-time *report* language – see *supra* note 84 – evolved and became more explicit over the years. *Compare* IAA for 1979, H.R. Rep. 95-1420, at 1-2 (1978) (Conf. Rep.) (“The classified annex to the joint explanatory statement...shall be deemed to reflect the final action of the Congress”); IAA for 1980, H.R. Rep. 96-512, at 5 (1979) (Conf. Rep.) (“a classified annex to this joint explanatory statement serves as a guide to the classified Schedule of Appropriations by providing a detailed description of program and budget authority contained therein”); IAA for 1999, H.R. Rep. 105-780 (1998) (Conf. Rep.) (“The classified Schedule of Authorizations is incorporated into the Act”), IAA for 2015, 160 Cong. Rec. S6464-65 (daily ed. Dec. 9, 2014) (JES) (“The classified Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law”).

The House and Senate committee reports generally include incorporation report language as well, reinforcing Congress’s intent. *See, e.g.*, IAA for 1996, H.R. Rep. 104-427, at 10 (1995) (“The Schedule of Authorizations contains the dollar amounts and personnel ceilings for the programs authorized by the bill. The Schedule is directly incorporated into, and is an integral part of, the bill”), *and* IAA for 1996, S. Rep. 104-97, at 2 (1995) (“the classified schedule of authorizations...is incorporated by reference in the Act and has the same legal status as a public law”).

through 2009, and the solitary lack of an incorporation provision in the IAA for 2010, due in part to controversy over post-9/11 intelligence programs.<sup>101</sup>

After a post-9/11 spike, a dip in enactment of provisions purporting to create secret law was produced by the IAA interregnum, combined with changes in the pattern of NDAA and DOD Appropriations provisions. NDAAAs for 1991 through 2002 carried statutory text that “incorporated” its entire Classified Annex into Public Law.<sup>102</sup> DOD Appropriations Acts from 1991 to 1995 had equally expansive incorporation provisions.<sup>103</sup> References to classified addenda continued thereafter, but the Armed Services and Appropriations Committees halted explicit full statutory incorporation of the entire annex. The reports do not say, but this may

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<sup>101</sup> During this period the Appropriations and Armed Services Committees resumed a comparatively larger role in conducting oversight via the classified addenda to their bills. A blanket authorization for intelligence programs was provided via a single sentence in annual DOD Appropriations Acts. Some Members maintain that this process disruption contributed to the mismanagement and cancellation of a costly satellite program. *See* RICHARD E. GRIMMETT, INTELLIGENCE AUTHORIZATION LEGISLATION CRS Report for Congress R40240, May 21, 2012, <http://fpc.state.gov/documents/organization/191874.pdf>. Regarding 2010 in particular, there was no standard incorporation provision in the Act because that IAA was not enacted until the fiscal year was over. *See* IAA for 2011, H.R. REP. NO. 112-72 at 10 (2011) (House intelligence committee report, which functioned as the last-in-time report for that IAA, explaining timing of IAA for 2010, its lack of a classified annex for that reason, and authorization via appropriations Acts instead when no IAA enacted).

<sup>102</sup> The NDAAAs eventually settled on a standard place for this provision in § 1002. In the NDAA for 1991, it states that the entire Classified Annex (not just a Schedule of Authorizations) “shall have the force and effect of law as if enacted into law.” In the NDAAAs for 1992 through 2002, the provision similarly states that the entire Classified Annex “is hereby incorporated into this Act.” *See* NDAA for 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990), § 1409(a); NDAA for 1992, Pub. L. No. 102-190, 105 Stat. 1290 (1991), § 1005; NDAA for 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992), § 1006; NDAA for 1994, Pub. L. No. 103-160, 107 Stat. 1547 (1993), § 1103; NDAA for 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), § 1003; NDAA for 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995), § 1002; NDAA for 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996), § 1002; NDAA for 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997), § 1002; NDAA for 1999, Pub. L. No. 105-261, 112 Stat. 1920 (1998), § 1002; NDAA for 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999), § 1002; NDAA for 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000), § 1002; NDAA for 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); § 1002.

<sup>103</sup> The DOD Appropriations Acts did not settle on a standard place for this provision, unlike the IAA in § 102 and NDAAAs in § 1002. Tracking the NDAAAs, in the DOD Appropriations Act for 1991 the provision states that the entire Classified Annex (not just a Schedule of Authorizations) “shall have the force and effect of law as if enacted into law.” In the Acts for 1992 through 1995, the provision similarly states that the entire Classified Annex “is hereby incorporated into this Act.” For the provisions, see DOD Appropriations Act for 1991, Pub. L. No. 101-511, 104 Stat. 1856 (1990), § 8111; DOD Appropriations Act for 1992, Pub. L. No. 102-172, 105 Stat. 1150 (1991), § 8124; DOD Appropriations Act for 1993, Pub. L. No. 102-396, 106 Stat. 1876 (1992), § 9126; DOD Appropriations Act for 1994, Pub. L. No. 103-139, 107 Stat. 1418 (1993), § 8108; DOD Appropriations Act for 1995, Pub. L. No. 103-335, 108 Stat. 2599 (1994), § 8084. As noted below, in recent years the DOD Appropriations Act’s text also appears to give budget numbers in the classified addenda the force of law by barring deviations from them.

have been due to Executive Branch objections that this practice would “create ‘secret law.’”<sup>104</sup> Assuredly operating too was the usual agency resistance to any statutory constraints. In the 2000s and 2010s, the defense Acts included repeating and ad hoc provisions reasonably read to put force of law behind parts of their annexes, including in connection with post-9/11 wars.<sup>105</sup>

In recent years, the defense Acts have employed new recurring provisions that have some of the effect of the 1990s-era explicit full “incorporation” language. NDAAAs in five of the most recent seven years statutorily authorize spending at the dollar amounts in funding tables in classified annexes.<sup>106</sup> DOD Appropriations Acts starting with 2012 statutorily bar movement of money among accounts that net deviates from the budget levels in the classified annexes.<sup>107</sup> Statutorily barring change to budget levels gives those levels the force of law.

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<sup>104</sup> See IAA 2010 OMB SAP, *supra* note 10, at 6 (according to OMB, the intelligence community has “consistently opposed [incorporation] provisions on the grounds that they are unnecessary and create ‘secret law’....The [intelligence community] and its oversight committees have successfully worked together over the years to resolve committee concerns without incorporation into law of the classified annex.”); NDAA 2002 OMB SAP, *supra* note 10 (also complaining of congressional secret law).

<sup>105</sup> Legal force for classified reporting requirements, for example: starting with the 2004 Act, DOD Appropriations Acts have for 12 straight years instead directed the Secretary of Defense to report quarterly “on certain matters as directed in the classified annex.” DOD Appropriations Act for 2004, § 8082; DOD Appropriations Act for 2005, § 8081; DOD Appropriations Act for 2006, § 8073; DOD Appropriations Act for 2007, § 8064; DOD Appropriations Act for 2008, § 8066; DOD Appropriations Act for 2009, § 8065; DOD Appropriations Act for 2010, § 8065; DOD Appropriations Act for 2011, § 8062; DOD Appropriations Act for 2012, § 8061; DOD Appropriations Act for 2013, § 8060; DOD Appropriations Act for 2014, § 8060; DOD Appropriations Act for 2015, § 8062.

<sup>106</sup> The new NDAA (partial) statutory incorporation language gives the force of law to dollar amounts in funding tables classified annexes. See NDAA for 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008), § 1005 (with slightly more explicit force of law language than provisions in the ensuing years: amounts are “hereby authorized by law to be carried out to the same extent as if included in the text of the Act”); NDAA for 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009), § 4001; NDAA for 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2012), § 4001; NDAA for 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), § 4001; NDAA for 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014), § 4001.

<sup>107</sup> The new DOD Appropriations Act (partial) statutory incorporation language bars deviation from the numbers in tables in the classified annexes. See DOD Appropriations Act for 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011), § 8093; DOD Appropriations Act for 2013, Pub. L. No. 113-6, 127 Stat. 198 (2012), § 8090; DOD Appropriations Act for 2014, Pub. L. No. 113-76, 128 Stat. 5 (2013), § 8089; DOD Appropriations Act for 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014), § 8094 (“None of the funds provided for the National Intelligence Program in this or any prior appropriations Act shall be available for obligation or expenditure through a reprogramming or transfer...that results in a cumulative increase or decrease of the levels specified in the classified annex accompanying the Act....”). (For a similar provision, see IAA for 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980), § 103). In Table 2, these are designated “repro” provisions. A few caveats: this provision applies only to the budget figures, not the entire classified annex, unlike in the provisions from the early 1990s; it is limited to the National Intelligence Program (NIP) authorized by the IAAs and directed by the DNI and excludes the massive Military Intelligence Program (MIP) authorized by the NDAAAs and directed by DOD; funds can be

These new, narrower incorporation provisions in the defense Acts have been accompanied during the present decade by a new sharp spike in statutory provisions giving legal force to particular parts of classified addenda. In the last two Congresses (2011-14), Congress has enacted more secret law-creating statutory provisions (35) than in the first eight Congresses (1977-92) of the practice’s history combined. The last Congress (2013-14) was the busiest yet. The public record does not show this phenomenon being brought to Congress’s attention, and Congress has not volunteered an explanation. Inferentially, one driver may be the narrower incorporation provisions in the defense Acts: now that they are not incorporating their entire classified annexes into law and instead only the classified budget caps, the NDAs and DOD Appropriations Acts may be turning to individual Public Law provisions to give legal force to individual classified directives. However, this would not explain the uptick in secret law-producing statutory provisions in the IAAs, which continue to use the same incorporation language as in decades past. A better explanation may be a greater overall regulatory appetite in Congress regarding intelligence. Perhaps the hyper-partisan trajectory of Congress and the nation’s political culture, together with its deep disruption of the legislative “regular order,” are playing a role, as well. These are speculations, however. More information from Congress would be valuable.

Meanwhile, the substantive reach of the classified addenda appears to have spread beyond intelligence programs. The Intelligence, Armed Services, and Appropriations Committees share jurisdiction over intelligence programs, and the practice of using classified addenda originated with new “accommodation” between Congress and the Intelligence Community post-Church-Pike. However, the defense Acts and their reports reference other DOD activities as well, ones that on the face of the Public Law are not clearly confined to intelligence. Examples include electronic warfare and missile programs, missile defense programs (derisively labeled “Star Wars” in the 1980s), and military operations in Iraq.<sup>108</sup> Secrecy is useful, and not surprisingly the Armed Services and Appropriations Committees appear to have made use of it more broadly in their regulation of the Pentagon.

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moved so long as they net out (make no “cumulative increase or decrease of the levels specified”); and, the provision goes on to make an exception if the intelligence committees are informed in advance.

Reprogramming (“repros”) and transfers are a regular part of the defense budget cycle. Reprogrammings are movements of funds within appropriations accounts, while transfers are movement of funds across accounts. *See JESSICA TOLLESTUP, CONGRESSIONAL RESEARCH SERVICE, APPROPRIATIONS REPORT LANGUAGE: OVERVIEW OF DEVELOPMENT, COMPONENTS, AND ISSUES FOR CONGRESS 1 (2015),* <https://fas.org/sgp/crs/misc/R44124.pdf>.

<sup>108</sup> *See, e.g.*, NDAA for 1985, H.R. Rep. 98-1080, at 258 (1984) (JES referencing discussion of electronic warfare programs in the classified annex); NDAA for 1987, H.R. Rep. 99-1001, at 383 (1986) (JES stating that restrictions on Advanced Cruise Missile program are in classified annex); NDAA for 1988, H.R. Rep. 100-58, at 143 (1987) (House committee report states that details regarding \$75 million for a laser missile defense program are found in classified annex).

*This study's fourth broad finding is that Congress has been doing its classified legal work at the apex of its constitutional powers – the power of the purse – and doing more than handing agencies cash.*

Congress has near-plenary power to control expenditure of public funds.<sup>109</sup> Through funding provisions, Congress can create, constrain, expand, or kill programs. With the salient exception of Congress's effort to designate part or all of classified addenda as Public Law, Congress's legislative work regarding classified activities is otherwise largely identical to the Legislative-Executive federal budget cycle generally. The President's budget request includes detailed "budget justifications" for classified activities, an assumption regarding intelligence spending is often implicitly included the Concurrent Resolution on the Budget, the authorizing and appropriations committees conduct (closed and open) hearings, the committees conduct closed markups in which classified addenda and statutory text are amended, the bills are considered on the House and Senate floors and their differences are worked out in House-Senate (formal and informal) conferences, and recurring statutory text directs that the classified addenda be shared with the President and agencies along with bills.<sup>110</sup> Administration officials comment on draft classified addenda in a manner similar to their comments on draft statutory text, and Statements of Administration Policy (SAPs) from the Office of Management and Budget sometimes threaten veto of a bill based on the contents of classified addenda.<sup>111</sup> Agencies commonly return to Congress before the next full budget cycle with supplementary funding and legislative authority requests for classified programs, just as they do for unclassified ones.<sup>112</sup>

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<sup>109</sup> See U.S. CONST., art. I, § 9, cl. 7 (Appropriations Clause); U.S. CONST., art. I, § 8, cl. 1 (Tax and Spend Clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (expansive view of Congress's ability to condition funding); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 595 (1988) (offering a general theory of Congress's appropriations power and its contours).

<sup>110</sup> For one budget year in the 1970s, the Executive Branch submitted more than a dozen budget justification volumes and over 3,000 pages of material to Congress. See DOD Appropriations Act for 1978, S. Rep. 95-325, at 103-4 (1977) (Senate Appropriations Committee report). A reasonable inference is that Executive Branch budget submissions would not have become less extensive as congressional oversight has become better established and if anything more intensive over the decades. For a recent list of the SSCI's closed and open hearings, see SSCI, Hearings, <http://www.intelligence.senate.gov/hearings> (last accessed Nov. 11, 2015). For a recent description of closed markup at which a classified annex was amended, see IAA for 2013, S. Rep. 112-192 at 16-17 (2012) (SSCI report). For example of a recurring provision directing sharing of classified addenda with the President, and with agencies by the President, see IAA for 2015, Pub. L. 113-293, § 102(b) (2014).

<sup>111</sup> See, e.g., S. Rep. No. 112-192, *supra* note, at 30 (excerpted letter from Director of National Intelligence to intelligence committees regarding proposed classified legislative provisions); IAA for 2010 OMB SAP, *supra* note 10, at 1, 6 (OMB veto threat based *inter alia* on funding authorizations in classified annexes, with detailed objections to be provided "via classified correspondence").

<sup>112</sup> For mention of how supplementary appropriations increased the CIA's budget in the late 1990s and after 9/11, see SNIDER, *supra* note 52, at 186-87.

IAA report language some years states that “details of the Schedule are explained in the classified annex,”<sup>113</sup> informing the common understanding that the classified Schedules are tables showing budget and personnel limits. However, the public record suggests that the classified Schedules deemed to be Public Law are more than “just a pile of numbers” and Congress is using its power of the purse in the classified addenda to address programmatic details. A passage in the Joint Explanatory Statement of the Conferees regarding the 1990 IAA states that “the Classified Schedule of Authorizations prohibits use of the CIA’s Reserve for Contingencies” for covert involvement in Nicaragua’s 1990 elections.<sup>114</sup> In its programmatic specificity, this report language accords with public accounts of Rep. Charlie Wilson’s use of classified appropriations to fund and manage a covert action in Afghanistan against the USSR.<sup>115</sup>

A provision in the original version of the Joint Explanatory Statement (JES) for the 1991 IAA has implications beyond a single program or fiscal year. This report language stated that the conferees “believed it was not necessary to specify...in the statute” that “any limitation, restriction, or condition set forth in any footnote to the amounts specified in the classified Schedule of Authorizations was itself part of such Schedule” – and therefore incorporated into Public Law. Footnotes deemed law could do a lot of legal work. Interestingly, this report language appeared only in the original JES associated with the 1991 IAA. After President George H.W. Bush pocket-vetoed the bill due to a dispute about covert action, the paragraph was omitted when the statement was re-filed prior to enactment of a mildly revised 1991 IAA.<sup>116</sup> Even so, the original statement provided a fleeting glimpse behind the curtain, suggesting that Congress has been doing more legal work in the Schedules than simply handing agencies cash.

In the case of the NDAs and DOD Appropriations Acts, where their statutory text incorporates into Public Law their entire Classified Annex – not just its Classified Schedule of Authorizations or Appropriations – the potential room for secret legislating is potentially even

<sup>113</sup> See, e.g., H.R. REP. NO. 105-350 at 18 (1997) (JES in connection with IAA for 1998).

<sup>114</sup> H.R. REP. NO. 101-367, at 20 (1989) (Joint Explanatory Statement for IAA for 1990). We can infer that this zero-out might be accomplished by a table showing zero funding for that line item, or through written text appended or footnoted to it. Note that this report language surfacing work done in the classified Schedule regarding the Nicaraguan election is in addition to the Public Law text of § 104 of the 1990 IAA, which conditions funding for support for the Nicaraguan resistance fighters (“Contras”). This shows detailed programmatic regulation.

<sup>115</sup> See generally, GEORGE CRILE III, CHARLIE WILSON’S WAR: THE EXTRAORDINARY STORY OF THE LARGEST COVERT OPERATION IN HISTORY (2003) (account of Rep. Wilson’s work on the covert action); “Charlie Wilson’s War,” Universal Studios (2007) (dramatization).

<sup>116</sup> Compare Joint Explanatory Statements in H.R. REP. NO. 101-928 at 20 (1990) (footnote reference) with H.R. REP. NO. 102-166 at 22 (1991) (omitting footnote reference). For discussion of the pocket veto, see SNIDER, *supra* note 52, at 156.

greater. NDAs with standard en bloc incorporation provisions also stipulated that the classified authorizations come with “such terms, conditions, limitations, restrictions, and requirements as are set out for that program, project, or activity in the Classified Annex.”<sup>117</sup>

In addition to standard incorporation provisions, other individual provisions in the three varieties of annual national security statutes effectively designate portions of classified addenda as law, often in connection with spending. Many of these provisions facially read to be about only the internal management of spy agencies, authorizing and limiting funding and personnel levels (but of course we cannot read the addenda provisions, nor any secret interpretations of these secret legislative authorities).<sup>118</sup> Other ad hoc Public Law provisions are more interesting. Some inferentially suggest potential impact outside the walls of intelligence agencies. At the height of the 2003-11 U.S. war in Iraq, for example, statutory provisions in DOD Appropriations Acts earmarked \$4.8 billion for “classified programs, described...in the classified annex.”<sup>119</sup> Speculatively, those classified programs could involve any or all of the following: intelligence collection, information sharing, clandestinely influencing foreign public opinion, or direct action to include lethal force. One funding provision blesses a program with potential domestic implications. The DOD Appropriations Act for 2004 terminated funding for the Terrorism Information Awareness Program, a rebranded version of Total Information Awareness (TIA), a controversial DOD big data integration and analysis program focused within the United States.<sup>120</sup> The same sentence of the Act goes on to authorize a program for “Processing, analysis, and collaboration tools for counterterrorism foreign intelligence, as described in the Classified

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<sup>117</sup> This language is present in the NDAs for 1992 through 2002. *See* supra note 102.

<sup>118</sup> See, e.g., provisions limiting the availability of funds for the Community Management Staff of the CIA: IAA for 1994, § 104; IAA for 1995, § 103; IAA for 1996, § 104; IAA for 1998, § 104; IAA for 1999, § 104; IAA for 2000, § 104; IAA for 2001, § 104; IAA for 2002, § 104; IAA for 2003, § 104; IAA for 2004, § 104. After management of the intelligence community was transferred from CIA to ODNI in the Intelligence Reform and Terrorism Prevention Act of 2004, this standard IAA provision started referencing community management accounts at ODNI, but was enacted less consistently. *See* IAA for 2005, § 104; IAA for 2011, § 103; IAA for 2012, § 104; IAA for 2014, § 104. Other provisions were more ad hoc. *See, e.g.*, IAA for 2013, § 103 (authorizes and limits DNI authority to adjust personnel limits in the classified Schedule of Authorizations).

<sup>119</sup> DOD Appropriations Act for 2005, Pub. L. No. 108-287, 119 Stat. 951, 1005 (2004) (earmarking \$1.8 billion); DOD Appropriations Act for 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2733 (2005) (earmarking \$3 billion).

<sup>120</sup> For discussion, *see* AM. CIVIL LIBERTIES UNION, *Congress Dismantles Total Information Awareness Spy Program*, Sept. 25, 2003, <https://www.aclu.org/news/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-calls?redirect=national-security/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-> (praising passage of Act); Jeffrey Rosen, *Total Information Awareness*, N.Y. TIMES, Dec. 15, 2002, <http://www.nytimes.com/2002/12/15/magazine/15TOTA.html> (“the most sweeping effort to monitor the activity of Americans since the 1960s” via datamining U.S. person communications and records).

Annex.”<sup>121</sup> The statute limits the new program to targets outside the United States or non-U.S. citizens.<sup>122</sup> In light of the uproar prompting the provision, one wonders if classified stipulations govern the new program regarding non-citizen U.S. persons protected by the Constitution.

References in scholarly works and media stories to provisions in classified addenda often leave unclear whether such provisions are found in the parts of the classified addenda incorporated into law or left merely as classified report language. Examples include provisions in IAA addenda governing the CIA’s drone program, funding, and covert action.<sup>123</sup>

In summary, based on close examination and empirical analysis of Public Laws and their unclassified reports, we can conclude that Congress for three and a half decades has been intentionally endeavoring to create what can reasonably be described as secret law. Whether or not a legislative report’s classified addendum or a part thereof can truly be law, the Legislative/Executive “accommodation” and the comments of ODNI General Counsel Robert Litt make clear that these classified addenda at least have the *effect* of law. Having hard data about this practice enables a better informed normative discussion of the secret law phenomenon.

Of course, the length and specific content of Congress’s library of secret law remains a shallow secret, a known unknown: the public knows it is there, can through studies such as this one how often it may be created via Public Law, and which committees are writing it, but does not know what is in it, nor how much of it there is. The full classified annexes incorporated en bloc into Public Law by the defense Acts in the 1990s and early 2000s could be two pages long, or 20, or 200. The same can be said of the presumably more narrow classified Schedules of Authorizations still annually incorporated into law by the IAAs, and the individual addenda provisions that Public Law is anointing with legal force at an accelerating pace.

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<sup>121</sup> DOD Appropriations Act for 2004, *supra* note 105, at § 8131(a). See also H.R. Rep. \_\_, at 344 (2003) (report language mentioning § 8131 as amendment to Senate bill language).

<sup>122</sup> See *id.*, § 8131(b).

<sup>123</sup> See, e.g., Greg Miller, *Lawmakers Seek to Stymie Plan to Shift Control of Drone Campaign from CIA to Pentagon*, WASH. POST, Jan. 15, 2014, [https://www.washingtonpost.com/world/national-security/lawmakers-seek-to-stymie-plan-to-shift-control-of-drone-campaign-from-cia-to-pentagon/2014/01/15/c0096b18-7e0e-11e3-9556-4a4bf7bcb84\\_story.html](https://www.washingtonpost.com/world/national-security/lawmakers-seek-to-stymie-plan-to-shift-control-of-drone-campaign-from-cia-to-pentagon/2014/01/15/c0096b18-7e0e-11e3-9556-4a4bf7bcb84_story.html) (discussing provision in secret annex to IAA that would restrict funding for Obama Administration’s effort to move control of lethal drone campaign against Al Qaeda and its affiliates from CIA to DOD); Steven Aftergood, *A Growing Body of Secret Intelligence Law*, SECRECY NEWS, May 4, 2015, <http://www.fas.org/sgp/news/secrecy/2015/05/050415.html> (*id.*); Relyea, 5 GOV’T INFO. Q., *supra* note 19, at 111 (discussing provisions concerning the Nicaraguan Contras); SNIDER, *supra* note 52, at 182-83, 190-91 (discussing CIA concern about micromanagement via the classified addenda); BANKS & RAVEN-HANSEN, *supra* note 36, at 52 (discussing 1991 dispute about legal effect of NDAA annex regarding funding); REISMAN & BAKER, *supra* note 49, at 118-19 (1992) (stating that intelligence legislation provides line-item authorization).

Managing secret law produced by Congress has only intermittently been a project of the Executive Branch, and evidently never one of the Judicial Branch. The Executive does not need to work to surface Congress's secret law for structural reasons: legislation is presented to the President for signature, and the entire point of the classified addenda is to manage agencies.<sup>124</sup> When the Executive has tried to manage Legislative Branch secret law, it has worked through the budget process and fought restrictions on its freedom of action in a way recognizable to any observer of usual Executive-Legislative interactions.<sup>125</sup> Regarding the courts, to whatever extent Congress governs the work of the FISC through classified addenda, here again Congress wants another branch to be aware of its classified work, so no disclosure battle is required. In the instance of the regular Article III courts, even if suit were brought to surface a classified addendum, the courts would be unlikely to rule for a litigant due to difficulty in establishing standing (specifically, showing personal harm when the activities in question are secret, if one were alleging harm from some activity authorized in the classified addendum),<sup>126</sup> if invoked the state secrets doctrine (under which courts refuse to consider claims that would require disclosure of classified information),<sup>127</sup> and FOIA's statutory exemption of Congress (if the claimant were bringing a FOIA suit).<sup>128</sup>

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<sup>124</sup> Again, statute directs that the President distribute the addenda within the Executive Branch. *See, e.g.*, IAA for 2015, Pub. L. 113-293, § 102(b)(2), 128 Stat. 3992 (2014). Additionally, report language has expressed frustration that relevant officials have not always been notified of the content of classified addenda regarding one of DOD's darkest corners of classification, special access programs. This "has resulted in actions contrary to Committee guidance. It is the responsibility of [DOD officials] to ensure proper notification of Committee actions...." DOD Appropriations Act for 1992, S. REP. 102-154, at 4-5 (1991) (report of Senate Appropriations Committee). The Committee's view should not surprise us: "The legislator's purpose in making laws would be defeated unless [they are] brought to the attention of those to whom they apply." HART, THE CONCEPT OF LAW at 22.

<sup>125</sup> *See* IAA for 2010 OMB SAP, *supra* note 10, at 1, 6. Additionally, one might view the Executive Branch's ability to control classified information as another tool for managing Congress's secret law. The Legislative and Executive Branches often disagree about access to classified information, which is generally in the hands of the Executive because of the President's constitutional authority regarding classification and because the Executive generates information in which Congress is interested. However, based on the public record there is no reason to think that this dynamic is distinct in any way when Congress is writing classified addenda versus conducting oversight of the Executive's factual activities.

<sup>126</sup> *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1141, 1154-55 (2013) (holding that claimants lack standing to challenge FISA Amendments Act provision because they cannot demonstrate they were surveilled by classified program); *Richardson*, 418 U.S. at 166 (rejecting "generalized grievance" taxpayer standing to challenge constitutionality of CIA Act of 1949 under budget disclosure requirements of the Appropriations Clause). *But see* Rosenthal, *supra* note 36, at 59-89 (arguing that *Richardson* can be read narrowly to apply to taxpayer standing and that suits on other grounds under the Statement and Accounts Clause and FOIA should succeed against claims of protecting classified information).

<sup>127</sup> *See* *U.S. v. Reynolds*, 345 U.S. 1 (1953) (formally recognizing the state secrets privilege).

<sup>128</sup> See discussion in text, *infra*.

## 2. Executive Branch

In the case of unpublished law in the Executive Branch, both the Legislative and Judicial Branches have both made significant – if sporadic and incomplete – management efforts. These have involved Congress and courts seeking access to alleged Executive Branch secret law for their own deliberations, or to surface it for the public. Concern about lack of publication of Executive Branch legal authorities dates to the Founding, and has taken particular salience in the Industrial Era and the Post-Church-Pike / Millennial Era. The rise of the administrative state and performance of the national security apparatus since 9/11 inform the Secret Law Thesis as it is currently expressed: that government often produces and operates on the basis of non-published law, at the cost of civil liberty, transparency, accountability, self-governance, and proper functioning of separation of powers.

With the exception of recent controversy about FISC opinions, allegations of secret law have most commonly focused on several species of Executive Branch legal authorities.<sup>129</sup> Some emanate from the President and those around the Chief Executive: presidential proclamations, Executive Orders (EOs), other presidential directives (including from the National Security Council (NSC) and other offices in the Executive Office of the President). These presidential orders are based in statutory or Article II authority. Other Executive Branch legal authorities that when not publicized have been alleged to be secret law include regulations (both governing the public, and those governing agencies internally), agency opinions on particular matters and adjudicated cases, Justice Department opinions (especially from OLC), and internal agency rules and guidelines.<sup>130</sup> Treaties and other international agreements are Executive Branch creatures in the sense that they are negotiated and signed by the Constitution’s Article II branch.

It is important to understand why the Executive Branch is especially prone to secret law.<sup>131</sup>

A key driver of secret law post-9/11 was the George W. Bush Administration’s embrace of an exclusive, minority Executive power theory endorsing virtually unlimited presidential power to act, interpret the law, and keep secrets beyond statutory regulation, especially in the

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<sup>129</sup> Few scholars or practitioners collect them. For one example, see *Secret Law and the Threat to Democratic and Accountable Government*, 110th Cong. 77–87 (2008) (statement of Steven Aftergood, Director, Project on Government Secrecy, Federation of American Scientists).

<sup>130</sup> Another example might be the guidelines governing the no-fly list. For discussion, see Jennifer Daskal, *Secrets Revealed: The Government’s No Fly List Arguments Aren’t Flying*, JUST SECURITY, April 25, 2014 (discussing existence of secret rules), <https://www.justsecurity.org/9865/secrets-revealed-governments-fly-list-arguments-arent-flying/>.

<sup>131</sup> Fuller noted that secret law “is most likely to arise in modern societies with respect to unpublished administrative decisions.” 71 HARV. L. REV. at 651.

name of national security.<sup>132</sup> But every administration, of whatever philosophy, has the opportunity and the temptation to create secret and especially *deeply* secret law from the perspective of the people and other branches (law that is an “unknown unknown”) because the Article II branch alone has the ability to act in the field and therefore does not have to send its law to another branch for it to be implemented.

The constitutional authorities and role of the President are also enormously relevant. Article II gives a single elected official “The executive Power,” makes the President the commander-in-chief of the armed forces and chief treaty negotiator, and gives “the Constitution’s first officer” the responsibility and unique power to do things, not just set policy or create law.<sup>133</sup> Every person in this position will perceive good reasons (e.g., protecting confidential sources and methods) and bad reasons (e.g., avoiding partisan and public scrutiny) to keep secrets. Every President will also perceive significant power to keep secrets and have them protected from disclosure, for reasons of executive privilege and classification authority,<sup>134</sup> and enormous power to direct subordinates. With operational responsibility and unity of command, the Executive’s secrecy tendencies operate in connection with what Hamilton termed “energy” and “dispatch.”<sup>135</sup>

Size matters too, especially that of the administrative state. The Executive is the largest branch, with dozens of agencies, thousands of programs, and millions of personnel creating a continual flow of operational situations requiring application of law in the form of legal opinions, orders, regulations, rules, handbooks, and other guidelines. Large bureaucracies tend to expand their authority, and to seek to bury rather than expose errors and abuses of authority.<sup>136</sup> The largest branch has as its largest part the secrecy-reliant national security apparatus.

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<sup>132</sup> There is a sizable literature advancing and criticizing Executive power theories. *See, e.g.*, PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (criticizing the idea of the unitary executive and other presidentialism); JOHN YOO, THE POWERS OF WAR AND PEACE (2006) (expansive vision of presidential power in national security).

<sup>133</sup> *See* U.S. CONST., art. II, §§ 1, 2; AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY \_\_ (2005); U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

<sup>134</sup> *See* United States v. Nixon, 418 U.S. 683 (endorsing a qualified executive privilege balanced against public interest); Dep’t of the Navy v. Egan, 484 U.S. 518 (1988) (courts will be deferential to President’s classification and clearances authority).

<sup>135</sup> THE FEDERALIST NO. 70 at 472 (Alexander Hamilton) (Jacob E. E. Cooke ed., 1788).

<sup>136</sup> Trevor Morrison makes a similar point about temptation to use the constitutional avoidance doctrine in secret memos to expand Executive power at the expense of Congress’s as reflected in statute. *See generally* Morrison, *supra* note 19.

Together, structural, presidential, and scale considerations – together with the time sensitivity and perception of peril – create pressure for immediate decisions based on rapid legal guidance citing available and sufficient legal authority, rather than going to Congress or waiting for a judicial ruling. Secret legal guidance can engage most easily with sensitive factual details. These dynamics are key to the classic process maladies of Executive Branch lawyering identified by Chief Judge Jamie Baker, former Legal Advisor to the National Security Council: speed, secrecy, ego, and fear of national security risk.<sup>137</sup> Another is intense focus on decision in the immediate crisis over long-term consequences.<sup>138</sup> Note also that the Executive Branch’s default is not public process. Most of its process is informal behind closed doors, especially in the classified national security realm. Congress does most of its work as well via informal process, but Congress institutionally is focused on creating Public Law and regulating government organs and public policy problems outside the Legislative Branch.

External efforts to surface Executive Branch secret law are most often impeded by the simple fact of its secrecy. Other often but not completely effective shields are the state secrets doctrine, standing requirements, and FOIA exceptions (especially for classified information, executive privilege, deliberative process, and pre-decisional documents).

Far more effective in surfacing alleged secret law have been leaks, political pressure, and legislated requirements for publication, reporting, and declassification. Taken as a whole, efforts by the Congress, courts, and the people to reveal secret law could reasonably be viewed as either significantly successful (publication of initially unpublished Executive Branch legal authorities is now commonplace) or problematic (many documents with the force of law produced by the Article II branch remain deeply or shallowly secret to the other branches or the people), or both.

To inform the normative work of subsequent Parts of this article, and recognizing that the legal merits and secrecy of Executive Branch unpublished legal authorities have received scholarly attention, the balance of this section on Executive Branch secret law provides an overview: of the development of the publication norm in relevant part, and of secret law management efforts by the other branches as the secret law of primary concern to them changed over the course of the Formative, Industrial, and Post-Church-Pike / Millennial Eras.

#### *a. Formative Era*

Reflecting and driving the Founders’ embrace of a general publication norm, James Madison famously emphasized that “popular government, without popular information, or the

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<sup>137</sup> BAKER, *supra* note 25, at \_\_.

<sup>138</sup> Justice Jackson put this point at the outset of his framework concurrence on separation of powers: “presidential powers hold both practical advantages and grave dangers....The tendency is strong to emphasize transient results upon policies...and lose sight of enduring consequences upon the balanced power structure of our Republic.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both.”<sup>139</sup> As President, Madison signed explicitly secret statutes, however, and in the early years of the republic presidential proclamations, EO<sup>s</sup>, and other executive statements with legal force such as Attorney General opinions were not issued and published in a systematic manner. To use Charles Relyea’s term, to this day many remain fugitive.<sup>140</sup> The federal bureaucracy was minuscule by current standards, with most administration at the state level. The scope of the federal government and its potential secret law proclivities were therefore limited. Even so, Congress passed measures seeking to improve and regularize publication of executive documents for similar reasons of the rule of law, accountability and deterrence of error and abuse, and public notice that motivated Congress to require publication of its own legal products.

Of particular concern in that era of comparatively primitive communication and greater strength of foreign states were treaties and international agreements. The country and its lawmakers needed to be aware of agreements with other nations concluded on their behalf. The modern version of a statute passed during the nation’s first century requires publication of treaties, other international agreements, and related presidential proclamations in the *United States Treaties* series.<sup>141</sup> The statute makes a limited exception that reflects the notice and self-government rationales for the general publication norm that has emerged over the nation’s history. The exception allows withholding of publication of agreements that did not become law via Senate advice and consent – and also that are not law because they are no longer in force (in the case of unilateral Executive agreements or congressional-executive agreements),<sup>142</sup> or do not “create private rights or duties” or otherwise govern private individuals, or are not of general public interest, or that might imperil national security. Even if these circumstances pertain, the statute makes these international agreements the shallowest of secrets by making them available upon request and requiring notice in the *Federal Register* of their non-publication.

#### *b. Industrial Era*

Required by the Federal Register Act of 1935,<sup>143</sup> the *Register* was a key part of Congress’s response to the advent of the federal administrative state – a phenomenon flowing initially from a combination of a national industrialized economy and the Progressive movement

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<sup>139</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), *quoted in* PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD (2013), at 125, [https://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

<sup>140</sup> See Relyea, 5 GOV’T INFO. Q., *supra* note 19, at 97.

<sup>141</sup> 1 U.S.C. § 112a (2012).

<sup>142</sup> For discussion of the differences among treaties, executive agreements, and congressional-executive agreements, see Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

<sup>143</sup> Federal Register Act of 1935, Pub. L. No. 74-220, 49 Stat. 500 (1935) (amended and codified at 44 U.S.C. §§ 1501-1511).

that sought to reform and better regulate both government and the private sector, and later the New Deal. Growth of government and its production of legal authorities had created such an abundance of disorganized Executive Branch legal directives that at one point Executive Branch lawyers found themselves before the Supreme Court defending an EO that had been withdrawn.<sup>144</sup> The *Register*, the daily contents of which are codified in the *Code of Federal Regulations* (C.F.R.), did not by any means capture all of the orders, rules, guidelines, and other legal authorities being issued by the growing Executive Branch. But it did surface, memorialize, and organize a great many, including EO<sup>s</sup>, proclamations, regulations, and other documents. Legally obligatory, systemized publication of administrative law strengthened the rule of law (particularly regarding its consistency), while providing notice of the law to Congress, the courts, and the public (notice being constructive for those who are not regular *Register* readers).

Additional transparency steps followed in the mid Twentieth Century.<sup>145</sup> Especially important were framework statutes built on the publication success of the *Register*: the Administrative Procedures Act (APA) of 1946 and Freedom of Information Act (FOIA) of 1966.<sup>146</sup> Both statutes were a response to the continued growth of the federal bureaucracy. The APA strengthened and broadened the Federal Register Act, and FOIA strengthened the APA. The Executive Branch was now required to publish its rules of procedure in the *Federal Register* and to make available to the public other legal authorities including statements of policy, precedential interpretations, staff manuals, and final administrative opinions from adjudications – in short, both binding internal guidelines and what is essentially agency-level case law.<sup>147</sup> In some instances they require release of decisions regarding particular cases and matters, both internal decisions and letters issued to individual parties. Petitioners could seek a court order to compel a recalcitrant agency to comply.<sup>148</sup>

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<sup>144</sup> See Relyea, 5 GOV'T INFO. Q., *supra* note 19, at 104.

<sup>145</sup> An example of formerly secret law that since 1970 must be public is “no action” and interpretive Securities and Exchange Commission letters construing securities rules. *See* 35 Fed. Reg. 17779 (1970), codified at 17 C.F.R. 200.81; *see also* 36 Fed. Reg. 2600 (1971) (process for submitting letter requests).

<sup>146</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (amended and codified at 5 U.S.C. §§ 500-596); Pub. L. No. 89-487, 80 Stat. 250 (1966) (amended and codified at 5 U.S.C. § 552).

<sup>147</sup> *See* FOIA, 5 U.S.C. § 552(a)(1), (2) (2012). A key U.S. House committee report on what would become FOIA depicted these decisions in this way: “the bureaucracy has developed its own form of case law” in the form of “thousands of orders, opinions, statements, and instructions issued by hundreds of agencies.” H.R. REP. NO. 1497, at 28 (concerning the Information Act). For contemporary discussion, see Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 773-74.

<sup>148</sup> FOIA requires indexing of final opinions, statements of policy, final interpretations of law, and instructions to staff that affect the public. *See* 5 U.S.C. § 552(a)(2) (2012).

During hearings before FOIA's passage, Kenneth Culp Davis and others levied the term secret law against unpublished agency guidelines and adjudicative decisions.<sup>149</sup> Some of this administrative law might arguably stay "inside the box" and concern only the internal functioning of an agency. But internal procedures can implicate the rights and interests of the people.<sup>150</sup> FOIA is viewed in this context by the Supreme Court as reflecting "a strong congressional aversion to secret [agency] law, and represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law."<sup>151</sup> Both statutes address themselves implicitly to secret law, both in process of creation (note the APA's requirement for publication of agency rulemaking and adjudication procedures, and stipulation of public notice and comment opportunities) and publication of administrative law documents once finalized (including both rules and opinions in particular cases). The APA provides that an interpretation may not be relied upon as precedent against any private party "unless it has been...made available or published."<sup>152</sup> This principle is part of a broader statutory norm of publication the two framework statutes reflected.

FOIA and APA have proven powerful tools in surfacing unclassified but non-public legal authorities of Executive Branch agencies, what some scholars have termed the fourth branch.<sup>153</sup> But otherwise, FOIA and APA were at their inception and continue to be of limited effectiveness. The APA and FOIA carry powerful exceptions for national security and properly classified information, enabling vast areas of government activity to operate in many instances

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<sup>149</sup> Davis maintains he coined the term secret law during his testimony before Congress in support of changes to the APA that became the FOIA. *See* Davis, *supra* note 9. *See also Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 88th Cong. 273 (1964) (Statement of Kenneth Culp Davis); *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 89th Cong. 149 (1965) (Statement of Kenneth Culp Davis, Professor of Law, University of Chicago). For discussion, *see* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5:18 (The Concept of "Secret Law") (2d ed. 1978).

<sup>150</sup> Fuller made this point. *See* Fuller, 71 HARV. L. REV. at 651.

<sup>151</sup> Nat'l Lab. Rel. Board et al. v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (internal quotation marks and citations omitted; brackets in the original). *See also* Frank Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUDIES 775, 777 (1980) (FOIA's "indexing and reading-room rules indicate that the primary objective is the elimination of 'secret law'"), *cited in* U.S. Dep't. of Justice. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 n. 20 (1989).

<sup>152</sup> For discussion, *see* Davis, 34 U. CHI. L. REV. at 773-74.

<sup>153</sup> *See, e.g.*, Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) (presenting empirical study of use of canons of statutory interpretation by agency lawyers).

without meaningful stricture by these administrative law “super statutes.”<sup>154</sup> FOIA has eight other statutory exceptions, *inter alia* protecting pre-decisional materials, attorney-client privilege, and attorney work product.<sup>155</sup> FOIA does not reach Congress, the courts, nor the President and advisors closest to the Chief Executive.<sup>156</sup> The courts have construed FOIA to include executive privilege protecting presidential communications.<sup>157</sup> Courts have also exempted the National Security Council (NSC), the Executive Branch’s most senior forum for inter-agency decisionmaking and advice to the President about foreign affairs, defense, and intelligence<sup>158</sup> (and note that NSC frequently grapples with legal questions and indeed coordinates production of documents that are binding law of the Executive Branch).<sup>159</sup> FOIA is also of no use against the most deeply secret and therefore most problematic secret law – “unknown unknowns” – because FOIA requests must specify the materials they seek to surface. One cannot ask for what one does not know exists.<sup>160</sup> Where requests are filed, the Executive Branch has tools in addition

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<sup>154</sup> 5 U.S.C. § 553(a)(1) (2012) (APA rulemaking requirements do not apply to “a military or foreign affairs function of the United States”); 5 U.S.C. § 552(b)(1) (FOIA exemption for matters properly classified and “kept secret in the interest of national defense or foreign policy”).

<sup>155</sup> See 5 U.S.C. § 552(b). For discussion, see, e.g., SAVAGE, *supra* note 9, at 445-47 (discussing power of these exemptions in protecting OLC opinions during Obama Administration). Note that the § 552(b)(5) (Exemption 5 for “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” has been interpreted to mean privileged documents of several varieties. The Supreme Court wrote in *Sears* that Davis’s interpretation of Exemption 5 is “powerfully supported” by the statute: “disclosure of all ‘opinions and interpretations’ which embody the agency’s effective law and policy, and the withholding of all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be.” *Sears*, 421 U.S. at 153 (*quoting* Davis, 34 CHI. L. REV., *supra* note 147, at 797. Congress had attorney-client privilege and attorney work product “specifically in mind when it adopted Exemption 5.” *Id.*, at 154. See also Abtew v. U.S. Dept. of Homeland Sec., 47 F. Supp.3d 98, 107 (D.D.C. 2014) (recommendation regarding asylum application is advice, not precedent, and not “secret law” that [the agency] is trying to hide from the public”), *citing* Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) (documents not protected by deliberative process privilege because they were “akin to a ‘resource’ opinion” or a manual).

<sup>156</sup> FOIA applies only to federal agencies and agency records. See 5 U.S.C. § 552(a). See also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 155-56 (1980) (legislative history unambiguous that Congress did not intend FOIA to apply to the President and immediate advisors).

<sup>157</sup> See *Sears*, *supra* note 151, 421 U.S. at 150.

<sup>158</sup> See *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 565 (D.C. Cir. 1996). The court held that the National Security Council – chaired by and advising the FOIA-exempted President – is not an agency subject to FOIA, 5 U.S.C. § 552(f), and therefore also not obligated to preserve its records under the Federal Records Act, 44 U.S.C. §§ 3101-07, 3301-14.

<sup>159</sup> For discussion, see SAVAGE, *supra* note 9, 64-67 (describing importance of NSC and especially its interagency lawyer’s group regarding law and policy questions during the Obama Administration).

<sup>160</sup> Requestors must “reasonably describe” records sought. 5 U.S.C. § 552(a)(3)(A) (2012).

to denial that can make FOIA less useful. The George W. Bush Administration, for example, slowed administrative rulings and reversed the Clinton Administration’s presumption in favor of disclosure, one President Obama reinstated.<sup>161</sup>

FOIA petitioners have argued for and courts have sometimes embraced the notion of a “secret law doctrine” requiring disclosure of documents with legal force, but the courts have also limited it with close readings of statutes and caselaw.<sup>162</sup> However, as Jack Goldsmith recently advised the intelligence community’s lawyers, FOIA claimants seeking to surface classified documents have been getting increasingly favorable reception because Executive Branch claims of national security harm have too often been attenuated or unsupported.<sup>163</sup> Court-ordered publication of the OLC al-Awlaki targeted killing memoranda in 2014 pursuant to FOIA remains a notable exception but also a sign of declining judicial deference.

### *c. Post-Church-Pike / Millennial Era*

The broad trajectory of jurisprudence since the Industrial Era continues to reflect a well-established but substantially excepted norm against unpublished agency rules in the form of

<sup>161</sup> The three presidents did this via successive framework Executive Orders on classification. *See* Classified National Security Information, Exec. Order No. 12,958, 32 C.F.R. § 701.23, § 1.2(b) (1995) (Clinton order, providing that “If there is significant doubt about the need to classify information, it shall not be classified”); Further Amendment to Executive Order 12958, as Amended, Classified National Security Information, Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (2003) (Bush order, omitting the language); Classified National Security Information, Exec. Order No. 13526, 75 Fed. Reg. 707, § 1.1(b) (Jan. 5, 2010) (Obama order, restoring language). Note also that Bush Administration Attorney General John Ashcroft issued a memorandum advising that the Justice Department would defend FOIA denials by agencies “unless they lack a sound legal basis.” Memorandum for Heads of all Federal Departments and Agencies Regarding the Freedom of Information Act from Attorney General John Ashcroft (Oct. 12, 2001) discussed in *SECURITY IN THE BUSH ADMINISTRATION* (PREPARED FOR REP. HENRY A. WAXMAN) 5 (United States House of Representatives Committee on Government Reform—Minority Staff 2004).

<sup>162</sup> *See, e.g.*, *New York Times Co. v. U.S. Dept. of Just.*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012) (secret law doctrine operates only in a limited manner regarding FOIA Exemption 5 for privileged documents and not *inter alia* regarding Exemption 1 for national security).

<sup>163</sup> *See* Jack Goldsmith, *My Speech at ODNI Legal Conference: “Toward Greater Transparency of National Security Legal Work,”* LAWFARE, May 12, 2015 (“The al-Awlaki/targeted killing context is one where judges have begun to push back against exaggerated needs for secrecy....Several judges have started to signal, in public opinions and in private conversation, that the government has lost credibility about the harms of disclosure because it so often exaggerates the harm.”), <https://www.lawfareblog.com/my-speech-odni-legal-conference-toward-greater-transparency-national-security-legal-work> [hereinafter Goldsmith, ODNI Legal Conference Speech]. For discussion of FOIA litigation and surveillance law by a practitioner, see Mark Rumold, *The Freedom of Information Act and the Fight Against Secret (Surveillance) Law*, 55 SANTA CLARA L. REV. 161, 179-87 (2015) (acknowledging that national security assertions virtually always defeat FOIA petitions, and describing how the Executive Branch could share legal analysis without endangering classified facts).

regulations, handbooks, and guidelines that deny regulated individuals notice. Courts repeatedly note in this context that “the idea of secret laws is repugnant,” is the mark of totalitarian regimes, and threaten one’s ability to “adjust their conduct to avoid liability.”<sup>164</sup>

Along with unpublished agency regulations, several varieties of Executive authorities that predate the Post-Church-Pike / Millennial Era continue to draw criticism from secrecy opponents and generate management efforts by Congress and the courts.

Executive Orders date to George Washington. They run the gamut from entirely policy and direction (just an “order”) to being legal authorities themselves.<sup>165</sup> Many are a mix of law, policy, and legal policy. EO 12,333 is a good example: this intelligence charter is relied upon by the Intelligence Community as a legal authority, but also reflects discretionary decisions by the President about which agencies will have authority, direction, and control of which activities.

To provide the public notice of the law, statute requires publication of EOs with “general applicability and legal effect.”<sup>166</sup> During the George W. Bush Administration, however, OLC asserted that the President could waive, modify, or cancel EOs without public notice.<sup>167</sup> In response, Senators Feingold (D-WI) and Whitehouse (D-RI) in 2008 and 2009 introduced legislation to require *Federal Register* notice of such changes or a classified report to Congress.<sup>168</sup> Their intent was to ensure that no President “can change the law in secret” and to save the *Register* from being a false facade behind which the real law exists in secret.<sup>169</sup> During the Obama Administration, a former State Department employee objected to secret legal interpretations of EO 12,333 to allow bulk surveillance abroad sweeping up large amounts of

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<sup>164</sup> *Torres v. Immigration and Naturalization Service*, 144 F.3d 472, 474 (7th Cir. 1998) (Judge Posner decries secret law generally for reasons of notice, but held that an immigration petitioner was wrong to view as secret law a recently enacted *statute* that in the petitioner’s view was insufficiently publicized); *United States v. Pulungan*, 569 F.3d 326, 328 (7th Cir. 2009) (Judge Easterbrook decried as notice-denying secret law non-published State Department guidelines regarding defense trade controls).

<sup>165</sup> The Supreme Court has recognized that EOs can have the force of law. See \_\_

<sup>166</sup> See 44 U.S.C. § 1505(a) (2012). See also Exec. Order No. 11,030 (1962) (process governing creation and publication of EOs and proclamations).

<sup>167</sup> See 155 CONG. REC. S13884 (Dec. 23, 2009) (statement of Sen. Feingold); Sen. Sheldon Whitehouse, Remarks to the American Bar Association’s 18<sup>th</sup> Annual Review of the Field of National Security Law Conference, Nov. 6, 2008, <http://www.whitehouse.senate.gov/news/speeches/remarks-of-sheldon-whitehouse-to-the-american-bar-associations-18th-annual-review-of-the-field-of-national-security-law-conference>, quoted in SAVAGE, supra note 9, at 185.

<sup>168</sup> Executive Order Integrity Act of 2009, S. 2929, 111th Cong. (2009); Executive Order Integrity Act of 2008, S. 3405, 110th Cong. (2008).

<sup>169</sup> See *supra* note 167.

U.S. person communications in alleged violation of the Fourth Amendment.<sup>170</sup> The Executive Branch has not released the opinions.

Other presidential directives that do not fall into the Federal Register Act-governed categories of EO s or proclamations also date to the nation's founding and have been the focus of allegations of secret law. Nomenclature and categories vary by administration. Some are voluntarily published and some not. They do work ranging from the mundane to establishing procedures for classified activities.<sup>171</sup> But they raise secret law concern regardless of topic.<sup>172</sup> They originate with the head of the Executive Branch and holder of powerful authorities under Article II of the Constitution.<sup>173</sup> Presidential directives are usually numbered, allowing close observers to note gaps and changes. Secret law critics have called for publication of any presidential directive with legal force, or at least rolling publication of a list that would alert the public to the frequency with which the President is creating secret law. This would allow tracking as documents are published without endangering secret fact or deliberative space.<sup>174</sup>

Several developments together heightened concern about Executive Branch secret law in recent years. One is the threat: the bipolar Cold War world with its superpower state adversary, and the 1990s interregnum of U.S. unipolarity, were displaced as of 9/11 by a radical non-state actor network unified by suicidal religious fanaticism. Its super-empowered individuals<sup>175</sup> could do catastrophic damage, operating in civilian settings, using civilian communications and transportation infrastructure, and targeting civilians. This new threat environment favored rapid,

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<sup>170</sup> See John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets NSA Spy on Americans*, WASH. POST, July 18, 2014, <https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-nsa-spy-on-americans/>.

<sup>171</sup> See HAROLD C. RELYE A, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW (Nov. 26, 2008), <https://www.fas.org/sgp/crs/misc/98-611.pdf> (discussing varieties of directives).

<sup>172</sup> See Ctr. for Effective Gov't v. U.S. Dep't of State, 7 F.Supp.3d 16, 19 (D.D.C. 2013). The court held that Presidential Policy Directive 6 (PPD-6) on Global Development is not protected from disclosure under the presidential communications privilege pursuant to Exemption 5 in 5 U.S.C. § 552(b)(5). This directive was sufficiently distributed within the Executive Branch to be outside of the privilege. PPD-6 is the "functional equivalent" of an EO and "carries the force of law as policy guidance," and in that way as well falls afoul of FOIA's purpose in countering secret law.

<sup>173</sup> U.S. CONST., art. II, § 1, cl. 1 (Executive vesting clause); § 2, cl. 1 (commander-in-chief).

<sup>174</sup> See, e.g., Elizabeth Goitein, *There's No Reason to Hide the Amount of Secret Law*, JUST SECURITY, June 30, 2015, <https://www.justsecurity.org/24306/no-reason-hide-amount-secret-law/>. Goitein counts 30 such directives during the Obama Administration, 19 of which are undisclosed and 11 of which the public does not know the subject.

<sup>175</sup> Thomas Friedman's memorable phrase. See THOMAS L. FRIEDMAN, LONGITUDES AND ATTITUDES: TRAVELS AFTER SEPTEMBER 11<sup>TH</sup> at 6 (2002).

preemptive action *ex ante* to acquire intelligence, interdict threatening individuals, and prevent attacks rather than rely exclusively on *ex post* investigation, arrest, and prosecution. A second trend was technological change. The digital revolution had simultaneously made some of the analogue-era assumptions of surveillance law outdated (e.g., foreign-to-foreign communications generally unprotected by FISA and the Fourth Amendment were now flowing through U.S. networks via fiber optic lines at a torrential rate, arguably requiring a FISA warrant because the collection was inside the United States), made intelligence easier to collect (electronic communication leaves splendid intelligence trails, massive amounts of data can be copied and moved at the speed of light over fiber optic lines, and again massive amounts of foreign communications were flowing through the United States), and simultaneously harder to process (the volume, velocity, variety, and integration of electronic communications were accelerating dramatically, making spotting threats harder and therefore placing further premium on rapid preventive action).<sup>176</sup> Third was a George W. Bush Administration with an expansive minority view of Executive power under the Constitution, a penchant for aggressive readings of statutes, appreciation for secrecy with regard to the public and in internal deliberations, and especially after 9/11 a preference for preemptive use of hard power (military and intelligence) against terrorists everywhere and adversaries in wars in Afghanistan and Iraq.<sup>177</sup> President Obama inherited changes to the national security environment and technology, and the programs and still-unpublished Executive Branch legal authorities of the Bush Administration. While drawing down the Iraq and Afghanistan wars, Obama has accelerated strikes against suspected terrorist leaders in “off-battlefield” places such as Pakistan, Yemen, and Somalia, including against U.S. citizens, using drones and special forces, without significant update by Congress of the post-9/11 Authorization for the Use of Military Force (AUMF).<sup>178</sup>

Together, these Post-Church-Pike / Millennial Era trends contributed to increasing Executive Branch reliance on internal constructions of the law that at least initially have remained unpublished. Secret law critics have sounded the alarm.

Especially noteworthy – and a new catalyst for allegations of secret law – were a series of classified or otherwise deeply secret legal memos prepared after 9/11 by OLC. Although there are some exceptions, generally the opinions of OLC are “the law of the Executive Branch,” binding and precedential until the law is changed by Congress or the courts, or (extremely rarely) the OLC opinion is contradicted or withdrawn by the President, the Attorney General, or OLC

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<sup>176</sup> For discussion, see Savage, *supra* note \_\_, at 173-87

<sup>177</sup> John Yoo wrote not long after leaving the Bush Administration OLC that it is “no longer clear that the United States must seek to reduce the amount of warfare, and it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force.” JOHN YOO, THE POWERS OF WAR AND PEACE ix (2006). The Bush team believed in being on the offensive militarily.

<sup>178</sup> Authorization for the Use of Military Force, PUB. L. 107-40, 115 STAT. 224 (2001).

itself.<sup>179</sup> OLC memoranda gave legal blessing for the most controversial elements of the Bush Administration’s “war on terror,” concerning interrogation of detainees, detention of U.S. citizens in military custody as enemy combatants without charge or access to the courts, NSA collection of electronic communications of U.S. persons, and potential use of military force within the United States.<sup>180</sup>

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<sup>179</sup> See DAVID J. BARRON, ACTING ASSISTANT ATT’Y. GEN., OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR ATTORNEYS OF THE OFFICE RE: BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS 1, July 16, 2010, <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (OLC exercises Attorney General’s delegated authority under Judiciary Act to provide “controlling advice to Executive Branch officials”) [hereinafter BARRON OLC BEST PRACTICES MEMO]; Dawn E. Johnsen, *Guidelines for the President’s Legal Advisors*, 81 IND. L. J. 1344 (2006). The power of OLC opinions, and the rarity of their withdrawal, made withdrawal and revision of many of the post-9/11 memos by Jack Goldsmith in 2004 remarkable. For discussion, see JACK GOLDSMITH, *THE TERROR PRESIDENCY* \_\_ (2007).

Note that in FOIA cases courts have sometimes declined to view unpublished OLC documents as controlling (secret) law on other agencies, reasoning instead that particular opinions merely describe in pre-decisional fashion what the law permits and are not “working law” of agencies unless “adopted.” *See, e.g.*, *Electronic Freedom Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 12-15 (D.C. Cir. 2014) (FOIA suit regarding OLC opinion on legality of “exigent” National Security Letters). For criticism, see Steve Vladeck, *OLC Memos and FOIA: Why the (b)(5) Exemption Matters*, JUST SECURITY, Jan. 4, 2014 (OLC opinions generally are viewed as binding) <https://www.justsecurity.org/5277/olc-memos-foia-b5-exception-matters/>.

<sup>180</sup> See MEMORANDUM FROM JAY S. BYBEE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, TO ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT, RE: STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. § 2340-2340A (Aug. 1, 2002) [hereinafter OLC 2002 INTERROGATION MEMO], *available at* <http://washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>, *superseded by* MEMORANDUM FROM DANIEL LEVIN, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, TO JAMES B. COMEY, DEPUTY ATTORNEY GENERAL, RE: LEGAL STANDARDS APPLICABLE UNDER 18 U.S.C. § 2340-2340A (Dec. 30, 2004), *available at* <http://usdoj.gov/olc/18usc23402340a2.htm>; MEMORANDUM FROM JOHN C. YOO, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, TO THE ATTORNEY GENERAL (Nov. 2, 2001) (heavily redacted declassified memorandum on President’s authority to order surveillance despite FISA statute) [hereinafter OLC STELLARWIND NSA SURVEILLANCE MEMO], <http://www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoo-memo-for-ag.pdf>; MEMORANDUM FROM JOHN C. YOO, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, FOR DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, RE: APPLICABILITY OF 18 U.S.C. § 4001(a) TO MILITARY DETENTION OF UNITED STATES CITIZENS (June 27, 2002) [hereinafter OLC U.S. CITIZEN DETENTION MEMO]; MEMORANDUM FROM JOHN C. YOO & ROBERT J. DELAHUNTY, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, FOR ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT & WILLIAM J. HAYNES, II, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, RE: AUTHORITY FOR USE OF MILITARY FORCE TO COMBAT TERRORIST ACTIVITIES WITHIN THE UNITED STATES (Oct. 23, 2001).

The legal reasoning of the post-9/11 OLC memos, their process of creation, and secrecy have been extensively analyzed and heavily criticized.<sup>181</sup> We need not revisit that discussion here in detail. For our purposes, the assessment of Jack Goldsmith is useful. When he moved from the DOD Office of General Counsel to head OLC in 2003, Goldsmith – already a senior lawyer at the Pentagon during wartime – was shocked to discover a body of opinions that “were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations.”<sup>182</sup> Secrecy allowed weak legal work to go unchallenged during drafting and after finalization. Multiple accounts indicate that the memoranda and enormously consequential policy decisions pursuant to them were Executive Branch deep secrets (at least for several months, prior to limited classified congressional briefings on policy), shared only with a self-described “war council” of a half dozen or so top Executive Branch personnel. In some instances, such key actors as the Secretary of State, Attorney General, Deputy Attorney General, the Directors of the FBI and NSA, and the NSA General Counsel were excluded.<sup>183</sup>

These memoranda had in common the minority Executive power view that Congress could virtually never statutorily limit the President’s Article II war powers.<sup>184</sup> OLC deployed this theory in concert with the constitutional avoidance canon of statutory interpretation to

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<sup>181</sup> See, e.g., Shane, *Executive Branch Self-Policing*, *supra* note 14. A group of former OLC lawyers crafted a set of principles to return OLC to firmer internal procedural footings, including less latitude for non-publication. See Dawn E. Johnsen et al., *Guidelines for the President’s Legal Advisors*, 81 IND. L. J. 1345, 1348-1352 (2006); Principles to Guide the Office of Legal Counsel, reprinted in 81 IND. L.J. 1345, 1348 (2006) [hereinafter Proposed OLC Principles]. Dawn E. Johnsen was one of the witnesses at Senator Feingold’s hearing on secret law. See SJC Constitution Subcommittee Hearing (2008) (Statement of Dawn E. Johnsen), at 7-9, 124-36.

<sup>182</sup> GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at 262.

<sup>183</sup> See OFFICES OF INSPECTORS GEN. OF THE DEP’T OF DEFENSE ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM at 10, 30 (2009), <https://fas.org/irp/eprint/psp.pdf> (concluding that it was “extraordinary and inappropriate that a single DOJ attorney,” OLC lawyer John Yoo, was the only person at DOJ cleared to know and advise about warrantless domestic surveillance program); SAVAGE, *supra* note 9, at 183-85 (NSA was ordered to implement what became called the Stellarwind warrantless collection program but NSA General Counsel was denied access to subsequent Nov. 4, 2001, classified OLC opinion on its legality in face of direct conflict with FISA, EO 12,333, and related DOD guidelines); GOLDSMITH, *supra* note 158, at 22–24, 146, 181–82 (discussing exclusion of key Executive Branch officials from the “war council”); JANE MAYER, THE DARK SIDE 66–70, 80–83, 121 (2008) (investigative journalist’s account of the George W. Bush Administration’s interrogation program and other counter-terrorism efforts after 9/11); Shane, *supra* note 13, at 515–18 (discussion of war council in the context of separation of powers).

<sup>184</sup> John Yoo drafted many of the OLC opinions. For discussion, see SAVAGE, *supra* note 9, at 184-85 (Yoo role in Nov. 4, 2001, OLC opinion on warrantless surveillance). In his scholarship, he articulated an expansive vision of presidential power. See, e.g., JOHN YOO, THE POWERS OF WAR AND PEACE (2006).

construe statutes governing surveillance, interrogation, and detention (including of U.S. citizens captured unarmed inside the United States) so as to not bind the President and set up a conflict with Article II.<sup>185</sup> Trevor Morrison argues that use of the avoidance canon in secret is impermissible because secrecy denies Congress the opportunity to disagree or clarify its intent, while also allowing (and providing an incentive for) the Executive Branch to – in effect – rewrite statutes in a way to grow its own power.<sup>186</sup> The OLC opinions were defended as wartime applications of a generally known Administration Executive power theory.<sup>187</sup> For months or years both the memoranda and the activities they authorized were in any event secret, however, and can reasonably be understood to function in practice as secret one-branch amendments-by-interpretation to statute and the constitutional balance among the branches. Because reliance on an OLC opinion generally precludes prosecution, legal secrecy essentially allows the Executive Branch to amend criminal law to authorize otherwise illegal activities, without the other branches or the people being aware.<sup>188</sup> (Yet another way to look at this dynamic is statutory evasion

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<sup>185</sup> See, e.g., OLC STELLARWIND NSA SURVEILLANCE MEMO, *supra* note 180, at 12 (“the statute must be construed to avoid” a conflict with Article II); OLC U.S. CITIZEN DETENTION MEMO, *supra* note 180, at 6 (id.). As Heidi Kitrosser notes, the President was very reasonably in Justice Jackson’s *Youngstown* category three regarding surveillance, interrogation, and detainees. See SJC Subcommittee Hearing 2008, *supra* note 19, at 147 (Testimony of Heidi Kitrosser); *Youngstown*, *supra* note 138, at 636-37. The statutes could not have been more directly on point: the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. (barring surveillance of U.S. persons without a warrant); anti-torture statute, 18 U.S.C. §§ 2340-2340A (barring torture); the Non-Detention Act, 18 U.S.C. § 4001a (barring detention of a U.S. citizen except pursuant to Act of Congress); and the Uniform Code of Military Justice (UCMJ), 10 U.S.C. [pincite] (providing rules for war crimes trials of detainees). OLC in its initial post-9/11 memoranda on surveillance and other matters failed to mention the canonical *Youngstown* framework at all. See [fisa opinion]; GOLDSMITH, *supra* note 179 (criticism of omission); SAVAGE, *supra* note 9, at 185 (id.). The Justice Department ultimately did make a *Youngstown* argument, claiming the President was in Category 1 under an expansive interpretation of the post-9/11 AUMF. See [2006 PSP DOJ white paper]. This interpretation did not survive Supreme Court review in the landmark war powers cases of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (AUMF implicitly authorized detention under the law of war of enemy combatants but not denial of due process), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (President’s order to try detainees in military tribunals invalid in face of UCMJ statute).

<sup>186</sup> Morrison, *supra* note 19. The larger idea that during the Bush era the government was self-dealing in constitutional power became a public meme, inevitably generating satire. See, e.g., *Bush Grants Self Permission to Grant More Power to Self*, THE ONION, Aug. 1, 2006, <http://www.theonion.com/article/bush-grants-self-permission-to-grant-more-power-to-2012>.

<sup>187</sup> This defense resonated with a more general governance philosophy as articulated by Bush Administration Ambassador to the UN John Bolton: “The President ought to have people philosophically attuned to his way of thinking, and if you’ve got a problem with that, I would suggest you have a problem with democratic theory.” Quoted in SHANE, *supra* note \_\_, at 179.

<sup>188</sup> Goldsmith described OLC opinions as effective “get-out-of-jail-free” cards. GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at 96-97. See also KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 17, at 102 (discussing Goldsmith’s observation); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579,

without risk of prosecution).<sup>189</sup> This is not a hypothetical: deeply secret post-9/11 OLC memos authorized surveillance implicating FISA's criminal penalties and interrogations implicating the War Crimes Act.<sup>190</sup> No one has been prosecuted for acting in reliance on these OLC opinions.

Over the next decade, reports of activities pursuant to and finally the text of opinions (several of which Goldsmith withdrew and revised) dribbled out to Congress, the courts, and public through a combination of leaks, whistleblowers, and voluntary release.<sup>191</sup> The Obama Administration has been more transparent than its predecessor, but has itself resisted – with notable setbacks – publication of OLC memoranda regarding the targeted killing of U.S. citizen and Al Qaeda in the Arabian Peninsula leader Anwar al-Awlaki.<sup>192</sup>

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594-98 (2009) (OLC provides legal cover to operatives). Senator Feingold made the point when introducing S. 3501. *See* Statement of Senator Feingold, *supra* note 167. OLC legal cover is strong but not perfect: the President, Attorney General, or OLC itself can over-rule OLC opinions.

<sup>189</sup> *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2007) (authorizing otherwise illegal torture to protect country akin to civil disobedience).

<sup>190</sup> Indeed, the original 2002 OLC interrogation memorandum was significantly oriented to making the case as to why personnel who carried out brutal interrogations would not face legal liability. *See* OLC 2002 INTERROGATION MEMO, *supra* note 180, at 36, 42-46. Criticized in GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at \_\_.

<sup>191</sup> *See* GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at \_\_ (discussing withdrawal of memoranda and preparation of replacements); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005 (report of CIA “black sites” abroad where detainees were interrogated); SAVAGE, POWER WARS, *supra* note 9, at 426-30 (recounting Obama Administration decision to release Bush OLC interrogation memoranda).

<sup>192</sup> FOIA claimants generally have little success regarding classified documents thanks to their exemption under FOIA’s Exemption 1, while Exemption 5 protects pre-decisional documents. *See* 5 U.S.C. § 552(b)(1, 5). However, the Second Circuit ruled that the government effectively waived these exemptions by public defense of the legality of targeted killings, including release of a white paper and speeches by top Administration officials. The court in partially redacted rulings ordered a July 2010 OLC memorandum published, with redactions to protect secret fact but not law. *See* N.Y. Times v. U.S. Dep’t of Justice, 752 F.3d 123 (2d Cir. 2014); 756 F.3d 100 (2d Cir. 2014). For documents, see DEPARTMENT OF JUSTICE WHITE PAPER: LAWFULNESS OF LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR ORGANIZATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE (posted Feb. 4, 2013), [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413 DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413 DOJ_White_Paper.pdf) (unclassified white paper, which the Justice Department acknowledged as officially disclosed; see 752 F.3d at 139); DAVID J. BARRON, ACTING ASSISTANT ATT’Y GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, MEMORANDUM FOR THE ATTORNEY GENERAL, RE: APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI (July 16, 2010) (memorandum ordered published in redacted form, lacks classification markings but described as classified in 752 F.3d at 138), <http://www.justice.gov/olc/olc-foia-electronic-reading-room>. *See also* DAVID J. BARRON, ACTING ASSISTANT ATT’Y GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, MEMORANDUM FOR THE ATTORNEY GENERAL, RE: LETHAL OPERATION AGAINST SHAYKH ANWAR AULAQI (Feb. 19, 2010) (earlier classified targeted killing memorandum also

Keeping the memos secret has been defended as necessary to protect classified sources and methods. Congress has shown sympathy to those who operated under their colors during the Bush Administration, providing safe harbor for telecommunications companies that cooperated in warrantless wiretapping and CIA personnel who carried out “enhanced interrogation techniques.”<sup>193</sup> On the merits of the programs, Congress largely ratified the major components of the Bush Administration’s warrantless wiretapping program.<sup>194</sup> The Obama Administration rejected the Bush-era interrogation programs, but continued the surveillance programs it inherited and accelerated its targeted killing program.<sup>195</sup> In sum, the shock associated with discovering that secrecy has been shielding questionable legal reasoning has had its limits.

On the other hand, there has been action in Congress to manage Executive Branch secret law. In terms of legal substance, Congress has twice repudiated the OLC interrogation memos by reaffirming the torture ban.<sup>196</sup> Senator Feingold introduced legislation requiring the Justice Department to report to Congress when it determines it does not have to observe a statutory requirement, for example through use of the constitutional avoidance canon.<sup>197</sup>

Congress also in 2010 legislated publication to Congress of secret intelligence law: a requirement that the intelligence committees to be informed of the legal basis of intelligence

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released), <https://www.aclu.org/legal-document/aclu-v-doj-foia-request-olc-memo>. Underscoring the unusual nature of the Second Circuit’s 2014 publication of the July 2010 al-Awlaki memorandum, the court subsequently withheld publication of other FOIA’d OLC documents because it was not clear they were adopted as binding by agencies. *See N.Y. Times v. U.S Dep’t of Justice*, 14-4432-cv, 14-4764-cv (2d Cir. 2015), [https://www.aclu.org/sites/default/files/field\\_document/135.\\_unsealed\\_opinion\\_from\\_10.22.15\\_released\\_11.23.15\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/135._unsealed_opinion_from_10.22.15_released_11.23.15_1.pdf).

<sup>193</sup> *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2468-69, codified at 50 U.S.C. § 1885a(a)(4) (requiring dismissal of suit if Attorney General certifies that an electronic communications service provider provided assistance for intelligence collection authorized by the President between Sept. 11, 2001, and Jan. 17, 2007); Department of Defense, Emergency Supplemental Appropriations Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005), Title X, § 1004 (portion of Detainee Treatment Act protecting U.S. government personnel who carried out certain interrogations).

<sup>194</sup> *See* Protect America Act of 2007, Pub. L. No. 110-55, 151 Stat. 553, 110th Cong. (2007), and FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

<sup>195</sup> *See, e.g.*, Exec. Order No. 13,491, 3 C.F.R. § 13,491 (2009) (interrogation policy).

<sup>196</sup> [cites]

<sup>197</sup> *See* OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008); S. Comm. on the Judiciary, S. RPT. No. 110-528 (2008) (committee report endorsing the bill); 154 CONG. REC. S8859 – S8862 (Sept. 16, 2008) (statement of Sen. Feingold explaining the bill is intended to combat secret law). The bill embodies an idea advanced by Morrison, *supra* note 19.

activities, including covert actions.<sup>198</sup> This provision was a response to the NSA's 2001-07 warrantless surveillance of the electronic communications of U.S. persons authorized in an OLC memo and revealed in 2005 by the *New York Times*.<sup>199</sup> In particular, the statutory change – § 331 of the IAA for 2010 – responded to several ways in which the Bush Administration mishandled the Legislative-Executive Branch oversight relationship regarding that NSA program: Congress was not informed of secret use of the constitutional avoidance canon by OLC to bypass FISA's statutory requirements; Congress was not notified promptly of a significant intelligence program; information on this *collection* program was inappropriately limited to a *covert action* notification process (i.e., notification only of the “Gang of Eight” leadership of the Senate, House, and the two intelligence committees); the Bush Administration did not fully explain the highly questionable legal argument for the program; and the oral-only notifications were restricted to Members of Congress with a stipulation that counsel could not be informed.<sup>200</sup> Sec. 331's statutory amendment represents an important step forward in transparency into Executive Branch legal interpretations that are classified along with the intelligence programs

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<sup>198</sup> IAA for 2010, Pub. L. No. 111-259, 124 Stat. 2654 (2010), § 331. Congress thereafter reorganized Title 50 of the U.S. Code, and the amended statutes in relevant part are found at 50 U.S.C. § 3092(a)(2) (as part of responses to the congressional intelligence committees on intelligence activities generally) and 3093(b)(2) (id., regarding covert actions). This provision joins a sibling enacted in 2004 requiring the Attorney General to provide to certain committees a semiannual “summary of significant legal interpretations” of surveillance law “involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review” as well as “copies of all decisions . . . or opinions” of the FISC “that include significant construction or interpretation” of law. 50 U.S.C. § 1871(a), enacted via Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 601, 118 Stat. 3638 (2004). For discussion, see Kerr, *supra* note 17, at 1523.

<sup>199</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. TIMES, Dec. 16, 2005, [http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?\\_r=0](http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0) (story reporting warrantless surveillance of U.S. persons by NSA).

<sup>200</sup> The National Security Act of 1947 as amended requires that the congressional intelligence committees be kept “fully and currently informed of all intelligence activities.” 50 U.S.C. § 3092(a). The program began in 2001 after the 9/11 attacks, and despite an enormous amount of Legislative-Executive communication regarding all aspects of the response to 9/11 in late 2001, and the enormous importance of the NSA program, the Bush Administration did not inform any Member of Congress until 2002 or 2003. See Letter from Senator John D. Rockefeller IV, Vice Chairman, Senate Select Comm. on Intelligence, to Richard B. Cheney, Vice President (July 17, 2003), <http://fas.org/irp/news/2005/12/rock121905.pdf> (declassified hand-written letter raising concerns about program). Vice President Dick Cheney carried out the notification via the “Gang of Eight” process under what is now 50 U.S.C. § 3093(c)(2), even though the NSA program was a collection program that did not meet the statutory definition of a covert action because it did not involve efforts to influence conditions abroad. Compare Remarks by Gen. Michael V. Hayden, Principal Deputy Director of Nat'l Intelligence, National Press Club, Jan. 23, 2006, <http://fas.org/irp/news/2006/01/hayden012306.html> (describing NSA program as one that collects information about calls with one end outside the United States) with 50 U.S.C. 3093(e) (covert action defined as involving secret action to influence conditions abroad). For discussion of the importance of Members having access to counsel as they conduct oversight. See Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915 (2011).

they concern. Note, however, several caveats. Sec. 331's window into Executive Branch secret law is one that only the intelligence committees can look through, and in secret. Sec. 331 does not stipulate that appropriately cleared committee counsel be able to review the notifications (although this is generally, but not always, part of the process).<sup>201</sup> Finally, President Obama's signing statement accompanying enactment of the IAA for 2010 made room for sharing secret legal reasoning but not actual secret legal opinions.<sup>202</sup>

### 3. Judicial Branch

Congress has been active managing alleged secret law in the judicial branch, as well. The ironies are hard to miss: the courts have condemned secret law in the Executive Branch,<sup>203</sup> and Congress by statute created a court whose entire output has been classified.<sup>204</sup> The evidence is clear that secret law is a three-branch phenomenon.

#### *a. Formative Era to Present Day: Development of the Publication Norm*

The judiciary's experience with publication of its decisions mirrors that of the other branches: an evolving publication norm, with inconsistent early years giving way to greater regulation and professionalization. After decades of reliance by the Supreme Court on private reporters, Congress in 1817 called for hiring a professional reporter to assist with reporting within six months and distribution within government.<sup>205</sup> In a helpful step for reporters and the rule of law alike, in 1834 the Court ordered itself to issue its opinions in writing. Meanwhile, reporting of lower court opinions remained inconsistent well into the 1800s. Congress

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<sup>201</sup> For background on the history of access of lawyer congressional staff members to intelligence information from the Executive Branch, see Clark, *supra* note 200, at 923-32.

<sup>202</sup> The “Administration understands section 331's requirement to provide to the intelligence committees ‘the legal basis’ under which certain intelligence activities and covert actions are being or were conducted as not requiring disclosure of any privileged advice or information or disclosure of information *in any particular form.*” President Barack Obama, Statement on the Intelligence Authorization Act, Oct. 7, 2010, <https://www.whitehouse.gov/the-press-office/2010/10/07/statement-president-intelligence-authorization-act> (emphasis added).

<sup>203</sup> See, e.g., *Torres v. INS*, 144 F.3d 472, \_\_ (7th Cir. 1998) (stating secret law is repugnant).

<sup>204</sup> See 50 U.S.C. § 1803 (establishing FISA court). Congress has also authorized the Attorney General to redact sensitive information from FISC orders that are shared with Congress. See FISA Amendments Act, Pub. L. No. 110-261, § 103(d), 122 Stat. 2436 (2008).

<sup>205</sup> 3 Stat. 376. For discussion, see Relyea, 5 GOV'T INFO. Q. at 98; Federal Judicial Center, History of the Federal Judiciary – “Court Officers and Staff,” [http://www.fjc.gov/history/home.nsf/page/admin\\_03\\_07.html](http://www.fjc.gov/history/home.nsf/page/admin_03_07.html).

eventually included publication of judicial opinions in GPO's mission. Nevertheless, private reporters continue to the present day to provide an enormous share of opinion reporting.<sup>206</sup>

*b. Post-Church-Pike / Millennial Era: Foreign Intelligence Surveillance*

What we term the Industrial Era ended circa 1975-78 with release of the Church-Pike reports, creation of the congressional intelligence committees, advent of classified legislative addenda, and passage of the Foreign Intelligence Surveillance Act (FISA). FISA would lead to some of the most pointed and controversial allegations of secret law in recent years.

FISA was a response to Church-Pike findings of surveillance abuses and inadequate oversight. Just as the Congressional-Executive “accommodation” revised constitutional inter-branch relations regarding legislative oversight, FISA enabled judicial oversight. FISA is a three-branch framework statute that states explicitly that it is the sole authority for national security surveillance of U.S. persons, provides statutory surveillance rules, and ensures judicial and congressional oversight.

FISA, from the start, could be viewed reasonably as either as an adaptation of or departure from the publication norm. And even as it combatted Executive Branch secret law, Congress arguably sanctioned it in the Judicial Branch: whereas secret legal opinions inside the Executive Branch formerly governed foreign intelligence surveillance entirely on their own, now the new Article III court – the Foreign Intelligence Surveillance Court (FISC) – would issue classified surveillance orders on the basis of classified ex parte applications and oral argument by the Executive Branch, where the FISC found probable cause to believe that a U.S. person target was a foreign power or agent thereof. Congressional oversight was informed via reporting about FISC actions to Congress. However, attention to FISC actions was generally limited to Members and staff of the intelligence and judiciary committees, due to the incentives mentioned in Part I.A.1.b against Members focusing on classified matters.<sup>207</sup>

Congress's management of Executive and Judicial Branch unpublished legal work continued after 1978. Congress remained vulnerable to claims that it had blessed creation of secret law in the judiciary, that the FISC lacked adversarial proceedings and rarely rejected warrant applications, that FISA's own terms left under Executive purview the national security surveillance of the rest of the world (the vast majority of national security surveillance), and that FISA was outsourcing to the Third Branch and burying under classification more granular

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<sup>206</sup> See generally West Publishing, <http://legalsolutions.thomsonreuters.com> (one of the most prominent publishers of U.S. legal materials since the late 1800s and the dominant one today).

<sup>207</sup> Congress has presumably provided funding and programmatic direction to the NSA, FBI, and other intelligence community elements via classified addenda to annual intelligence and defense legislation, but the public legislative record provides little from which to extrapolate.

balancing of liberty and security regarding surveillance.<sup>208</sup> These observations are not without merit. The FISC's classified orders have legal force, it rejects a tiny fraction of applications, national security surveillance abroad has been governed primarily by EO 12,333 (most recently revised in 2008) and secret legal interpretations thereof inside the Executive Branch, and Congress even as it has amended FISA has kept the FISC charged with secret review of warrant applications.<sup>209</sup> For many years, the strongest arguments in reply to the claim that the FISC was creating secret law were that the FISC was better than the alternative of Executive Branch unilateral decisionmaking, and that the FISC – like regular Article III courts considering criminal surveillance warrants *ex parte* – was acting in a ministerial capacity and not generating law with precedential value or other application beyond each individual surveillance target.

Efforts by Congress during the Post-Church-Pike / Millennial Era to have the FISC authorize more than “classic FISA” warrants, together with efforts by the Executive Branch to put on firmer legal footing a number of intelligence collection programs, led to the work of the FISC becoming less defensible as merely ministerial – and allegations of secret law compelling.

Congress gave the FISC the power to authorize a number of foreign intelligence-related collection activities, including under § 215 of the USA PATRIOT Act.<sup>210</sup> This provision was written by Congress with business records in mind, and allowed the FISC to issue an order compelling production of any “tangible thing” that is “relevant” to an investigation. During the George W. Bush Administration, the Executive Branch first developed and won FISC approval of an aggressive interpretation of § 215: corporate records of the communication metadata of millions of people are in bulk a “tangible thing” and “relevant” to investigating terrorists because, in effect, the Executive Branch found it necessary and beneficial to able to sift it for communications linked to terrorists. The public record reflects that the Justice Department secured regularly renewed FISC blessing of an email metadata collection program (subsequently cancelled by NSA), and later secured FISC approval of the telephony metadata bulk collection program continued under Obama and revealed by Edward Snowden in 2013.<sup>211</sup> In 2007, the

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<sup>208</sup> For the outsourcing interpretation, see McNeal, *supra* note 17, at 98-99. Loch Johnson memorably articulated the idea that intelligence oversight is mainly prompted by shocking revelations. *See* JOHNSON, SHOCK THEORY, *supra* note 92.

<sup>209</sup> For analysis of the FISC's approval rate, see e.g., Donohue, § 215 Article, *supra* note 21, at 834: the FISC in 2003-12 denied less than one percent of applications for electronic surveillance or physical searches, although in the case of some approvals the application was revised at the FISC's urging. The FISC denied no applications for orders regarding tangible goods under § 215 from 2005-12.

<sup>210</sup> Another example is FISA physical searches. *See* 50 U.S.C. §§ 1821-1829.

<sup>211</sup> *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272 (2001). Attentive readers of major U.S. papers would have noted cryptic reports of the telephony metadata collection as early as 2006. *See* Rumold, *supra* note 163, at 162. For criticism of the FISC's reasoning regarding § 215, see

FISC issued a classified opinion approving a modified version of the warrantless U.S. person international communications surveillance program authorized by OLC in 2001 and revealed by the *New York Times* in 2005. First in 2007 and then in 2008 in § 702 of the FISA Amendments Act, Congress statutorily put the latter program under rolling, detailed FISC supervision.<sup>212</sup>

The legal and policy merits of these programs have engendered considerable discussion.<sup>213</sup> It will suffice here to note that in its classified orders authorizing and supervising these programs, the FISC departed from its “classic FISA” role in important ways. First, instead of issuing only short orders and warrants that would be familiar to any prosecutor, the FISC was now doing statutory and constitutional law reasoning in extensive opinions. Second, the FISC,

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Donohue, *Bulk § 215 Article*, *supra* note 21 (arguing that bulk collection of metadata is illegal); Donesa, *supra* note \_\_ (describing history of § 215 program now in public record).

<sup>212</sup> Protect America Act [cite] (2007), and FISA Amendments Act [cite], § 702 (2008). For discussion of the § 702 program’s history and legality, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL’Y \_\_ (forthcoming 2015) (arguing that aspects of NSA programs are illegal under statute and the Fourth Amendment, and calling for a firmer wall between national security and criminal surveillance), <http://scholarship.law.georgetown.edu/facpub/1355/>.

<sup>213</sup> For legal analyses in addition to those mentioned previously, see Shayana Kadidal, *NSA Surveillance: The Implications for Civil Liberties*, 9 ISJLP 433 (2014) (legal basis for surveillance has changed since Bush Administration but actual surveillance programs and therefore their civil liberties implications have not); Katherine Strandburg, *Membership Lists, Metadata, and Freedom of Association’s Specificity Requirement*, 9 ISJLP 327 (2014) (conceiving NSA social network analysis as relational surveillance and arguing it violates First Amendment Freedom of Association); Peter M. Shane, *Foreward: The NSA and the Legal Regime for Foreign Intelligence Surveillance*, 9 ISJLP 260 (2014) (surveying surveillance law history and arguing that FISC is giving its assent to Executive Branch legal arguments about surveillance authority for in exchange for Executive’s submission to FISC program monitoring to protect privacy); Stephen I. Vladeck, *Standing and Secret Surveillance*, 9 ISJLP 552 (2014) (exploring implications of Supreme Court’s understanding of Congress’s power to confer standing for judicial review of secret surveillance); John Yoo, *The Legality of the National Security Agency’s Bulk Data Surveillance Programs*, 9 ISJLP 302 (2014) (arguing the programs are legal under statute and under Article II of the Constitution and the Fourth Amendment); McNeal, *supra* note 17 (history of § 702 program, and arguing for changes to FISC process).

For policy analyses, see, e.g., John Mueller & Mark G. Stewart, *Secret without Reason and Costly without Accomplishment: Questioning the NSA’s Metadata Program*, 9 ISJLP 408 (2014) (questioning the secrecy, cost, and cost-effectiveness of NSA’s bulk telephony metadata program and concluding that privacy here ought to trump security arguments); Nathan Alexander Sales, *Domesticating Programmatic Surveillance: Some Thoughts on the NSA Controversy*, 9 ISJLP 524 (2014) (proposing and applying principles for policy assessment of NSA big data collection); Bruce Schneier, *How the NSA Threatens National Security*, THE ATLANTIC, Jan. 6, 2014, <http://www.theatlantic.com/technology/archive/2014/01/how-the-nsa-threatens-national-security/282822> (“ubiquitous surveillance” is ineffective and carries enormous risks and costs); Mark D. Young, *National Insecurity: The Impacts of Illegal Disclosures of Classified Information*, 9 ISJLP 368 (2014) (Snowden’s revelations are hurting vital intelligence activity regarding key threats).

despite disclaimers, was de facto creating precedents for itself and the agencies it oversees, in secret.<sup>214</sup> Third, the FISC was no longer confining its work to particularized warrants regarding individual surveillance targets, but was reviewing and supervising bulk collection programs implicating the privacy interests of millions of people. The net result, as Orin Kerr observes, is that the FISC became a hybrid of a ministerial *ex parte* court and a common law court – one that created law out of view of the public and all but a handful of Members of Congress, without adversarial argument, rarely with even secret appellate review, and therefore without the usual connection to a “feedback loop” that would dissuade and correct weak legal reasoning.<sup>215</sup>

Senator Ron Wyden (D-OR) predicted in 2011 (in a Senate floor speech that was unusual for an intelligence committee Member) that Congress and the people would be shocked to learn how the intelligence collection statutes were being interpreted in secret.<sup>216</sup> The Senator was correct, on both programmatic and legal grounds, particularly about the § 215 bulk telephony metadata collection program and its supporting legal reasoning when revealed by Edward Snowden and in subsequent declassifications of FISC orders. Laura Donohue, Orrin Kerr, Marty Lederman, and other scholars exposed significant weaknesses in the Executive / FISC interpretation of § 215, one which Kerr characterized as appearing nothing like the statute facially read.<sup>217</sup> President Obama commissioned a panel to review surveillance practices. Based on its December 2013 findings and the reports of other independent commissions, Obama in 2014 ordered modifications to the § 215 program and other surveillance activities.<sup>218</sup>

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<sup>214</sup> For discussion of the effectively precedential nature of FISC rulings, see Donohue, *§ 215 Article*, *supra* note 21, at 822-24; SAVAGE, *supra* note 9, at 190. For discussion of how stare decisis is challenged by secrecy, see Boeglin & Taranto, *supra* note 17.

<sup>215</sup> Kerr, *supra* note 17, at 1515.

<sup>216</sup> Quoted in Rumold, *supra* note 163, at 164.

<sup>217</sup> See Donohue, *§ 215 Article*, *supra* note 21 (criticizing lack of particularization and lack of prior targeting, reliance on NSA to determine reasonableness, misuse of relevance standard, inconsistency with pen-trap provisions, and problematic Fourth Amendment reasoning); Marty Lederman, *The Kris Paper, and the Problematic FISC Opinion on the Section 215 “Metadata” Collection Program*, JUST SECURITY, Oct. 1, 2013, <http://justsecurity.org/2013/10/01/kris-paper-legality-section-215-metadata-collection/> (emphasizing weak analysis of § 215 in context with other statutes); Kerr, *supra* note 17, at 1526-27 (statute as interpreted bore little resemblance to how it read facially); Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215*, THE VOLOKH CONSPIRACY, Sept. 17, 2013 (agreeing with FISC constitutional analysis but viewing its statutory analysis and legislative ratification reasoning as weak). Cf., DAVID S. KRIS, ON THE BULK COLLECTION OF TANGIBLE THINGS, LAWFARE RESEARCH PAPER SERIES 1-4, Sept. 29, 2013 (defense of legality of bulk telephony metadata collection, a draft part of a supplement to Kris’s treatise with J. Douglas Wilson, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS), <http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-1.pdf>.

<sup>218</sup> See President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals->

Meanwhile, Snowden's leaks mitigated the standing problem that had bedeviled litigants against surveillance programs, facilitating a series of lawsuits that have led to diverging+ rulings.<sup>219</sup>

The Second Circuit's rejection of the FISC's § 215 reasoning in May 2015 spurred Congress to pass a package of reforms in the USA FREEDOM Act. These included having telephony metadata held by the private sector rather than the government, creating an amicus to make arguments on behalf of privacy at the FISC, and enhancing opportunities for appeal from the FISC to the Foreign Intelligence Surveillance Court of Review.<sup>220</sup>

Additionally, the USA FREEDOM Act mandated declassification by the Attorney General and Director of National Intelligence of all FISC opinions with "a significant construction or interpretation of any provision of law," or publication of an unclassified summary.<sup>221</sup> The provision's bipartisan authors trumpeted it as "end[ing] the era of secret law in America."<sup>222</sup> There is no question that this Act will likely provide unprecedented transparency into the Post-Church-Pike / Millennial Era's judicial secret law. Note, however, that it does not address Executive nor Legislative Branch secret law. The Executive Branch can also still

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intelligence; President Barack Obama, Presidential Policy Directive-28 (Jan. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>.

<sup>219</sup> In the Second Circuit petitioners have had success at the appellate level after rejection at the district court level. In the D.C. Circuit, the opposite has been the case. *See Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (bulk collection of telephone metadata does not violate the Fourth Amendment), reversed and remanded by *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 795 (2d Cir. 2015) (plaintiffs have standing, and telephony metadata not authorized by § 215); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013) (plaintiffs have standing, and Fourth Amendment claim likely to succeed), reversed and remanded by *Klayman v. Obama*, 800 F.3d 559 (D.C. Cir., Aug. 28, 2015) (suit unlikely to succeed). During the six month wind-up allowed by the USA FREEDOM Act regarding the former metadata program, litigation continued. *See Klayman v. Obama*, 2015 WL 6873127 (D.D.C., Nov. 09, 2015) (plaintiffs likely to succeed on standing and Fourth Amendment violation involving irreparable harm), stayed by *Klayman v. Obama*, 2015 WL 9010330 (D.C. Cir., Nov. 16, 2015), rehearing en banc denied by *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir., Nov. 20, 2015).

<sup>220</sup> *See USA FREEDOM Act*, *supra* note 13, at §§ 401, 402.

<sup>221</sup> *See USA FREEDOM Act*, *supra* note 13, at § 402.

<sup>222</sup> *See* 161 CONG. REC. S3642-01 (daily ed. June 3, 2015) (statement of Senator Merkley); Office of U.S. Rep. F. James Sensenbrenner (R-WI), Web Page on USA FREEDOM Act (H.R. 3361 / S. 1599, 113th Congress), <http://sensenbrenner.house.gov/legislation/theusafreedomact.htm>. This provision was in similar form contained in the FISA Court Reform Act of 2013, S. 1467, § 6, 113th Cong. 1st Sess. For discussion, see Boeglin & Taranto, *supra* note 17, at 2200 (endorsing bill).

withhold publication of FISC opinions, redact, or briefly summarize them. Although its effects remain to be seen, it promises to reduce FISC secret law and enhance management of it.<sup>223</sup>

## B. Appraisal

Publication of the FISC's § 215 reasoning – and subsequent rejection by Congress, the President, and courts of the program as legally constructed in secret – demonstrates the practical effect of publication. With secrecy removed, an expansive construction of the law did not survive (as also happened in the case of interrogation). In the process, publication of the FISC's § 215 opinions laid bare risks associated with secret law: shielding questionable legal reasoning and aggressive minority interpretations from scrutiny, interrupting the usual law-improving “feedback loop” of appellate review and inter-branch legal dialogue, disrupting the rule of law by creating major discontinuities in the law as constructed in secret versus as understood by the public and most of their elected lawmakers, and lack of notice for private citizens about privacy implications and what personal action implicates government investigative authorities.

It is true that terrorists who might be § 215 targets have a clearer sense of the U.S. government's legal authorities and operational details. The value to intelligence collection targets of that legal knowledge, however, is questionable in view of extensive factual indications of expansive NSA electronic surveillance domestically at least since revelation of warrantless wiretapping in 2005 (and virtually unlimited NSA electronic intelligence collection abroad has been well established for decades). What terrorist would *not* regard any use of a phone as a security risk? (This in contrast to everyone else, for whom government snooping should not be a default). Whatever distinct, incremental compromise to operational security happened solely as a result of publication of § 215's interpretation ultimately must be balanced against rule of law and self-government costs, and disaggregated from all of the operational detail about many intelligence sources and methods revealed in Snowden's avalanche.

In addition to the tipping-off-the-target argument, critics of the Secret Law Thesis, insofar as they do make arguments, usually try to define secret law away. For example, an argument heard during the § 215 debate is that the metadata program did not operate on the basis of secret law because its authority was not found in a secret statute, and classified FISC interpretations of § 215 authorizing the metadata collection by NSA were shared with congressional committees before Congress voted to reauthorize § 215 in 2010 and 2011.<sup>224</sup> This

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<sup>223</sup> Another potential example of judicial secret law warranting review as such is redaction of opinions. In the FOIA cases, for example, courts do this to protect classified information. *See, e.g.*, N.Y. Times v. U.S. Dep't of Justice, 14-4432-cv, 14-4764-cv, at 2 (2d Cir. 2015) (redacted portions of district court opinion in FOIA case regarding OLC targeted killing documents to remain undisclosed), [https://www.aclu.org/sites/default/files/field\\_document/135.\\_unsealed\\_opinion\\_from\\_10.22.15\\_released\\_11.23.15\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/135._unsealed_opinion_from_10.22.15_released_11.23.15_1.pdf).

<sup>224</sup> *See, e.g.*, Donesa, *supra* note 17, at 104, 107, 118, 128 (making implicit arguments as noted in text).

reasoning requires that the FISC opinions either not be law, or that Congress voting on a Public Law with some Members having knowledge of secret FISC opinions not only ratifies the secret opinions (reasoning the Second Circuit rejected in May 2015)<sup>225</sup> but somehow makes them no longer secret. In fact, they remained secret to the vast majority of Members, and to the public.

Other definitional arguments were heard at a congressional hearing focused on secret law in 2008. Their nexus was the notion that contemporary alleged secret law binds the government internally rather than individuals outside it. Senator Sam Brownback (R-KS) expressed skepticism that alleged secret law in the Executive Branch and FISC “comports with the notion of secret law as identified by the Federal courts,” meaning “administrative guidance or standards that an agency applies to the public” that are not published.<sup>226</sup> Then-current and former George W. Bush Administration lawyers testified that “there is no such thing as true ‘secret law’ in the way most lay observers would understand that term” as “rules of prospective application that govern or regulate private conduct, setting forth rights and duties whose violation might subject a person to some form of sanction.” That would be intolerable and “does not exist.”<sup>227</sup> They argued that what is often alleged to be secret law is in reality merely non-public internal government law “that regulate[s] the conduct of the executive branch” and is fine so long as there is inter-branch dialogue about it.<sup>228</sup>

The observation that today’s secret law mainly binds the government internally is worthwhile. But it only goes so far. This definitional reasoning maintains that the only secret law warranting attention as such is its most obviously worrisome, most Kafka-esque incarnation. It suggests that there is little reason to be concerned in principle about the secrecy of the law itself, from rule of law and self-government standpoints. It suggests that there is little reason to be concerned about the law’s secrecy specifically in the cases of legal force being given to legislative addenda that manage intelligence activities; OLC opinions on activities such as targeted killings of U.S. citizens, interrogation, and surveillance; and, FISC opinions authorizing intelligence collection – including suspicionless collection of communications in bulk every day of millions of people. This definitional reasoning also fails to come to terms with the reality that criminal law is implicated by secret law in the wake of “the wall” impeding law enforcement and

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<sup>225</sup> See *Clapper*, supra note 219.

<sup>226</sup> SJC Constitution Subcommittee Hearing (2008) (Statement of Sen. Brownback), supra note 19, at 3.

<sup>227</sup> See SJC Constitution Subcommittee Hearing (2008) (Statement of Bradford Berenson), *supra* note 19, at 9-10, 91 (quoted in main text); SJC Constitution Subcommittee Hearing (2008) (Statement of John P. Elwood, Dep’t Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice), *supra* note 19, at 111-12 (OLC “does not ‘make law’ in the same sense that Congress and the courts do” because it is internal to Executive Branch).

<sup>228</sup> Berenson, *supra* note 227, at 9-10.

intelligence agencies from coordinating and sharing information coming down after 9/11.<sup>229</sup> In these important instances, the effects of activities regulated by secret law – even as it technically only binds the government internally – plainly are reaching beyond the borders of the “black box” of the intelligence world. Definition-based efforts to dismiss claims of secret law have, in short, not been persuasive.

An alternative line of pushback against the Secret Law Thesis we might posit is this: what Part I.A documents is not remarkable and does not deserve the sinister term “secret law” because it is essentially of a kind with a slate of common legally binding unpublished documents (so this is another definitional argument). For our purposes, we can call this everyday sealed law “quotidian secret law.” Government-issued examples include criminal indictments and warrants; juvenile, drug, trade secret, and attorney discipline cases; and temporary restraining orders and civil cases involving minors, qui tam actions, and confidential settlement agreements.<sup>230</sup> In the private realm, examples include sealed dispute resolutions and confidential contract addenda (including “secret warranties”).<sup>231</sup>

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<sup>229</sup> See 50 U.S.C. § 1804(a)(6)(B) (2006 & Supp. V 2011) (“a significant purpose” of FISA surveillance may be “to obtain foreign intelligence,” revising earlier stipulation that foreign intelligence must be “the” purpose, and therefore allowing use of FISA surveillance to collect information for law enforcement provided there is a significant foreign intelligence purpose as well); *In Re Sealed Case*, 310 F.3d 717 (For.Intel.Surv.Rev. 2002) (declassified Foreign Intelligence Surveillance Court of Review opinion striking down FISC-imposed restrictions on intelligence and law enforcement cooperation and information sharing); SAVAGE, *supra* note 9, at 188-89 (contextual discussion).

<sup>230</sup> See FED. JUDICIAL CENTER, SEALED CASES IN FEDERAL COURTS (Oct. 23, 2009) (collecting examples of sealed cases, identifying reasons for sealing, and presenting data), [http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\\$file/sealcafc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc.pdf). To take one example, federal grand jury indictments like criminal search and arrest warrants are often sealed until the defendant is in custody so as not to tip off the target. *See* *Id.* at 17; Fed. R. Crim. P. 6(e)(4) (allowing sealed indictments). Regarding warrants, note that there are vastly more warrants issued under Title III and other authorities such as the Electronic Communications Privacy Act (ECPA) of 1986 than under FISA for foreign intelligence surveillance. *See* Stephen W. Smith, *Gagged, Sealed, and Delivered: Reforming ECPA’s Secret Docket*, 6 HARV. J. L. & POL’Y REV. 314 (2012) (federal magistrate judge estimates that in 2006 more than 30,000 sealed non-FISA surveillance-related orders were issued in federal courts, exceeding in a single year the entire output of the FISC since its creation in 1978). Still more surveillance does not require a court order, or is under warrants at the state and local level.

In grey areas between law and plans, and between public and private law, are the wind-down Resolution Plans required of banks by the Dodd-Frank financial reform statute. Banks annually must create for government review (and revision demand) a “living will” for how the bank would be dismantled in a crisis. These include published and unpublished sections. *See* 12 U.S.C. § 5365(d); 12 C.F.R. 243, 381. They cannot be surfaced via FOIA. *See* 5 U.S.C. § 552(b)(2) (exempting trade secrets).

<sup>231</sup> *See, e.g.*, Jeff Sovern, *Good Will Adjustment Games: An Economic and Legal Analysis of Secret Warranty Regulation*, 60 MO. L. REV. 323 (1995) (describing secret warranties on cars and other goods, analyzing implications, and discussing federal and state regulatory approaches). David Pozen notes that scholarly exploration of deep versus shallow secrecy focused on private law before public law. *See* Pozen, *supra* note 18, at 261-62.

Sealed everyday legal documents and cases are an exception to the publication norm but a common one.<sup>232</sup> They are sealed for reasons closely tied to their purposes: providing legally binding disposition of particular matters while protecting sensitive information. The secret law documented in Part I.A similarly allows law to be applied to fact while restricting knowledge of sensitive matters only to those with need to know, and serving the distinct purpose of each branch of government in our constitutional system. Congress is ensuring that the elected representatives of the people are able to write the law regarding classified programs they cannot name in Public Law, the Executive Branch is making the law meaningful to its agencies with administrative responsibilities and personnel in the field, and the FISC is doing a court's work of providing independent review of government requests to use investigative authorities implicating privacy and other rights.

These are legitimate points. Secrecy of everyday documents with legal force deserves additional inquiry generally, but for our purposes can be distinguished. First, the secret law documented in Part I.A is essentially public law of general applicability, and challenges self-government in a republic and the proper functioning of our constitutional order to an extent the quotidian secret law mentioned here does not.<sup>233</sup> Quotidian secret law is for the most part case-specific, limited in scope to particular government interactions with particular individuals, or to

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<sup>232</sup> Another example of alleged everyday secret law is officially unpublished judicial opinions. *See, e.g.*, *County of Los Angeles v. Kling*, 474 U.S. 936, 938 & n.1 (1985) (Justice Stevens, dissenting, criticizing a “proliferation of this secret law”); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001) (analysis of factors predicting publication of federal appellate decisions). In a common law legal system relying on precedent and employing the stare decisis doctrine, consistency and fairness considerations exert strong publication pressure. Courts throughout the country’s history have often chosen not to publish many opinions formally in the official reporters, however (although as a practical matter unpublished opinions have often been readily available to the public). A negative view of this practice is jurists failing to be accountable for or wanting to hide their decisions. A more charitable view emphasizes the prudential value of waiting for the right case with which to set or evolve precedent. In the context of overwhelming dockets, publishing only some decisions as formal precedents also can be understood as focusing scarce judicial resources. Whatever the merits of motives, this practice came to include the vast majority of federal appellate opinions. *See* Merritt & Brudney, *supra* (nearly four-fifths of federal appellate decisions were formally unpublished as of the end of the Twentieth Century). Discussion have often focused not on whether these opinions are published in fact – many technically unpublished decisions have been available from the court and appeared in the *Federal Appendix* (and in the current era online) – but rather by what method and how broadly, whether too many opinions are formally unpublished, and how and whether they should be cited. (For discussion, see, *e.g.*, Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005-2006)). Federal Rule of Appellate Procedure 32.1, approved in 2005, provides that courts cannot prohibit or restrict citation of officially unpublished decisions.

<sup>233</sup> FISC orders on electronic communications may facially read to be about particular individuals or telecommunications providers but as noted FISC orders in the 2000s began to operate effectively as precedents. OLC opinions similarly might concern a particular factual situation but create precedents.

particular transactions and other consensual arrangements.<sup>234</sup> The secret law discussed in Part I.A also concerns national security. This is the area of public policy that holds the greatest potential risk to the polity, sees the greatest government power, and is of widest possible general applicability and interest. The people have a compelling interest in being able to find the law in this area of enormous consequence, even if they do not on a daily basis know it in detail (nor any other law).<sup>235</sup> The public interest in individual criminal search warrants and the pattern of their use and in law regarding contracts and settlements exists to be sure, but is of a different kind.<sup>236</sup> Finally, note that the organs of government concerned with civil, criminal, and private law are far more accessible to the people than are the locked Sensitive Compartmented Information Facilities (SCIFs) in which national security legal authorities are drafted and debated only by public officials and employees with security clearances the government grants at its discretion.

In this foundational Part, I have considered the Secret Law Thesis and found strong evidence of what can reasonably be termed secret law. Naturally, it varies across the branches with the kind of legal instruments each produces. But what this Part has reviewed meets the definition: legal documents that require compliance that are classified or otherwise unpublished. In the Legislative Branch, this Part has shown that the evidence of secret law's existence is considerably more extensive than generally understood. In sum, claims of secret law are sufficiently compelling that we need to take secret law seriously as a general phenomenon.

## II. SECRET LAW VS. SECRET FACT

Secrecy is nothing new.<sup>237</sup> Its practical benefits are clear and compelling. In the context of a perilous security environment, it allows the state to collect, analyze, and disseminate

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<sup>234</sup> Fuller writes that generally private laws or “the great bulk of modern laws relate to specific forms of activity” such as business, and average citizens need not be aware. FULLER, *supra* note 16, at 51.

<sup>235</sup> “I do not know a single law of my country. I couldn’t recite a single one of them.” MacIntosh, *supra* note, at 9, 11; see also FULLER, *supra* note 16, at 50-51. Fuller responds to this argument that what matters is that the people are “entitled to know,” and that knowledge of the law by those who inform themselves percolates into society. *See* FULLER, *id.*

<sup>236</sup> “No governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981). For the people generally, their security interest is at least as paramount as their liberty interest.

<sup>237</sup> For recent treatments of the longstanding discussion about secrecy generally, see e.g., JASON ROSS ARNOLD, *SECURITY IN THE SUNSHINE ERA: THE PROMISE AND FAILURE OF U.S. OPEN GOVERNMENT LAWS* (2014) (analyzing expansion of secrecy within the U.S. Government despite enactment during the 1960s and 1970s of a series of laws promoting transparency); RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECURITY* (2013)(analyzing dilemmas associated with secrecy generally), and Pozen, *supra* note 18, (exploring secrecy generally and arguing that the constitution presumptively regards deep secrecy as illegitimate). For competing policy views, see e.g., GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* (2011)(arguing for the necessity of secrecy and a growing disconnect between views of secrecy between those in government and media),

information, advise decisionmakers, formulate plans, and counter the public and clandestine activities of other state and non-state actors without giving them notice. It allows speed and timely action, providing what the Director of National Intelligence terms decision advantage: the ability to act with the benefit of information other players do not have or do not know one has. When the intelligence community speaks of protecting sources and methods, it is talking about something important and fragile. The lives and livelihoods of Americans and foreigners who provide information to the United States depend on secrecy, and on technologies and arrangements with foreign entities that are hard to develop, tough to maintain, and often irreplaceable if compromised. Secrecy and compartmentalization of information reduce its exposure, in a context in which every person who knows a secret and every information technology component and every physical place through which it transits or in which it resides increases the risk that it will fall into the wrong hands by accident, leak, or compromise by a bad actor (e.g., recruiting or blackmail of a U.S. individual with a clearance, or penetration of a computer system or physical facility).

Secrecy – and more generally confidentiality – also provides a safe space for deliberations, where information can be evaluated, options developed, and advice rendered outside the hot glare of public or inter-branch scrutiny. It allows pre-decisional space, in other words, to be candid and imperfect on the road to the most relevant and high quality decisions. Secrecy allows difficult issues and even the intimate details of the lives of people potentially implicated in the activities of bad actors to be discussed in a context in which their privacy is otherwise protected. For the citizens of the republic, secrecy in the conduct of national security activities allows for uncomfortable, disturbing, and even terrifying information, threats, and decisions to be delegated to professionals under a proverbial cone of silence. Secrecy protects the placidity of the daily life of the people as much as it does national security information.

Secrecy's costs are clear and compelling, as well. In a republic, these include inherently less legitimacy for activities that do not receive full democratic due process consideration by government and the people, who are sovereign. Secrecy raises the question of how the people remain self-governing regarding matters that are hidden from public view. Secrecy is a process malady that by excluding key information, officials, and arguments from decisionmaking too often prevents issues from getting consideration that is meaningful, timely, contextual, and keeps faith with constitutional values.<sup>238</sup> By impeding information sharing, secrecy risks surprise despite all of the information necessary to prevent the surprise being in the system (in the case of 9/11, the costs of unconnected dots were high).<sup>239</sup> Secrecy risks preservation and even

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and Federation of American Scientists, Project on Government Secrecy (website), <http://www.fas.org/sgp/> (“Through research, advocacy, and public education the FAS Project on Government Secrecy works to challenge excessive government secrecy and to promote public oversight”).

<sup>238</sup> See BAKER, *supra* note 25, at \_\_, 323-24.

<sup>239</sup> See [9/11 Commission].

amplification of groupthink and other biases among secret-holders whose perceptions are unchallenged.<sup>240</sup>

Over time, secrecy facilitates the security apparatus's inertia, unaccountability, and growth. Newly installed public officials inherit classified activities and classification decisions, which roll forward beneath a cloak of secrecy and plausible deniability. Policy and organization change can be inhibited by reformer information deficits and reasonable warnings by defenders of the status quo that change could risk classified information, sources, and methods. When revealed – and especially when leaked – shocking secrets undermine trust in government, and implicitly emphasize its separateness from the people.<sup>241</sup> Secrecy masks the natural bureaucratic growth of government, including the tendency for the number of secrets, classified documents, classified programs, and people with clearances to grow.<sup>242</sup> Along with them, secrecy facilitates growth in the scope of issues that are “matters of national security.” From that development flows troubling implications for vertical and lateral federalism: empowerment of federal authority versus the states and people, and empowerment of the President and national security bureaucracy versus the Congress and courts.<sup>243</sup>

Secrecy brings power and status, and is itself inherently a form of regulation that brings influence and status to insiders.<sup>244</sup> If Henry Kissinger was right that power is “the greatest aphrodisiac,” then secrecy is sexy, too.<sup>245</sup> It can also breed risk-taking and arrogance. Because

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<sup>240</sup> See Pozen, *supra* note 18, at 280.

<sup>241</sup> See Pozen, *supra* note 18, at 280, 287 (quoting Richard Nixon: when information is withheld that should be known to the public, “the people soon become ignorant of their own affairs, distrustful of those who manage them, and – eventually – incapable of determining their own destinies”).

<sup>242</sup> For the first time in decades the number of people with clearances and original classification authority (OCA) has been reduced in recent years, but it has taken enormous effort by the intelligence community. See Steven Aftergood, *Security-Cleared Population Declined by 12% Last Year*, SECRECY NEWS, April 27, 2015, <http://fas.org/blogs/secrecy/2015/04/clearances-2014/> (data on number of documents classified and number of people with security clearances).

<sup>243</sup> See, e.g., [source from intro footnote critiquing secrecy generally]; Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1579 (2011) (critiquing growth of the idea of national security). The Framers understood these dynamics. “It is of the nature of war to increase the executive at the expense of the legislative authority” and of liberty, Hamilton wrote in *Federalist No. 8*, a point that can be made more generally about the secrecy with which the national security apparatus operates.

<sup>244</sup> Max Weber and Senator Daniel Patrick Moynihan memorably made *inter alia* this point. See, e.g., DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 59, 73 (1998); MAX WEBER, *BUREAUCRACY*, IN *ESSAYS IN SOCIOLOGY* 196, 233-35 (Gerth & Wright eds. & trans. 1970) (1946), discussed in Pozen, *supra* note 18, at n.60.

<sup>245</sup> For the quote, see Philip Sherwell, *The World According to Henry Kissinger*, THE TELEGRAPH, May 21, 2011, <http://www.telegraph.co.uk/news/worldnews/us-politics/8528270/The-world-according-to->

people – in the famous formulation of *The Federalist* – “are not angels,” individuals inevitably will also be tempted to use secrecy to cover abuses of authority and their honest errors and incompetencies.<sup>246</sup> Secrecy creates an incentive for decisionmakers to think they will not be held to account for bad, unethical, or immoral decisions, or ex post that messes can be buried.

The merits and costs of secrecy I have just identified are extensively discussed in the scholarly literature and public fora. They apply to both fact and law. But does that mean that secret fact and law are not meaningfully different? Put a different way, are the tens of thousands of classified State Department cables that Chelsea Manning leaked to WikiLeaks different in some important way than the classified law leaked by Edward Snowden? Some say no, arguing explicitly that secret law is not a distinct problem.<sup>247</sup> Most participants in the secrecy conversation draw no distinction.<sup>248</sup> Others, including secret law critics in Congress, do claim that they are different. They argue that some amount of secret fact is inevitably necessary but all law should be public.<sup>249</sup>

My contention in this Part is that secret fact and secret law are importantly different in the extent to which we can potentially tolerate them. The publicity principle most famously articulated by Immanuel Kant is the idea that generally law cannot be legitimate – it is not really law – if it cannot withstand public scrutiny.<sup>250</sup> Kant addressed his principle to secrecy generally,

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Henry-Kissinger.html. I am defining sexy here in its most expansive sense, as in mysterious and attractive, but not arguing the term applies to all secrets nor to all who know them. When known, secrets are often ugly, or amazing, or obvious and boring.

<sup>246</sup> See THE FEDERALIST NO. 51 (James Madison) (arguing that if people were angels government would not be necessary). The Framers took a dim view of human nature: people are “ambitious, vindictive, and rapacious.” THE FEDERALIST NO. 6 (Alexander Hamilton).

<sup>247</sup> For a brief but explicit argument that secret law and fact are not different, see Berenson, *supra* note 227, at 91 (nothing “unique or special” about secret legal materials).

<sup>248</sup> See, e.g., Pozen, *supra* note 18, Richard A. Clarke, Michael J. Morrell, Geoffrey R. Stone, Cass R. Sunstein, & Peter Swire, The President’s Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World, Dec. 12, 2013, at 48-52, 124-29, available at [https://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [hereinafter President’s Review Group] (panel of two non-lawyer national security practitioners and three legal scholars chartered by the President after Snowden’s revelations).

<sup>249</sup> IAA for 2015, S. RPT. NO. 112-43 (2014) at 30-31 (text of amendment offered during committee markup, § (a)(8)); see also CONG. REC., May 24, 2011, S3259-60 (Statement of Senator Wyden: “Americans know their government will sometimes conduct secret operations, but they don’t believe the government ought to be writing secret law”).

<sup>250</sup> As noted *supra*, scholars use varying terms for the principle including publication, publicity, and promulgation.

but I will maintain that it must operate more strongly regarding law than policy fact. This idea is reflected in U.S. governance in the constitutional norm against secret law, one that is not absolute but is stronger than the norm against secrecy generally. Similarly, the publicity principle in theory is not absolute. There is a line of thought suggesting that a non-public law might still be legitimate if it is a shallow secret. That is, secret law is a known unknown to the public, and a known known to clearance-holding officials who are accountable to the people.

Informed by Part I's assessment of secret law, and this Part's reflection, I close this Part by identifying five overarching and at times competing constitutional values that implicate whatever contested space secret law may legitimately occupy.

#### A. The Publicity Principle

All discussion of fact is itself also fact, but not all discussion of the law is law. That status difference reflects something deeper about law's essence that makes law different from other varieties of information.

The question of which rules are legitimately laws – “what is law?” – has engaged lawmakers and scholars since law’s advent.<sup>251</sup> A rich conversation has focused on several essential qualities of law. Some of these criteria are well accepted as requisite qualities of law, while others are more disputed. Similarly, some scholars view law dichotomously as existing or not and accordingly carrying an obligation or not, while others would admit the possibility that a purported legal authority would have greater or lesser legal heft based on how many and which attributes of law it possesses.<sup>252</sup> Still others might say that the question instead is whether it ought to be obeyed.<sup>253</sup> For our purposes it is sufficient to observe that the literature suggests several classic qualities of law – law is a general rule obligating compliance,<sup>254</sup> published;<sup>255</sup> emanates from a legitimate authority;<sup>256</sup> created and subject to change through processes under

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<sup>251</sup> H.L.A. Hart noted that this definitional question has been asked about law with a frequency that is not paralleled in other fields such as medicine or chemistry. HART, THE CONCEPT OF LAW at 1.

<sup>252</sup> See Bix, *supra* note 19, at 8 (discussing natural law theorists and Aquinas).

<sup>253</sup> See, e.g., Hart, 71 HARV. L. REV. at 593.

<sup>254</sup> See, e.g., FULLER, THE MORALITY OF LAW at 46-49, 209-10; HART, THE CONCEPT OF LAW at 20-25.

<sup>255</sup> See, e.g., FULLER, THE MORALITY OF LAW at 39, 49-51

<sup>256</sup> Law is made for the public’s benefit by one “who has the care of the community.” THOMAS AQUINAS, SUMMA THEOLOGICA, Question 90, art. 4, in SAINT THOMAS AQUINAS, THE TREATISE ON LAW 145 (R. J. Henle, S.J., ed. & trans., 1993).

the rule of law;<sup>257</sup> clear;<sup>258</sup> consistent;<sup>259</sup> implemented or at least implementable;<sup>260</sup> not retroactive or *ex post*;<sup>261</sup> followed;<sup>262</sup> and, just<sup>263</sup> – and that the principle most applicable to the question of whether secret fact and law are different is that of *publication*.

This publicity requirement has ancient roots, evident in the Roman Republic’s posting of its statutes on twelve tablets in the Forum, and in the Roman Emperor’s signed edicts.<sup>264</sup> Thomas Aquinas defined law in terms of its publication: “a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated.”

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<sup>257</sup> The debate about whether due process includes a substantive element reflects tension in understandings of what it means for process to produce law that is truly law. A corollary to law’s production through process is availability of process for changing the law and challenging adjudications pursuant to it. A law that cannot be changed becomes illegitimate because it has become disconnected from the sovereignty of the self-governing people.

<sup>258</sup> For example, Fuller’s vision of law’s “inner morality” includes its understandability. *See* FULLER, THE MORALITY OF LAW at 39, 63-65. In statutory interpretation, ambiguous text is reconstructed, trumped by deference principles, slain as void for vagueness, or otherwise given no effect. Lack of clarity undermines law-ness.

<sup>259</sup> Laws that are inconsistent undermine the essential law-as-rule quality, for the rules then are not as they purport to be. Examples of inconsistency are contradiction, constant change, and lack of congruence between official action and the declared rule, violating Fuller’s fifth, seventh, and eighth principles. *See* FULLER, THE MORALITY OF LAW at 39, 65-70, 79-91.

<sup>260</sup> Hart discusses the importance of a threat of implementation “in the event of disobedience.” HART, THE CONCEPT OF LAW, at 25. Fuller’s sixth principle is that law is capable of implementation. FULLER, THE MORALITY OF LAW AT 39, 70-79. Impossible laws, uninvoked laws, and unenforced laws over time become more questionable. Desuetude reflects the notion that law that is old and not given continuing life through enforcement and compliance loses its legal force.

<sup>261</sup> *See, e.g.*, U.S. CONST., art. I, § 9, cl. 3 (banning *ex post facto* laws); FULLER, THE MORALITY OF LAW at 39, 51-62 (Fuller’s third principle).

<sup>262</sup> *See, e.g.*, HART, THE CONCEPT OF LAW at 23 (discussing “a general habit of obedience”).

<sup>263</sup> Whether the justice of law is integral to its status as law is a classic question. *See* Kutz, *supra* note 19, at 12. Fuller’s fourth principle, disputing the lawfulness of retroactive laws, reflects a vision of law as a moral project. FULLER, THE MORALITY OF LAW at 51-62. But note that Fuller also makes exceptions for curatives. *See* ID. (quotidian examples); Fuller, 71 HARV. L. REV. at 661 (invalidating Nazi laws).

<sup>264</sup> *See* FULLER, THE MORALITY OF LAW at 49; Kutz, *supra* note 19, at 8-13. Kutz traces the principle’s ancient roots, and notes Blackstone’s mention of the wretched emperor Caligula’s twisting of the promulgation tradition: publishing his edicts “upon high pillars,” in tiny script, “the more effectively to ensnare people.” *Id.* at 15 (citing BLACKSTONE, COMMENTARIES, Bk. 1, sec. iii, \*40).

“[P]romulgation is necessary for law to have its binding force.”<sup>265</sup> Lack of publicity, in Christopher Kutz’s words, is the “mark of tyranny, inconsistent with the notion of law itself.”<sup>266</sup> Keeping the law secret denies the public notice, and thereby undermines popular sovereignty and self-government in two ways: the *political self-government* right of the people to determine the content of the law and choose the public officials who create and administer it, and the *personal self-government* ability of the people to conform their conduct to the law.

Immanuel Kant famously articulated the publicity principle. It is the “transcendental formula of public law,” one that some scholars see as consistent with his idea of the categorical imperative.<sup>267</sup> “All actions relating to the right of other human beings,” Kant wrote, “are wrong if their maxim is incompatible with publicity.”<sup>268</sup> David Luban emphasizes that Kant’s legally focused principle breaks with the pre-Enlightenment idea – still with many adherents – that average people are not competent to exercise judgment in affairs of state. Statecraft in this Machiavellian view requires secrecy, special inspiration, and even lies, betrayal, and murder.<sup>269</sup>

The principle is clear, but must it be absolute? Kant maintained that laws (and other acts of policy and law) by definition must have the “*capacity for publicity*” (emphasis added) but not necessarily actually be published.<sup>270</sup>

Despite the inherent ambiguity of Kant’s complication of his principle, Luban suggests that Kant would find the idea of secret legislation “unthinkably bizarre.” Yet overall, Luban finds Kant’s case for the publicity principle unpersuasive.<sup>271</sup> Luban’s most relevant reason for our national security purposes is that publication could frustrate a law by presenting notice and

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<sup>265</sup> THOMAS AQUINAS, SUMMA THEOLOGICA, Question 90, art. 4, *in* SAINT THOMAS AQUINAS, THE TREATISE ON LAW 145 (R. J. Henle, S.J., ed. & trans., 1993), quoted in Bix, *supra* note 19, at 2.

<sup>266</sup> Kutz, *supra* note 19, at 7-8.

<sup>267</sup> John Rawls endorsed Kant’s view, including with reference to the categorical imperative. JOHN RAWLS, A THEORY OF JUSTICE 130-33 & 133n) (the publicity principle is a “formal constraint on the concept of right”). For David Luban’s thoughtful treatment, see Luban, *supra* note 16, at 180-82.

<sup>268</sup> I use Luban’s translation, for the reasons he explains, *supra* note 16, at 155 n.1; *see also* IMMANUEL KANT, PERPETUAL PEACE 381 (1795).

<sup>269</sup> Luban, *supra* note 16, at 157. For discussion of Kant’s theoretical union of law and morality related to his categorical imperative, see 180-81.

<sup>270</sup> Kant, *supra* note 16, at 386. For discussion, see Luban, *supra* note 16, at 155-57, 177. Publicity also does not necessarily make a law or act right. *Id.* at 157. Regarding the connection between publicly held conceptions of justice and the publication necessity, Luban observes that Kant’s public justice case is “incomplete” and it “scarcely follows that the laws cannot be secret.” *Id.* at 180.

<sup>271</sup> Luban, *supra* note 16, at 181, 183.

threfore perverse incentives to its target. A law setting a date for removal of price controls is Luban's example.<sup>272</sup> Others might be laws banning cigarettes on a particular day, or instituting a new surveillance method. Kant's publicity principle can be saved, in Luban's view, with the qualification that secret legal specifics could be fine so long as the government publishes notice that it is withholding the policy details on a particular matter in order to avoid self-defeat.<sup>273</sup>

How secret can the law can be and still be legitimately termed law? One can envision a zone of law that is a known unknown (to borrow former Defense Secretary Donald Rumsfeld's famous formulation).<sup>274</sup> The *existence* of unpublished secret law is published, or at least has the capacity for publicity.<sup>275</sup> Writing about secrecy generally largely without reference to secret law specifically, David Pozen explores the distinction between shallow secrecy (the existence of the secret is known, but its substance is secret) and deep secrecy (the secret is itself a secret, an unknown unknown).<sup>276</sup> Writing about law specifically, Kutz similarly distinguishes what he terms direct secrecy and meta-secrecy. Despite his abhorrence generally for secret law and especially meta-secret law, Kutz admits the possibility that direct secret law "might merit the notion of law, if official conduct were sufficiently controlled."<sup>277</sup> That is in large part a matter of

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<sup>272</sup> Luban, *supra* note 16, at 183-89. Luban uses the term autopaternalism for violation of the publicity principle to avoid perverse incentives for the law-abiding. *Id.* at 191. *See also* MacIntosh, *supra* note 9, at 2-5 (without engaging Kant, also arguing that a law might be legitimately non-public if publication would result in self-defeat).

<sup>273</sup> Luban, *supra* note 16, at 188-91.

<sup>274</sup> See Donald H. Rumsfeld, Sec'y of Defense, Dep't of Defense News Briefing (Feb. 12, 2002), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636>; *quoted in* Kutz, *supra* note 19, at 7.

<sup>275</sup> Luban explores what capacity for publicity meant to Kant, or could mean. Luban, *supra* note 16, at \_\_\_\_.

<sup>276</sup> Pozen, *supra* note 18 (article generally), and at 327 (sole specific discussion of secret law: a recommendation for Congress to legislate a reporting requirement on the President concerning secret law s/he produces).

<sup>277</sup> Kutz, *supra* note 19, at 6 n.8. See also *id.* at 29: "where the fact of secrecy is known, the governor's private realm is demarcated, hence made public. The public knows what it does not know, and can evaluate externally the ruler's claim to use the techniques of secrecy to advance the commonweal....Meta-secrecy, in contrast, hides the limits of the ruler's power, and so releases those limits altogether....[M]eta-secret laws are a hallmark of tyranny. And if tyranny is, at root, lawlessness, then secret laws are -- paradoxically enough -- a form of lawlessness."

Kutz's contribution to the publicity principle literature comes in the context of scholarly debate about publication and positivism. Here the legal literature has directly engaged secret law. A strict positivist view departs from Kant's close association of legality and morality, and does not necessarily require law to accord with Kantian publicity. Lon Fuller took on H.L.A. Hart's positivist view, arguing generally for publication. *See* Fuller, *supra* note 131, 71 HARV. L. REV. at 651. Fuller argued that failure to publicize the law stands with lack of legal rules and six other errors as a mark of a legal system's

oversight and process, addressed in Parts III and IV. One can reasonably understand the publicity principle to suggest greater legitimacy the greater the publication to the public or internally within government.<sup>278</sup> We can make a similar observation about fact (policy), to which Kant categorically applies his publicity principle as well.

Despite both fact and law being more legitimate with more publication, and both admitting some contested space for secrecy, I argue it would be wrong to conclude that the publicity principle operates with the same force regarding fact and law. We must have less tolerance for secret law because publication is required for other definitional qualities of law – qualities that make law *law*.

To begin, to have force of law a purported legal instrument must have the quality of what Aquinas termed “a rule and measure” with “the power of obligating.”<sup>279</sup> H.L.A. Hart similarly conceives of law in terms of “rules of obligation,”<sup>280</sup> while Lon Fuller makes the presence of rules – as opposed to ad hoc adjudication – as a requirement without which a legal system fails.<sup>281</sup> Jeremy Waldron observes that “The main demand that law makes on us as subjects is that we comply with it.”<sup>282</sup> All of these varying but similar law-as-rule formulations necessitate some level of publication – that is, sharing with officials administering and overseeing it, and sharing with the people who are (and whose government is) subject to it. Lacking publicity, a secret law becomes entirely specific to an individual or institution, one that by definition has both the power to create and remove it. An unpublished law therefore is mere recording of a potentially ephemeral guideline by an entity that is a law unto itself. Law loses its Thomistic essence as a rule, and with that loss also loses its capacity to limit. Legal authority without limit,

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failure at “the internal morality of law.” FULLER, THE MORALITY OF LAW 39, 49-51. Hart accepted unpublished law in the context of officials and lawyers making it intelligible. *See* HART, THE CONCEPT OF LAW at 22. Kutz’s project in arguing for “the repugnance of secret law” is in part one of setting forth a “normatively-oriented positivism” that generally requires law to be published, not only for its practical benefit of notice to the governed but for its moral and existential value in ensuring the legitimacy of the lawmaking state in view of popular sovereignty. Kutz, *supra* note 19, at 5-7. Grant similarly argues for the consistency of positivism and the publicity principle, as “a necessary connection” between the law and its moral merits. Grant, *supra* note 2, at 301-3.

<sup>278</sup> Bix, *supra* note 19, at 6 (discussing John Finnis, writing from a natural law standpoint, arguing that a non-promulgated law would still be law, but being unknown it could not engage our moral sensibility and therefore is law of a lesser form).

<sup>279</sup> AQUINAS, *supra* note 256, at 2. Even a statute that is optional (“the Secretary may...”) is binding in the sense that the existence of the option is still required, and exercise of option must be respected.

<sup>280</sup> H.L.A. HART, THE CONCEPT OF LAW 91 (1961).

<sup>281</sup> FULLER, THE MORALITY OF LAW, *supra* note 16, at 46-49.

<sup>282</sup> JEREMY WALDRON, LAW AND DISAGREEMENT 100 (1999).

or authority to create and repeal law without limit, is not law. It is mere power, action, and governance. As Kafka posited, it would also over time also take on that appearance: people would come to doubt the existence of the unpublished “secret code” of laws and decide that the law instead is whatever the governing regime does.<sup>283</sup> In theory and in practice, law that is entirely unpublished (for example, not even shared with other agencies) decays from the category of law to mere fact. It becomes unilateral and unilaterally reversible decision. In contrast, secret fact – a program, intelligence collection method, or operational practice – that is not published beyond its creator is not similarly undermined, because its essence carries no requirement of being a rule or limitation.

Second, the notion of law-as-rule also requires the basic rule of law principle of consistency. Fuller articulated this principle in this way: law is not contradictory.<sup>284</sup> Without consistency, the rules are not what they purport to be and lose some or all of their legal force. Some other rule – arguably the secret rules of those who wrote it – becomes the real law (a problem that presented when the FISC interpreted § 215 of the USA PATRIOT Act so broadly that it bore little relation to the plain text or congressional intent; in the darkness of secrecy the classified FISC opinion had displaced Public Law as the controlling law).<sup>285</sup> Alternatively, in the case of inconsistency the real law might be some combination of rules read together, there might be a partial or total gap created by inconsistency, or the purported law is again just power or action. Consistency, in turn, presupposes some necessary level of publication. It involves accord or resolution of differences among multiple laws, and therefore some level of dialogue.

But what about a law that is internal to one entity and also consistent with other laws, and other entities are not aware of it? Does not that solve the consistency problem, and leave us back in the more general Thomistic law-as-rule discussion above? The only way a secret law could avoid the consistency problem if it stayed entirely secret to its own creating individual or institution is if it is not in any way at odds with other law created by or known to other institutors and people who are not aware of the secret law. In other words, losing the force of law due to inconsistency is only avoided by secret law through not being inconsistent. It must say within the four corners of the publicized law and not challenge it in any meaningful way. It must be entirely derivative, subordinate, and ministerial. Secret law must never challenge public law. What one might term “secret conflict of laws jurisprudence” must operate differently when secret law is involved: public law must always trump secret law, and secret interpretations must

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<sup>283</sup> See FRANZ KAFKA, *The Problem of Our Laws*, *supra* note 2, at 157. In Kafka’s parable, the view that the law does not exist is held only by a small part of the populace because the majority does not believe itself “worthy of being entrusted with the laws” and instead “recognizes the nobility and its right to go on existing.” *Id.*, at 157-59.

<sup>284</sup> FULLER, THE MORALITY OF LAW at 65-69.

<sup>285</sup> Kerr makes this point. See Kerr, *supra* note 17, at 1525 (§ 215 interpretation was “shocking”).

exercise great deference to Public Law and public understanding of it. This is the essence of the first limiting principle I posit in Part IV.

In contrast, the secret world of fact can be and generally is rife with inconsistency, among secret activities and between public and secret policies. Secret agencies, actors, and actions are often pulling in contrary directions, sometimes with the knowledge of (publication to) those involved – and sometimes not (e.g., a state secretly assisting both sides in a conflict). Either way, inconsistently in secret policy, activity, or methods may make for chaotic (or brilliant) statecraft but does not conceptually undermine those secret activities in the same way that inconsistency among laws undermines their very law-ness.

Note that I say *to the same extent*: because of popular sovereignty, a policy publicly made and ratified by the public through elections carries greater legitimacy than one that is secret. But that lack of institutional or electoral endorsement in public does not categorically negate the legitimacy of secret policies in the same way. It is common for legislative ratification of secret activities to be inferred from public votes by Members of Congress to approve legislation with secret addenda. In contrast, the Second Circuit in disagreeing with the FISC’s secret expansive construction of § 215 refused to infer legislative ratification of the FISC’s secret law when Congress reauthorized § 215 before the FISC opinion was leaked.<sup>286</sup>

The third and related observation I will make briefly about the publicity principle and how it must operate less tolerantly toward secret law than toward secret fact relates to the nature of the state. A state that has no secrets at all, even about the secret activities of other states, is essentially inconceivable, in view of the perilous international security environment. Even a small state dependent for security on a state with strong national security capabilities would probably need to conclude some secret arrangements with its protector and would face clandestine encroachments from common adversaries and shadowy criminal elements. One can at least imagine, in contrast, a polity that decides to have no secret law.

These reflections about the publicity principle suggest less theoretical tolerance for secret law than for secret fact, but do not tell us how much secret law is allowable. That question is informed by the norms of our particular polity, starting with its governing Constitution.

## B. The Constitutional Norms

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<sup>286</sup> See *Clapper*, 785 F.3d at 819 (“the *public* nature of an interpretation plays an important role in applying the doctrine of legislative ratification” (emphasis added)). For discussion, see Marty Lederman, *Second Circuit Rules that Section 215 Does not Authorize Telephony Bulk Collection Program*, JUST SECURITY, May 7, 2015, <https://www.justsecurity.org/22799/breaking-circuit-rules-section-215-authorize-telephony-bulk-collection-program/>.

The question of secrecy and the Constitution has received relatively little scholarly attention.<sup>287</sup> My claim here is that constitutional text and history reflect the publicity principle. Part I of this article documented the extent to which the constitutional norm against secret law exists but carries a significant and longstanding exception. In contrast, the constitutional norm against secret fact is weaker. Law and fact are, in short, different in the extent to which our constitutional order tolerates them.

### 1. The Constitutional Norm and Law

The Constitution is a national security document, written in the wake of the war that won the country its independence. It was significantly motivated by enormous concern among the Framers about the central government's weakness under the Articles of Confederation compared to foreign empires and the risk of liberty-imperiling war among the states. It provided the central government for the first time the taxing and conscription powers to create a standing army and a single President to direct it. The Constitution is therefore fairly assessed by Akhil Amar as "a war machine"<sup>288</sup> (but not only that). Taken as a whole, the Constitution endeavored to craft a federal governing structure that was strong enough to deter external and prevent internal war, but sufficiently limited through lateral and vertical federalism and individual liberties that its own powers and the ambitions of officeholders would not imperil liberty.<sup>289</sup>

In this context, one could imagine a Constitution replete with references to secrecy, including the creation of secret laws. Hamilton argued for the controversial proposition of a

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<sup>287</sup> See, e.g., SJC Constitution Subcommittee Hearing (2008) (Statement of Heidi Kitrosser), *supra* note 19; & KITROSSER, RECLAIMING ACCOUNTABILITY at 2-17 (2015) (developing argument that the nature of the Executive Branch tends toward secrecy and unaccountability if unchecked, and that the overall public and dialogic nature of the Constitution's lawmaking processes favor a constitutional norm of publicity); Pozen, *supra* note 18, at 292-333 (arguing that that Constitution should be understood to be comfortable with shallow secrecy but not deep secrecy); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1183-1214 (2003) (analyzing significance of the Constitution's drafting in closed sessions).

<sup>288</sup> See THE FEDERALIST NO. 8 (Alexander Hamilton). Entitled "The Consequences of Hostilities Between the States," this essay famously argued that

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

For discussion of his "war machine" gloss on the Constitution's design, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY \_\_ (2005).

<sup>289</sup> See THE FEDERALIST NO. 51 (James Madison) (if people were angels government would not be necessary; dividing power reflects the need for "Ambition must be made to counteract ambition").

single national chief executive by emphasizing that such an individual would bring the unity of command and effort to deal with national security threats, acting as necessary with “decision, activity, secrecy, and dispatch.”<sup>290</sup> And yet, the text, structure, and history of the Constitution are hostile to it. The document’s text makes its sole reference to secrecy in the Journal Clause of Article I, and it is by way of exception.<sup>291</sup> The Constitution is heavily about authorities and procedures, and makes no reference to creation of secret laws. The Appropriations Clause’s requirement of an Act of Congress for any spending, and the Statement and Accounts Clause’s stipulation that budget figures for “all public Money shall be published from time to time,” together provide a powerful command for publication of law drawing funds from the Treasury, even for classified activities (while leaving granularity and timing an open question).<sup>292</sup> Of the three branches, the Constitution gives primacy of placement in Article I not to its new Commander-in-Chief but instead to the branch most accountable to the people, who will demand transparency: the Congress. The Constitution’s legislature-executive-judicial lawmaking flow inherently reflects legislative supremacy.<sup>293</sup> Because that process is assumed to be public, that legislative primacy equals what Heidi Kitrosser terms a “macro transparency.”<sup>294</sup>

The history of constitutional practice reflects this generally strong constitutional norm against secret law. As explained in Part I: Congress has designated its governance decisions Public Laws and consistently published its statutes; the general rule for the Executive Branch has been publication of guidelines and rules, particularly in the era of the administrative state thanks to the APA; and the courts have published their decisions and decried secret law in FOIA cases. Furthermore, canons of statutory interpretation crafted by the courts – now used outside of the

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<sup>290</sup> THE FEDERALIST No. 70 (Alexander Hamilton).

<sup>291</sup> U.S. CONST., art. I, § 5, cl. 3. The Supreme Court understands the aim of the Clause as ensuring “publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.” *Field v. Clark*, 143 U.S. 649, 670-71 (1892). *See also* Berenson, *supra* note 227, at 97 (secrecy is exception).

<sup>292</sup> U.S. CONST., art I, § 9, cl. 7. *See also* supra note 36.

<sup>293</sup> Several scholars make a related point. *See* Morrison, *supra* note 19, at \_\_ (Constitution reflects legislative supremacy); Kerr, *supra* note 17, at 1533-34, 1538-39 (Congress best able to make the law).

<sup>294</sup> *See* Kitrosser, Senate Subcommittee Hearing (2008), *supra* note 19, at 138-41, and Heidi Kitrosser, *Macro-Transparency as Structural Directive*, 91 MINN. L. REV. 1163 (2007) (arguing that the Constitution inherently demands macro-transparency).

courts as well – assume public review.<sup>295</sup> They operate as part of a feedback loop of public dialogue with the electorate and among the three branches about law and policy.<sup>296</sup>

The examples of secret law discussed in Part I exist in this context as an exception to the general constitutional norm against secret law – and relatively narrow ones.

## 2. The Constitutional Norm and Fact

The constitutional norm against secret law applies to fact, as well, but less stringently.

The vast majority of the federal government’s activities are unclassified. That is the default. Even before the formal system of classification was created in connection with the rise of the administrative state and Cold War, and despite a long history of development of the notion of executive privilege, the government could acknowledge the vast majority of its activities. Today, non-secrecy remains the default even for the majority of the work done in many parts of the national security establishment, including the Departments of Defense and State. An affirmative act is required to classify a document, and that decision must be defended and documented with citation to legal authority and national security need.<sup>297</sup> Getting access to secret documents and to the authority to share and create them involves a complicated and often long security clearance application process.<sup>298</sup> The Federal Register Act, APA, and FOIA represent congressional commands to the Executive Branch to publicize information generally. If the government tries to restrict access to information using a FOIA exception, it must affirmatively make and justify that decision.

Nevertheless, the exception to the constitutional norm against secrecy is considerable – and much larger regarding programs, activities, and communications than is about the legal authorities under which they are conducted. As noted, the Framers specifically intended for the President to engage in and direct secret communications. They gave “America’s first officer”<sup>299</sup> the ability to command armed forces to protect the nation in an international security context they understood to be Hobbesian and characterized by espionage and secret diplomacy. Secrecy in connection with intelligence collection and other military and foreign affairs matters was

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<sup>295</sup> Morrison makes the point regarding the Constitutional Avoidance canon. *See* Morrison, *supra* note 19, at 1239. One could make the point about the canons generally.

<sup>296</sup> Kerr uses the feedback loop metaphor in his thoughtful essay. *See* Kerr, *supra* note 17, at 1515.

<sup>297</sup> *See* Classified National Security Information, Exec. Order No. 13,526, 75 Fed. Reg. 1,013 (Jan. 8, 2010).

<sup>298</sup> *See* Access to Classified National Security Information, Exec. Order No. 13,467, 73 Fed. Reg. 128 (June 30, 2008), *amending* Exec. Order No. 12,968 (Aug. 7, 1995).

<sup>299</sup> For the phrase, see AMAR, AMERICA’S CONSTITUTION, *supra* note 288, at \_\_.

consistently part of American statecraft from the Founding. Massive growth of the national security apparatus during World War II and the Cold War resulted in enormous expansion of the volume of secret activities and information, regulation of classified information and activities under a series of Executive Orders, and presidential direction of secret activities via National Security Council directives.<sup>300</sup> Congress's inclusion of major national security exceptions in the APA and FOIA, together with regularized congressional oversight and creation of classified legislative addenda by multiple committees, provided legislative blessing to a huge national security exception to the general norm against secret activities. The judiciary also has participated in construction of this bifid constitutional norm. The potential necessity of factual secrecy and Executive Branch control over classified information in particular was endorsed by the Supreme Court in the landmark Twentieth Century cases of *Curtiss-Wright* (concerning separation of powers), *Reynolds* (regarding the state secrets privilege), and *Egan* (concerning clearances), even as the courts condemned secret law in their FOIA jurisprudence.<sup>301</sup>

As in the last century, today the largest part of the U.S. government – the national security apparatus – does an enormous share of its work in the classified space. Several million people hold security clearances. The government produces hundreds of thousands of classified documents per year, of which only a small (but notable) number are legal authorities that critics assail as secret law.<sup>302</sup> Meanwhile, the Executive Branch regularly continues (often with legislative and court blessing via the FOIA legal regime) to withhold publication of unclassified documents on the basis of Executive Privilege. Congress and the courts are unbound by FOIA and consistently do substantial work in closed hearings or otherwise in settings in which key deliberations and documents produced are not public.

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<sup>300</sup> See Relyea, 5 GOV'T INFO. Q., *supra* note 17, at \_\_ (discussing expansion of national security apparatus and NSC directives).

<sup>301</sup> See U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("Secrecy in respect of information gathered...may be highly necessary"); U.S. v. Reynolds, 345 U.S. 1 (1953) (formally recognizing the state secrets privilege); Dep't of the Navy v. Egan, 484 U.S. 518 (1988) (deference to the Executive in national security including regarding access to classified information). These opinions are cited here as reflecting a strong exception to the otherwise general constitutional norm against secret fact. There is an extensive literature criticizing these cases or over-reading of them. See, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION \_\_ (1990) (criticizing over-reading of *Curtiss-Wright*); Laura K. Donohue, *The Shadow of State Secrets*, 159 PENN. L. REV. 77, 82-83 (2010) (criticizing over-interpretation of the importance of *Reynolds*); Louis Fisher, *Judicial Interpretations of Egan*, LAW LIBRARY OF CONGRESS, Nov. 13, 2009, <http://fas.org/sgp/eprint/egan.pdf> (criticizing the Court for straying from the statutory interpretation question at issue, and related over-reading of *Egan*).

<sup>302</sup> See Steven Aftergood, *Number of New Secrets Hit Record Low in 2014*, SECRECY NEWS, June 4, 2015, <http://fas.org/blogs/secrecy/2015/06/isoo-2014/>; Steven Aftergood, *Security-Cleared Population Declined by 12% Last Year*, SECRECY NEWS, April 27, 2015, <http://fas.org/blogs/secrecy/2015/04/clearances-2014/> (data on number of documents classified and number of people with security clearances).

### C. Five Constitutional Values

With the benefit of Part I's orientation regarding secret law in all three branches, and considering together the publicity principle and constitutional norm against secret law and their contested exceptions, we can identify five constitutional values at play in the question of secret law. These values provide a pivot for prospective normative consideration of the question of secret law, the focus of Parts III and IV.

The first three constitutional values disfavor secret law and promote transparency.

One is the *rule of law*. This value is textually founded in the Constitution's Supremacy Clause, which provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made...shall be the supreme law of the land."<sup>303</sup> The supremacy of the Constitution and its law require the supremacy of the Constitution's mechanisms: its lawmaking process, separation of powers, checks and balances, and federalism. These structures and our default of transparency yield an environment in which laws and interpretations can be assessed in view of knowledge of *all* other law. Each actor is aware of the law (positive and interpretive) of the other branches and has a meaningful opportunity to respond with endorsement, revision, cancelation, or acquiescence as the Constitution's mechanisms allow. Law that is unconstitutional, inconsistent with other law, inconsistent with the preferences of a political branch as they reflect popular sovereignty, or weak or otherwise poorly crafted, can be checked.

Two other constitutional values that disfavor secret law concern self-government in a republic based on popular sovereignty and a presumption of liberty. One is *political self-government*. Transparency and notice regarding the law allow the people to exercise law/policy choice (law/policy improvement through selection and modification of alternatives), and choice of public officials (detection, correction through removal, and therefore deterrence of error, incompetence, and abuse of authority by public officials). Transparency and notice, in short, allow accountability. Publicity checks inertia, in law and in leadership. The third publicity-favoring constitutional value is *personal self-government*. Notice of the law is requisite in this sense so one can adjust their behavior accordingly. Because law is presumed to be public, our legal system can presume the constructive notice of the law upon which punishment is often based.<sup>304</sup> One can also exercise political self-government via the Constitution's rule of law mechanisms to change laws that bind in ways one does not favor.

Each of these first three constitutional values is dependent upon and promotes transparency. They operate better the less secrecy exists about the law. They fail to function

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<sup>303</sup> U.S. CONST., art. VI, cl. 2.

<sup>304</sup> Relyea makes this point. Relyea, 5 GOV'T INFO. Q., *supra* note 17, at 98.

effectively when the law is deeply secret. Shallow legal secrecy from a public standpoint at least allows debate about “whether the secrecy system is a good system, or whether more openness ought to be provided”<sup>305</sup> in view of factors both auguring against and for secrecy.

In their prominent December 2004 proposed principles for OLC, 19 former OLC officials and lawyers noted that any potential rationales for “secret executive branch law” endure over the long run, regardless of who is in the White House. The declaration does not identify those rationales.<sup>306</sup> For our purposes, we can discern two constitutional values that often exert normative pressure for the law’s secrecy.<sup>307</sup>

The first is *protection of legitimately classified or otherwise sensitive factual information*. National security is the most basic of constitutional functions. Incident to it is protection of secret fact (communications, intelligence, plans, activities, capabilities, etc.) for the reasons collected at the outset of this Part.

Another constitutional value tolerant of room for secret law is *deliberative space*. This is the realm of principles impeding publication of documents involved in decisionmaking, such as executive privilege, attorney-client confidentiality, and exemption of Congress, the President, and the courts from FOIA. Deliberative space and some amount of confidentiality are reflected implicitly in the Constitution’s sole reference to secrecy in the Journal Clause, and in a line of cases about Executive information through the Supreme Court’s Watergate-era *Nixon* decision, and beyond. This constitutional value plainly has limits, however, as reflected in the principle that pre-decisional documents are protected but not final decisions or law, which can still be withheld if properly classified.<sup>308</sup>

### III. THREE NORMATIVE OPTIONS

The last Part explained that secret law and fact are importantly different because the publicity principle and constitutional norms operate more strongly against secret law than against secret fact. But they reasonably can be understood to admit *some* limited potential legitimate space for secret law. This Part grapples with the question of whether as a matter of legal policy we should tolerate secret law. I construct three broad options, reflecting schools of thought

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<sup>305</sup> Pozen, *supra* note 18, at 305, 293-305 (exploring arguments for and against a constitutional presumption of government openness generally).

<sup>306</sup> See Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), reprinted in 81 IND. L.J. 1348, 1352 (2006).

<sup>307</sup> See, e.g., Berenson, *supra* note 227, at 10, 99-100 (identifying these considerations for non-disclosure).

<sup>308</sup> See *supra* notes \_\_ [nn. citing Nixon, and discussion of FOIA Exemption 5 and pre-decisional documents].

about secret law: Live with the Status Quo, End It (the case for not tolerating any secret law), and Reform It (we can live with some quantum of secret law, but need to govern it better).<sup>309</sup>

### A. Live with the Status Quo

Half a century ago Lon Fuller wrote that there “can be no greater legal monstrosity than a secret statute,” but yet also made a “bow to grim necessity”: potential tolerance of some amount of secret law, such as providing secret appropriations for weapons systems.<sup>310</sup> Fuller was writing during what this article designates the Industrial Era, before the advent of Congress’s classified addenda, classified OLC memoranda on targeted killings, and the FISC’s classified common law. But perhaps Fuller’s articulation of both a norm and an exception was prescient and got it right: by grim necessity, we must live with secret law.

The case for the status quo must to a significant degree be constructed because we have not yet heard a fulsome defense. A reasonable case for living as-is with secret law can be made, and centers on two arguments. One is from necessity and the other relates to the sufficiency of the oversight mechanism.

#### 1. (Grim) Necessity

Defense of the status quo begins with a contention that secret law is necessary. This argument emphasizes national security information protection, deliberation space, and rule of law constitutional values. It maintains that secret law is needed to manage secret fact: the enormous number of intelligence, military, and other sensitive programs that would be disrupted if revealed, but also must be bound by law. These activities are inevitable and vitally important to the nation’s security. In a republic under the rule of law, these non-public activities can only be legitimate if grounded in legal authority and approved and supervised through appropriate process. Classified legislative addenda, classified or non-published Executive Branch regulatory and interpretive law, and classified FISC opinions and orders serve these interests, involving all three branches of the federal government. The advent of this body of secret law reflects good faith effort to ensure that secret activities are legal, and a reasonable judgment that public law is not up to the challenge. Secret legal work is now longstanding in multiple branches, and reflects “a remarkable, fundamental consensus regarding the need for secrecy and confidentiality in certain types of governmental activities.”<sup>311</sup>

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<sup>309</sup> A fourth potential option would be Embrace It, meaning push back against the publication and constitutional norms and make greater use of secret law. An argument for it is not part of the current conversation and would require considerable development, and so is not addressed here.

<sup>310</sup> Fuller, 71 HARV. L. REV. at 651; FULLER, THE MORALITY OF LAW at 91-92.

<sup>311</sup> See Berenson, *supra* note 227, at 101-102.

Classic futility, jeopardy, and perversity arguments<sup>312</sup> can be deployed against greater publication of secret legal authorities and other transparency changes. One commonly heard futility argument, recently expressed on the Senate floor during the USA FREEDOM Act debate, is that secret law and fact cannot be disaggregated.<sup>313</sup> Redacted sensitive programmatic details will be inferred from the published legal analysis, leading to a jeopardy argument: if publication does proceed, sources and methods will then be placed in peril, in turn giving notice to the targets of surveillance and other national security activities. Meanwhile, public officials will know this and be less willing to seek legal advice and less thorough in what they put on paper, constraining decision space. Another futility argument stems from the nature of the ongoing intelligence effort against terrorist and state adversaries who operate through and in civilian information technology systems. It is inevitable that additional clandestine intelligence efforts will be needed against these adversaries, and in the process those intelligence efforts will implicate privacy rights and limits on surveillance activity in FISA and other statutes. It would be futile to think that secret law reform efforts could halt creation of unpublished guidelines for agencies without ignoring either substantive law or the publicity-requiring law. That, in turn, is the essence of perversity arguments: that trying to extinguish secret law, especially in the action oriented Executive Branch, will result in greater evasion of the law and of lawyers by policymakers, or push secret law from shallow to deep secret.

The potential hazards of greater publication were lent credence when current and former OLC officials indicated in late 2015 that increasing risk of publication pursuant to FOIA is having a deterrent effect: OLC is being asked less often for opinions, and fewer are being written.<sup>314</sup> The Executive Branch's most authoritative legal voice (other than the President and Attorney General) is saying less as perception of publication risk goes up. Secrecy critics reply that this perception of heightened FOIA risk is unfounded, and can point to redaction of targeted

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<sup>312</sup> For description of these classic lines of argument, see ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION (1991).

<sup>313</sup> Senator Richard Burr (R-NC) expressed concern that operational details of intelligence collection programs could not be effectively redacted from classified legal authorities without such risk – and pointed as an example to reported adaptation by Al-Qaeda in the use of phones in the wake of Snowden's (forced) publication of FISC orders regarding the telephony metadata bulk collection program under § 215 of the USA PATRIOT Act. 161 CONG. REC. S3642-01 (daily ed. June 3, 2015) (statement of Sen. Burr). *See also* Goitein, *supra* note 17 (mentioning notice-to-targets argument).

<sup>314</sup> See Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO, Nov. 5, 2015, <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567> (quoting current CIA General Counsel and former OLC lawyer Caroline Krass and current OLC head Karl Thompson); Ryan J. Reilly, *Obama Justice Department Won't Disclose Classified OLC Opinions (UPDATE)*, HUFFINGTON POST, Feb. 25, 2013, [http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions\\_n\\_2759878.html](http://www.huffingtonpost.com/2013/02/25/obama-classified-olc-opinions_n_2759878.html) (tracking OLC opinions in context of OLC refusal to state how many have been produced).

killing memos ordered released by the courts.<sup>315</sup> Nevertheless, *perception* of a rising publication risk and its chilling effects exist within the national security apparatus, amidst claims of a related general decline in OLC's influence<sup>316</sup> and growing evidence that in general secrets do not stay secret as reliably as they once did.<sup>317</sup> These dynamics themselves are problematic.

In sum, there are reasonable considerations supporting the view that solutions to the problem of secret law – principally more publication to the public and within the government – are worse than the disease.<sup>318</sup> The necessity argument and supporting futility, jeopardy, and perversity claims tell us that we are better off with than without secret law to govern secret fact. An additional point, to alleviate concern about the status quo, is that there is reason to hope that the expansion of secret fact is slowing. At enormous effort, the number of new original classifications declined by 20 percent in 2014 and the size of the population with security clearances declined 12 percent.<sup>319</sup>

## 2. Sufficiency of the Oversight Mechanism

Another major argument for the status quo is that the oversight mechanism for secret law is working well enough. That is, it provides enough publication within the government and to

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<sup>315</sup> See Brett Max Kaufman, *Lawyering in Secret and the Government's FOIA Bogeyman*, JUST SECURITY, Nov. 10, 2015, <https://www.justsecurity.org/27500/lawyering-secret-governments-foia-bogeyman/> (ACLU attorney disputes claim that FOIA chills government lawyering); **[awlaki targeted killing memos]**, *supra* note \_\_.

<sup>316</sup> See, e.g., Jack Goldsmith, *The Decline of OLC*, LAWFARE, Oct. 28, 2015, (former head of OLC identifies reasons why OLC and the force of its opinions have become less influential, including rising FOIA risk) <https://lawfareblog.com/decline-olc>; Jack Goldsmith, *More on the Decline of OLC*, LAWFARE, Nov. 3, 2015 (id.) <https://www.lawfareblog.com/more-decline-olc>. Reports have emerged of exclusion of OLC and the Attorney General – the Executive Branch's senior legal officer – from preparation of legal memoranda regarding the most consequential counter-terrorism operation of the Obama Administration, the 2011 bin Laden raid, in order to reduce the risk of leaks. This despite the Obama Administration's stated desire to depart from the secrecy of the Bush Administration. See Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES, Oct. 28, 2015, [http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?\\_r=0](http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0). Concern about the "FOIA-ability" of Justice Department documents may have been one motive for exclusion of DOJ.

<sup>317</sup> See, e.g., PETER SWIRE, THE DECLINING HALF LIFE OF SECRETS (2015), <http://www.newamerica.org/cybersecurity-initiative/the-declining-half-life-of-secrets/> (report arguing that secrets generally stay secret for increasingly shorter durations).

<sup>318</sup> Articulated by Berenson, *supra* note 227, at 93, 102.

<sup>319</sup> See Steven Aftergood, *Number of New Secrets Hit Record Low in 2014*, SECRECY NEWS, June 4, 2015, <http://fas.org/blogs/secrecy/2015/06/isoo-2014/>; Steven Aftergood, *Security-Cleared Population Declined by 12% Last Year*, SECRECY NEWS, April 27, 2015, <http://fas.org/blogs/secrecy/2015/04/clearances-2014/>.

the people to ensure that secret legal authorities remain a shallow secret. The oversight regime *sufficiently if imperfectly* reflects the rule of law and its constitutional processes, allows political self-government including accountability of public officials, and provides the people notice of conduct that implicates secret activities.

Key components of that regime include,<sup>320</sup> first, inter-branch mechanisms of the Congress and courts (Executive Branch agencies are the ones being monitored). Most of Congress's oversight is informal, involving conversations, briefings, and letters. Regular hearings and periodic investigations (such as of the CIA's interrogation program) provide more formal ongoing monitoring and focused inquiry. The Senate's power to advise and consent to nominations and treaties provides additional opportunities to surface secret legal documents.<sup>321</sup> As discussed in Part I-A, Congress writes both Public Law and provides guidance concerning the authorities, personnel, funding, and processes of the national security agencies. Congress has legislated a series of reporting requirements, ranging from the general (the President and agencies shall keep the intelligence committees "fully and currently informed" of all significant intelligence activities, including in some instances their legal basis) to the specific (e.g., the Attorney General shall report on use of § 215, § 702, and classic FISA investigative authorities).<sup>322</sup> Congress has also empowered the FISC to conduct oversight, via requirements for FISC approval of particular searches and general programs (such as § 702, which concerns collection of internet "transit traffic" through U.S. networks).<sup>323</sup> Executive Branch officials must report regularly to the FISC regarding minimization standards and other matters, and Congress gets reports as well on the FISC's work. The regular federal courts also provide oversight where programs become public and the state secrets privilege is unavailing (see, e.g., court rulings on the § 215 and 702 programs in the wake of Snowden's disclosures).

Oversight mechanisms also operate regarding secret law within the branches. Within the Legislative Branch, the legislative process itself – involving dozens of formal and informal "veto-gates"<sup>324</sup> – slows legislation and allows for review opportunities for all Members of proposed Public Law in public, and of draft classified addenda in secret. In the Executive Branch, internal oversight starts at the top with the chief executive, the President, who is accountable to the people at the ballot box. The President is assisted by the National Security Council and its staff, which regularly consider the legal aspects of intelligence and other national

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<sup>320</sup> For one concise summary, see President's Review Group, *supra* note 248, Appendix C.

<sup>321</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>322</sup> See 50 U.S.C. §§ 3091, 3093, 1862.

<sup>323</sup> **50 U.S.C. § 1881a (2015).**

<sup>324</sup> See William N. Eskridge, *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

security matters, and review legal matters continually through the interagency Lawyers Working Group.<sup>325</sup> Agency heads who are nominated, must report to, and can be removed by the President, and who have authority, direction, and control of their organizations, provide the next layer of internal oversight of secret law. Agency lawyers provide the most immediate review of potentially secret law (even as they produce it), with obligation and opportunity to report illegal activities to general counsels and inspectors general, who in turn have reporting obligations and investigation powers.<sup>326</sup> Meanwhile, the Privacy and Civil Liberties Oversight Board and the President's Intelligence Advisory Board are independent commissions that provide independent review of intelligence activities, including some discretion to look into legal matters.<sup>327</sup> In the judicial branch, the work of lower courts is reviewed by appellate bodies (including in the case of the FISC the Foreign Intelligence Surveillance Court of Review) and the Supreme Court.

Whistleblowers have recourse beyond their superiors to general counsels, inspectors general, and Congress, and the protection from reprisal provided by the Whistleblower Protection Act.<sup>328</sup> The distinction between whistleblower and leaker can be in the eye of the beholder, however. Useful differentiating principles are whether their motives are civic-minded or personal, and whether they use established channels or go to the media.<sup>329</sup> These distinctions are complicated by the practice of “official leaks” under which senior officials share classified information with the media, often for a combination of selfish and civic reasons (and to the frustration of rank and file personnel, are rarely held to account).<sup>330</sup> Authorized or not, leaks are

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<sup>325</sup> For discussion of its operation in the Obama Administration, see, e.g., SAVAGE, *supra* note 9, at 64-65.

<sup>326</sup> On the importance of Executive Branch lawyers operating in a context that encourages broad “pluralist” review of legal memoranda, see Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT. SEC. L. & POL’Y 507 (2012). Regarding one particularly important inspector general, see Afsheen John Radsan & Ryan M. Check, *One Lantern in the Darkest Night: the CIA’s Inspector General*, 4 J. NAT. SEC. L. & POL’Y 247 (2010).

<sup>327</sup> [cites]

<sup>328</sup> See Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989), as amended. See also PRESIDENT’S REVIEW GROUP, *supra* note \_\_, Appendix D (Avenues for Whistleblowers in the Intelligence Community).

<sup>329</sup> John Napier Tye’s articulation of concern about how EO 12,333 (2008) has been interpreted regarding intelligence collection abroad represents a hybrid: the former State Department employee evidently used official channels and also submitted for pre-publication review a handwritten op-ed. See John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, WASH. POST, July 18, 2014, [https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2\\_story.html](https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html). Regarding whistleblowers and the civic motive generally, see Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL’Y REV. 281 (2014).

<sup>330</sup> For discussion, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosure of Information*, 127 HARV. L. REV. 512 (2013).

of enormous value to the media, especially regarding legal reasoning behind closed doors and in secret authorities. And, the media on its own investigates and holds officials to account.

The oversight mechanism is layered, and not very elegant. It is a jury-rigged, ad hoc, failure-prone, and continually evolving amalgamation of formal and informal processes. It resembles a Rube Goldberg contraption of steel, microchips, cardboard, and duct tape. But one can make a reasonable argument that it has functioned sufficiently well to date regarding secret law in view of rule of law, political self-government, and personal self-government constitutional values. Non-public legal authorities are now published within the government not universally but with regularity, including Congress's classified addenda, an increasing number of OLC classified opinions, and FISC opinions. These allow public officials who are accountable to the people via the elected President and Congress to review secret law on behalf of the people. Meanwhile, recent years have seen a deluge of secret legal documents published to the public – via leaks, voluntary declassifications, and FOIA on key questions of national security. The branches and public have a considerable and unprecedented if inevitably incomplete picture of the legal authorities on which agencies are relying. Via a series of statutes on detainees and interrogation from 2004 to 2015, and via the USA FREEDOM Act and Second Circuit FOIA targeted killings memorandum declassification in 2015 on surveillance, the public and public officials have used Public Law to force change to several key national security programs, reflecting inter-branch dialogue and public self-government. Meanwhile, private enterprise and individuals have unprecedented awareness of government authority to collect electronic data, and since 2013 have adapted their conduct and made increasingly common use of encryption (to the frustration of the FBI and other Executive Branch agencies).<sup>331</sup>

Although the Executive Branch has been taking pains to lock the barn door post-Snowden, there is every reason to think this pattern of increasing if imperfect and inelegant publication and transparency will continue. Congress in the USA FREEDOM Act made a series of publication-enhancing and secret law-combatting changes to surveillance programs, discussed in Part I-A, including mandatory declassification or public summary of all FISC opinions with a significant construction of law. President Obama directed a series of changes to intelligence collection programs in February 2014, and the intelligence community is experimenting with an unprecedented level of openness, to include accelerated voluntary declassifications and proactive

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<sup>331</sup> See, e.g., James B. Comey, Director, Federal Bureau of Investigation, & Sally Quillian Yates, Deputy Attorney General, Statement Before the Senate Judiciary Committee, July 8, 2015, <https://www.fbi.gov/news/testimony/going-dark-encryption-technology-and-the-balances-between-public-safety-and-privacy> (statement expressing concern about government surveillance “going dark” due to encryption).

outreach.<sup>332</sup> In the Article III branch, regular courts have decried secret law in FOIA cases including regarding NSC documents, and FISC judges have taken agencies to task in relation to their adherence to legal requirements imposed by the court.

Note also the context of their work. Not just the President but all three branches operate within what Goldsmith terms a “synopticon” of continual and increasingly intensive public and political monitoring and knowledge of government work regarding law and national security. The watchers are watched by aggressive journalists, activists, whistleblowers, inspectors general, lawyers, and non-governmental organizations (NGOs).<sup>333</sup> Goldsmith maintains that the synopticon energized Congress and the courts to surface secret Executive Branch legal arguments and played a role in checking the interrogation, extraordinary rendition, and incommunicado detention programs of the George W. Bush Administration. The synopticon has only grown in scale and intensity in the wake of Snowden’s revelations, leading to rejection of the § 215 program and its legal theory by Congress, the President, and regular federal courts.

Further empowering the synopticon is what Peter Swire describes as the declining half-life of secrets. Swire writes that synergistic trends making secret information easier to leak and steal, attitudes within government and the outside I.T. community about government secrecy, and changing sources and methods for intelligence collection together “increase the likelihood that government secrets will not remain secret for long.”<sup>334</sup> The massive theft of security clearance personnel records from the Office of Personnel Management, revealed in 2015,<sup>335</sup> validates Swire’s thesis, one that can apply equally to documents containing fact and law. A dissenter from Swire’s prescription for greater voluntary disclosures might still observe that the dynamic he identifies means that the informal oversight/disclosure mechanism is working so well – if haphazardly – that constitutionally sufficient promulgation is being achieved.

## B. End It

Addressing non-published but unclassified legal authorities of the Executive Branch as Congress prepared to pass the FOIA, Kenneth Culp Davis wrote of “the need for prohibiting all

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<sup>332</sup> See, e.g., the IC’s Tumblr page (OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, IC ON THE RECORD, <http://icontherecord.tumblr.com/>) and the ODNI General Counsel taking the initiative to email a secrecy blog to clarify the legal status of portions of secret legislative addenda (supra note 10).

<sup>333</sup> See JACK GOLDSMITH, POWER AND CONSTRAINT (2012). For discussion, see Neal Kumar Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990 (2013); Jack Goldsmith, *A Reply to Professor Katyal*, 126 HARV. L. REV. F. 188 (2013).

<sup>334</sup> See SWIRE, supra note 317.

<sup>335</sup> See Julie Hirschfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES, Nov. 1, 2015, <http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html>.

secret law” because it is a “fundamental principle is that secret law is an abomination,” without exception.<sup>336</sup> Assailing a larger spectrum of secret law in an age of classified legislative addenda, secret OLC opinions on killing citizens with drones, and the FISA court’s de facto classified common law, today’s critics have taken up the abolitionist view.<sup>337</sup>

The core abolitionist argument is that secret law does not live up to our constitutional values of the rule of law, political self-government by the people, and their personal self-government. Therefore, even if the publicity principle and constitutional norm against secrecy might in theory offer potential space for some limited quantum of secret law, we cannot permit it. Secrecy regarding the law gives too much power to the people who create it. It disrupts the feedback loop that allows review of the law and therefore full functioning of separation of powers, checks and balances, and public accountability. As Senator Wyden argued in a floor statement and in the formal legislative findings he proposed, voters “have a right to know how the law is being interpreted so that the American people can ratify or reject decisions made on their behalf” and elected officials can be held accountable.<sup>338</sup> Although critics of the Secret Law Thesis are right as far as we know that there are not any substantive criminal laws that are secret, secret law in all three branches potentially does regulate surveillance and other criminal and national security investigative authorities – in a post-“wall” era in which law enforcement and intelligence agencies actively coordinate and share information.<sup>339</sup>

For these reasons, secret law is “un-American” and the mark instead of totalitarian regimes.<sup>340</sup> This is not company the United States wants to keep, the “End It” view reasonably maintains, and current experiments with secret law in all three branches should be abandoned. The national security necessity and oversight arguments for the status quo can also be met with strong arguments.

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<sup>336</sup> Davis, 34 U. CHI. L. REV. at 779, 797 (condemning secret law).

<sup>337</sup> See, e.g., S. REP. 112-43 (2011) at 29 (Additional Views of Sen. Ron Wyden (D-OR) and Sen. Mark Udall (D-CO) on the IAA for 2012) (intelligence agencies “should not be allowed to rely on secret laws”); SJC Constitution Subcommittee Hearing (2008) (statement of Heidi Kitrosser), *supra* note 19, at 138 (secret law “has no place in our constitutional system” and Congress should abolish it).

<sup>338</sup> 112 CONG. REC. S3259 (May 24, 2011) (Statement of Senator Wyden decrying secret law); S. Amend. SA339, offered by Senators Wyden, Udall, Udall, and Merkley, 157 CONG. REC. S3283 (May 24, 2011) (Statement of Senator Wyden about similar amendment not adopted during Senate floor during debate on reauthorization of the USA PATRIOT Act).

<sup>339</sup> See *supra* note \_\_. [n. on “the wall’ coming down]

<sup>340</sup> See, e.g., Conor Friedersdorf, *Why Secret law is Un-American*, THE ATLANTIC, Jan. 3, 2014, <http://www.theatlantic.com/politics/archive/2014/01/why-secret-law-is-un-american/282786/>.

There has always been a national security secrecy argument for keeping not only operations secret but the rules governing them as well. These arguments would have been especially strong when the United States was a second or third tier power in the Eighteenth and Nineteenth Centuries. And yet the secret statutes of 1811 and 1813 stand as exceptions that demonstrate the lack of necessity of secret law. Today, public law ably governs secret activities, as reflected in the covert action statute, National Security Act of 1947 as amended, and other laws. Targets of surveillance and other activities surely are aware that the U.S. government is working hard to listen in. Where supposedly gap-filling secret law has come to light, its reasoning and conclusions have not survived public scrutiny, as evident in the outcry and legal changes made by Congress in the wake of publication of OLC opinions on interrogation, and of the FISC's § 215 opinions. Secrecy has allowed interpretive law to shelter use of minority constitutional theories and poor reasoning. It risks facilitating the inertia of secret law.

Abolitionists can reply to futility, jeopardy, and perversity theses with reasonable arguments. First, it is reasonable to believe that law can be scrubbed of operational details without revealing them by inference. This was demonstrated in the OLC targeted killing memoranda ordered published in redacted form by the courts. Congress implicitly agreed when in the USA FREEDOM Act it required mandatory declassification or public unclassified summary of FISC opinions. In any event, this idea will now be put to the test. Second, status quo defenders may be right that public officials will experience pressure to bury legal guidelines from expanded public disclosure – it is human and bureaucratic nature to cover sensitive matters entirely. However, the law is not the only area in which sensitive matters in government implicate an obligation of reporting to other branches or the government. This can be managed with strong internal processes and inter-branch sharing of information and supervision. Ending secret law will allow inter-branch relationships to function properly.

The abolitionist response regarding oversight is that it does not work sufficiently to allow the republic to tolerate secret law.<sup>341</sup> The oversight mechanism has not surfaced for the public a single congressional classified annex, has not surfaced untold numbers of NSC presidential decision directives and OLC memoranda, and allowed OLC's controversial memoranda on interrogation and other issues to remain deep secrets for several years. The USA FREEDOM Act will not fix these problems. It will not surface the secret law that was secret at the time it was enacted, nor force today's public officials to take responsibility for its continued legal effect or classification. Inertia problems, in other words, remain. Going forward, the new law does not require declassification of congressional, presidential, or OLC secret law, only that of the FISC, and only then declassification or release of an unclassified public summary of potentially limited

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<sup>341</sup> See, e.g., Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT'L L. 69, 76 (2015) ("[T]remendous amounts of law constructed by the executive branch and Congress and construed by the courts to enable surveillance with little meaningful oversight...mimics and ultimately undermines efforts to uphold the rule of law").

value.<sup>342</sup> The new statute also does not fully respond to Kerr's critique of the FISC as a dysfunctional hybrid of an ex parte and common law court. Kerr argues the FISC should leave lawmaking to Congress,<sup>343</sup> but under the new law the FISC can keep creating what is essentially classified common law without full publication. The USA FREEDOM Act also did not fill the gaps in the APA and FOIA for two of the three branches and for national security – and there is no indication the Congress ever would. The criticism is similar to one hears of the War Powers Resolution: in their gaps, these statutes ratify more Executive discretion than they constrain.

Furthermore, leaks are no way to conduct oversight. It is irrational, and enormously messy and unpredictable, to rely on the system breaking to inform Congress and the public of government activities. It is absurd to think that promulgation-via-security-breach is the right way to serve constitutional interests in limiting secret law.<sup>344</sup> For its part, the government has compelling interests in the security of properly classified fact, and in the reliability of employees charged with protecting the nation from violent attack. Leaks-as-oversight incentivizes disloyalty. It energizes reporters and foreign intelligence services to ask public employees to be insubordinate, commit crimes, and endure accusations of treason.<sup>345</sup> Finally, there is an enormous public confidence cost. Even before the FISC § 215 interpretation leaked, Senators Wyden and Udall wrote that “the government has relied on secret interpretations of surveillance laws in the past, and the result in every case has been eventual public disclosure, followed by erosion of public trust that makes it harder for intelligence agencies to do their jobs.”<sup>346</sup>

The oversight mechanism is, in short, not up to the task of governing secret law. Public Law is. In the “End It” view, secret law is inherently problematic and must be abolished.

### C. Reform It

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<sup>342</sup> USA FREEDOM Act, *supra* note 13, at § 402.

<sup>343</sup> Kerr, *supra* note 17, at 1535.

<sup>344</sup> Sudha Setty puts it more diplomatically: “Reliance on sporadic leaks to trigger genuine accountability is structurally problematic.” 51 STAN. J. INT’L L. at 88.

<sup>345</sup> Many prominent figures have accused former federal contractor Snowden of treason. *See, e.g.*, Jeremy Herb & Justin Sink, *Sen. Feinstein Calls Snowden’s NSA Leaks an “Act of Treason,”* THE HILL, June 10, 2013, <http://thehill.com/policy/defense/304573-sen-feinstein-snowdens-leaks-are-treason> (SSCI Chair, Sen. Diane Feinstein (D-CA), making treason accusation); Laura Barron-Lopez, *Rogers Says Snowden Committed Treason*, THE HILL, Dec. 22, 2013, <http://thehill.com/policy/technology/193832-rep-rogers-says-snowden-committed-treason> (HPSCI Chair, Rep. Mike Rogers (R-MI), making treason accusation).

<sup>346</sup> *See* S. Rep. No. 112-43, 112th Cong. (2011), at 29 (Additional Views of Sen. Ron Wyden (D-OR) and Sen. Mark Udall (D-CO). *See also* 157 CONG. REC. S3247-S3262 (May 24, 2011) (Statement of Sen. Wyden).

In response to the iterative revelation of secret legal documents with alarming content and reasoning since 9/11, and especially after Snowden’s deluge, Congress, the Executive Branch, the courts, and the public could reasonably have embraced either the Live with the Status Quo or End It options. But they have not. An effort by the self-described civil libertarian “wing nuts” of both Democratic and Republican parties in the House to terminate the telephony metadata program narrowly failed shortly after its revelation in 2013.<sup>347</sup> Instead, an implicit consensus has appeared around toleration of some quantum of secret law but also better management of it. Essentially: continuation of the constitutional norm generally against secret law with some limited exception for it, as described in Part II.

Reform efforts at present focus on processes that promote internal and external checks: publication and review within and among the branches, and in redacted form publication to the public. The USA FREEDOM Act brought changes including mandatory declassification or publication of an unclassified summary of FISC opinions, creation of an *amicus* (potentially a sort of public defender for the information indigent, us), and enhanced review opportunities by the Foreign Intelligence Surveillance Court of Review and the Supreme Court.<sup>348</sup> Others await action, such as Goldsmith’s recommendation that the national security community adopt the “front page rule” and presume publication of all final legal analysis, Morrison’s suggestion of a law requiring disclosure to Congress when the Justice Department deploys the constitutional avoidance canon to narrow a statute, and Kerr’s urging of a rule of lenity for secret surveillance law that prioritizes the interests of the public over that of the government.<sup>349</sup>

These ideas are intriguing, important, and reasonable. But they represent more ad hoc-ing our way ahead, without addressing secret law in full as a general phenomenon. In the next Part of this article, I posit limiting principles for governing secret law.

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<sup>347</sup> An amendment to the DOD Appropriations Act for 2014 offered by Rep. Justin Amash (R-MI) and Rep. John Conyers (D-MI) that would have effectively de-funded bulk telephony metadata collection was defeated on a 205-217 U.S. House vote on July 24, 2013. *See* H. AMD. 413, 113th Cong., to H.R. 2397; 159 CONG. REC. H5028 (roll call vote), <https://www.congress.gov/amendment/113th-congress/house-amendment/413/text> ; H. Rep. No. 113-170, 113th Cong. (2013) at 29 (text of amendment printed in House committee report); Steve Vladeck, *The Coming Political Realignment?*, JUST SECURITY, Sept. 29, 2013, <https://www.justsecurity.org/1332/coming-political-realignment/> (discussing Amash-Conyers amendment and its politics).

<sup>348</sup> USA FREEDOM Act, *supra* note 13, at secs. 401, 402 (amicus curiae and appellate review, declassification review and publication). Note that the *amicus* can provide legal arguments that “advance the protection of individual privacy and civil liberties,” or information on technology, or legal arguments or expertise on anything else the court thinks relevant.

<sup>349</sup> *See* Goldsmith, ODNI Legal Conference Speech (arguing for a legal “front page rule”); Morrison, *supra* note 19; Kerr, 100 VA. L. REV., *supra* note 17.

## PART IV. PRINCIPLES AND PROPOSALS FOR GOVERNING SECRET LAW

In 2011, Senators Wyden and Mark Udall,<sup>350</sup> two of secret law's most vocal opponents, proposed an amendment in committee that would have directed the Attorney General and Director of National Intelligence to report on the problems associated with relying on secret legal interpretations and provide a plan for addressing them.<sup>351</sup> Reflecting the abolitionist viewpoint of its authors, the amendment did not ask for the Executive Branch's views of the potential benefits of secret law. The amendment did not pass, and to the best of our knowledge the Executive Branch did not do the study it would have required. That is unfortunate, because the inquiry may have found supporters deep inside the security apparatus. One longtime intelligence veteran recalled that it would have been helpful for serious thought about classified lawmaking to have been done and some guidelines produced.<sup>352</sup>

This Part takes up the challenge of developing an agenda for better governing secret law.

This agenda is addressed to the secret law maladies discussed in the prior parts. Constitutional values of the rule of law and of political and personal self-government must be balanced with constitutional values favoring legal secrecy: the protection of pre-decisional deliberative space and the protection of secret fact. This agenda flows from the "Reform It" option developed in Part III, and therefore acknowledges that in service of these latter constitutional values some quantum of secret law is likely inevitable. Balancing and (ideally) aligning the conflicting constitutional values in play is not easy. But all of them are necessary, and so balancing them is necessary. That is the project of this Part. It grapples directly, generally, and normatively with the secret law phenomenon.

The following section sets forth general principles, and particular proposals.<sup>353</sup> The *principles* operate a higher and very normative level of generality than the implementation *proposals*. The principles can be embraced in public statements or in legal documents issued by officials in the three branches, while the proposals can be implemented via statute, executive

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<sup>350</sup> The amendment additionally was cosponsored by Senators Merkley (D-OR) and Tom Udall (D-NM).

<sup>351</sup> See IAA for 2012, S. REP. NO. 112-43 at 26, 29-31 (2011) (statement of Senators Wyden and Udall, including text of amendment) [hereinafter Wyden-Udall 2011 Committee Amendment]. The amendment's language was particular to surveillance law, and also included extensive findings. See also S. Amend. SA339, offered by Senators Wyden, Udall, Udall, and Merkley, 157 CONG. REC. S3283, May 24, 2011 (Statement of Senator Wyden about similar amendment not adopted during Senate floor during debate on reauthorization of the USA PATRIOT Act).

<sup>352</sup> Interview with former SSCI staff member, *supra* note \_\_.

<sup>353</sup> For an analogous list of principles, see Nourse, 122 YALE L.J., *supra* note 73, at 90-133 (proposing five principles for reading legislative history, including "later textual decisions trump earlier ones").

order or other Executive Branch directive, judicial decision, or via lawyer and policymaker informal practice, as is contextually appropriate.

This agenda address secret law's creation, scope, review, duration, and publication. Several principles and proposals are new to the secret law conversation, while others reflect reforms that are underway or that have been advanced elsewhere. Some reconceptualize or otherwise engage with ideas advanced by other participants in the secret law conversation.<sup>354</sup>

Application of these principles and proposals must be contextual. As Lon Fuller wrote about his eight principles of law, "the stringency with which [they] should be applied, as well as their ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration ....[T]o know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver."<sup>355</sup> Or a legislator, agency lawyer, or reasonably informed citizen.

Policymakers and legal interpreters could select from the following list of principles and proposals, or – most restrictively of secret law – implement it as a unified agenda. This list is not meant to be exclusive. Nor should it be read to suggest that usual legal principles and doctrines (such as the rule against *ex post facto* laws) should not operate, as well. This agenda's intent is to stimulate a needed broader and more wholistic discussion about the secret law phenomenon. Ideally, this agenda will stimulate action, as well, starting with the first, cardinal principle.

#### **A. The Public Law Supremacy Rule (a Cardinal Principle)**

If the republic decides that some amount of secret law is inevitable but seeks to govern it better, it should stipulate that secret law must be subordinate to *public* law (not just Public Law).

In terms of constitutional values, this cardinal principle reflects the rule of law. Our constitutional law-making architecture, functioning in public, must be able to create the law that *actually is* the "supreme law of the land." Serving this rule of law constitutional value in turn protects popular sovereignty, and its constitutional value of political self-government in both its law/policy choice and leader choice aspects. If the constitutional mechanics produce law after the people have made policy and leader choices based on public understanding of what the law is and how leaders would change it, but nevertheless the real controlling law is *contrary* to public law and remains secret, the people inevitably become less self-governing. They lose control over the law under which they live. This, in turn, endangers the constitutional value of personal self-

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<sup>354</sup> For example, in 2004 nineteen former OLC officials and lawyers proposed 10 principles to govern OLC's work. *See Proposed OLC Principles, supra* note 181; Pozen, *supra* note 18, at 323-38, proposes four varieties of practical solutions to the problem of deep secrecy, including "second order disclosure requirements" (announcing the existence of a secret, to keep it a shallow secret), Legislative-Executive consultation, internal Executive checks and balances, and bureaucratic culture reforms.

<sup>355</sup> *See* FULLER, THE MORALITY OF LAW, *supra* note 16, at 93-94.

government. The people risk loss of notice of the controlling law and therefore opportunity to calibrate their conduct. They risk becoming subjects rather than self-governing citizens.

In contrast, it is not obvious how this Public Law Supremacy Rule would significantly impinge upon protection of pre-decisional deliberative space or legitimately secret facts. This rule may have some costs in terms of the granularity with which secret law can manage secret programs. But because the Public Law Supremacy Rule as I conceive it would bar secret expansion of government legal authority, that granularity would be lost in connection with legal work that probably should not be done in secret documents in the first place. If the government needs additional authority or if it otherwise wants to deviate meaningfully from public law, then those changes to the law should be made in public.

### 1. Proposal: Deference or Avoidance Favoring the Public Understanding of Public Law

Operationalized, the Public Law Supremacy Rule may be given effect through adoption by all creators of secret law of a super-strong heightened deference or avoidance rule. The Public Law Supremacy Rule would require the greatest caution and restraint in the creation of secret law, either directly (e.g., via legislation or executive order) or via interpretation. Any conflicts between public law and secret law would be avoided or resolved in favor of public law.<sup>356</sup>

How should we conceive of “public law” under the Public Law Supremacy Rule? After all, understanding law is inevitably an act of interpretation.<sup>357</sup> This is an important question that warrants more inquiry. To begin this conversation, I propose that avoidance and deference should operate in relation to the majority public meaning of the law. By this I mean the understanding a knowledgeable and reasonable person, employing majority approaches to interpreting the law, would have based on public sources, and upon which they could rely in evaluating law and policy, in voting, and in their personal conduct.<sup>358</sup> To the drafter of a

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<sup>356</sup> A corollary: public legislative history must trump secret legislative history.

<sup>357</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997) (“Every issue of law resolved by a federal judge involves interpretation of text – the text of a regulation, or of a statute, or of the Constitution”).

<sup>358</sup> The term “public meaning” has been used in the context of originalist constitutional analysis and statutory interpretation. See, e.g., *Citizens United v. F.E.C.*, 558 U.S. 310, 432 (2010) (criticizing Justice Scalia’s original public meaning analysis of the First Amendment); *Jerman v. Carlisle*, 559 U.S. 573, 607 n.1 (2010) (Scalia, J., concurring, writing that public meaning is “the understanding of the text by reasonable people familiar with its legal context,” and criticizing use of legislative history in statutory interpretation case); Victoria Nourse, *Misunderstanding Congress*, 99 GEO. L.J. 1119, 1175 (2011) (contrasting public meaning of statutes informed by legislative history, with elite, legalist meanings); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (observing that original public meaning is dominant originalist theory, and arguing that it should employ original

classified addendum or an interpretive opinion, this majority public meaning of other implicated public law may be obvious. Or, it may need to be constructed<sup>359</sup> based on reading text (of the Constitution, statutes, Executive Orders and other presidential authorizations, regulations, OLC opinions, and caselaw), and based on majority understanding of the relevant law's intent and purpose, to include using public legislative history.<sup>360</sup> To give the Public Law Supremacy Rule effect, this public meaning of public law must not be evaded by "aggressive," surprising, or government power-expanding legal interpretations.<sup>361</sup> Examples include secret invocation of Article II power together with the judicially-created constitutional avoidance doctrine, as seen in Bush-era deeply secret OLC memoranda on interrogation, detainees, and surveillance.<sup>362</sup> Kerr's suggestion that the FISC employ a Rule of Lenity for liberty and against the government accords with the Public Law Supremacy Rule by deferring to the lawmaking power of the people via their voting, speech, and other political participation. The Public Law Supremacy Rule would suggest deference to the public meaning, even if a minority view might appear reasonable or desirable to a legislator, president, agency official, judge, or lawyer.

One reasonable qualification of the powerful Public Law Supremacy Rule and the heightened deference / avoidance rule articulated here would be a *constraint caveat*: secret law may depart from public law in constraining Executive Branch authority. With this caveat, the Public Law Supremacy Rule would allow the people reasonable confidence that the

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interpretive rules). I mean something a bit different. I use the term "majority" in *majority public meaning* to include current majority approaches to legal analysis, including use of legislative history. I use the term "public" to exclude use of secret or otherwise non-public materials and knowledge.

<sup>359</sup> The national security apparatus makes extensive use of "red teams" to challenge conventional thinking. An analogue here would be lawyers who could be called upon to provide an independent assessment of the majority public meaning of the law on a particular topic. Their work would be the more accurate the fewer classified facts they know.

<sup>360</sup> This vision of a Public Law Supremacy Rule endorses use of legislative history and of intentionalist and purposivist analysis in ascertaining the public meaning of the law because these are majority public methods of statutory interpretation. A harder version of textualism that generally does not admit legislative history and other contextual analysis remains a minority viewpoint, albeit an important one. *See* Nourse, 99 GEO. L. J. at 1137 & n.79 (empirical studies show that the Supreme Court and a majority of appeals courts have rejected a harder textualist approach that generally bans use of legislative history).

<sup>361</sup> Senators Wyden and Udall had something similar in mind with their 2011 amendment's § (a)(6), which would have expressed the sense of Congress that the government should "not secretly reinterpret public laws in a manner that is inconsistent with the public's understanding...." *See* Wyden-Udall 2011 Committee Amendment, *supra* note 351.

<sup>362</sup> *Accord* KITROSSER, RECLAIMING ACCOUNTABILITY, *supra* note 17, at 129 ("Secret statutory circumvention [should] be recognized as categorically illegitimate" if the people and other branches are to "have the ability meaningfully to judge and respond").

government's legal authority is no *broader* than it appears, and if anything may have been limited in secret for reasons of inter-branch accountability or better protection of liberty.

Employed regarding Congress, this Public Law Supremacy Rule would dictate that classified addenda provisions with legal force or effect must do very limited legal work. The addenda could not expand government legal authority, nor narrow legal limitations on government action, nor impinge upon the rights of the people. To respect Congress's important oversight role regarding classified activities, and consistent with the constraint caveat, the classified addenda could permissibly constrain secret activities otherwise authorized by law.

The funding and personnel authorities found in Congress's Classified Schedules of Authorizations and Appropriations are problematic under the Public Law Supremacy Rule to whatever extent they create new legal authority for the government. They are likely saved insofar as Public Law is doing two things. First, Public Law must itself somewhere authorize and appropriate the total number of dollars to be spent and authorize the total number of personnel to be employed. Publishing the overall budget and personnel levels for intelligence would mean more transparency, but there is a reasonable case for the current practice of dollars and personnel for intelligence agencies and other clandestine activities being silently built into the overall ceilings enacted for the Defense Department or other agencies (but to whatever extent new authorities are created out of whole cloth in the classified addenda, they become problematic). Second, if the classified Schedules or other addenda are to have legal force the Public Law should plainly say so in every case, not only in "incorporation" provisions.

More potentially problematic are classified addenda provisions that purport to provide legal authority beyond budget and personnel matters. Of course, the addenda may already be acting consistent with the Public Law Supremacy Rule, but we do not know. Understanding that addenda are insulated from court review, means of enforcing the Rule in the Constitution's Article I branch could include congressional procedural rules, the informal norms and practices of the committees and their staffs, and presidential veto.<sup>363</sup>

If followed in the Executive and Judicial branches, the Public Law Supremacy Rule would operate to prevent a repeat of known secret law misadventures of recent years involving minority views of the Constitution and aggressive interpretations of statute.<sup>364</sup> The Public Law

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<sup>363</sup> Congress conceivably could legislatively provide for taxpayer standing to sue and in camera judicial review of the classified addenda. Significant barriers include certain vociferous Executive Branch and intelligence committee opposition, and that judicial review would mean court legitimization of the congressional secret law it does not strike down.

<sup>364</sup> The NSA Civil Liberties Protection Officer commented that a lesson "we're really taking to heart" is no "contorted" nor "cute" secret legal interpretations. *See* Stewart Baker, *DEA v. NSA – the Podcast*, VOLOKH CONSPIRACY, Feb. 3, 2015 (weekly cyberlaw podcast interviewing Civil Liberties Protection Officer Rebecca Richards) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/03/dea-v-nsa-the-podcast/>; *discussed by* Conor Friedersdorf, *The NSA's Director*

Supremacy Rule under the constraint caveat would allow departure from widely accepted public understandings of the law only to limit Executive Branch authorities. Congress would have the opportunity to cancel such secret constraints, provided that Congress is aware of Executive Branch secret law (see the Plurality of Review Principle below).

Lest the Public Law Supremacy Rule appear excessively constraining, recall that the government's authorities are presently understood by the public to be expansive. The public understanding of national security law is informed by the broadly written post-9/11 Authorization for the Use of Military Force (AUMF) statute, creation by recent Presidents of new Article II constitutional authority precedents,<sup>365</sup> release of OLC memoranda on the targeted killing of U.S. citizens, and release of an unprecedented number of FISC surveillance opinions. The cardinal secret law limiting principle I posit here would apply only to still-secret law. It would not extinguish the government's ability to act clandestinely.

If a branch of government seeks to adjust public understanding of the law to provide more interpretive room in secret legal authorities, it could readily do so by creating and immediately publishing new law that expands its authority – both facially, and its room to create secret interpretations.

## B. The Anti-Kafka Principle

Franz Kafka conjured our greatest nightmare of secret law: deprivation of liberty and life by the government on the basis of law the people cannot see. Thankfully, today it is generally “beyond dispute that members of the public cannot be expected to conform their behavior to legal requirements that have been concealed from them” and therefore such Kafka-esque secret laws are unacceptable in any form.<sup>366</sup> As noted, when courts mention secret law it is often in connection with this conduct-conforming self-government idea.

A red line of this kind might appear obvious, and its purposes mostly accomplished by the Public Law Supremacy Rule. But it is so important, and the tendency of the state to create

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*of Civil Liberties Renounces Secret Law*, THE ATLANTIC, Feb. 4, 2015, <http://www.theatlantic.com/politics/archive/2015/02/the-nsas-director-of-civil-liberties-disavows-secret-law/385150/>.

<sup>365</sup> For an example of claims of Article II's continuing expansion under the Obama Administration, see Jack Goldsmith, *Ever-Expanding Theories of Unilateral Article II War Power*, LAWFARE, Sept. 17, 2015 (“slow, marginal, but relentless expansion of the President's unilateral Article II war powers”), <https://www.lawfareblog.com/ever-expanding-theories-unilateral-article-ii-war-power> .

<sup>366</sup> See, e.g., Brownback, *supra* note 19, at 4 (for quote in main text); FULLER, THE MORALITY OF LAW, *supra* note 16, at 92 (“I can conceive...of no emergency that would justify withholding from the public knowledge of a law creating a new crime”). But see HART, THE CONCEPT OF LAW, *supra* note 16, at 22 (generally speaking, “laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby”).

secret law so clear, that this second cardinal rule merits articulation in our discussion of how to govern secret law. Concisely stated, this Anti-Kafka Principle is that *secret law shall not impose duties on third parties*. By that I mean U.S. persons outside government without access to secret law, and therefore without ability to seek that law's repeal. This principle protects substantive criminal law and personal agency more strictly than the powerful Public Law Supremacy Rule.

### 1. Proposal: No Secret Criminal Law

The Anti-Kafka Principle at its core means that substantive criminal law of general applicability shall not be created nor expanded via secret law. The general applicability stipulation is directed toward criminal law as reflected in the Constitution, legislated law, administrative regulations and guidelines that obligate compliance, and caselaw. It excludes "quotidian" secret law (see Part I.B) in the criminal realm applicable only to particular individuals or things, such as search warrants that are sealed so as not to give the target notice. The categorical unacceptability of criminalizing something that is not criminalized based on reading the law evident to the public hopefully is and will remain truly beyond debate, and is a "proposal" only insofar as this Part terms specific manifestations of principles to be proposals.

### 2. Proposal: Secret Law May Not Otherwise Impose a Duty on a Third Party

The Ant-Kafka Principle would also bar secret law from imposing duties on U.S. person third parties beyond the criminal realm, as well. (To return to our operating definition, by secret law I mean a non-public legal authority of general applicability either on its face or by operating precedent, not merely a warrant or other such highly particularized document). An example of a prohibited speech restriction would be telling an individual that their detention, interrogation, or other treatment by the government is classified and therefore they may not speak about it. That blocks their ability to use the political system to over-ride the secret law on the basis of which they allege their rights were trammelled. Another example would be a secret law that allows the government to impose a gag on a telecommunications provider that has been ordered to hand over records regarding a suspect subscriber.<sup>367</sup> If the government seeks authority to restrict speech, it should obtain it in the light of day through the Constitution's usual lawmaking process as the government has done in the case of National Security Letters. Statute allows the government to demand information and impose a gag order on the Letter's recipient.<sup>368</sup>

## C. The Shallow Secrecy Principle

As Pozen has written about secrecy generally, deep secrets "entail serious deficits in ex ante authorization by citizens and their elected representatives; party as a result, they also entail

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<sup>367</sup> [example]

<sup>368</sup> 18 U.S.C. § 2709 (2012)

serious deficits in ex post accountability.”<sup>369</sup> Deeply secret law is a particular problem of the Executive Branch, and the most problematic secret law because it is known only to the branch that creates it (and at worst, only known to a small group within the Executive Branch, such as the Bush-era “war council”). For other legal actors and the public, deeply secret law is an “unknown unknown.” The creator of a deeply secret law becomes a law unto itself.<sup>370</sup> The other branches and the people are denied any basis upon which to inquire about, review, improve, or check the law, and the people lack notice of its content as they conduct their everyday lives. Constitutional values of the rule of law, political self-government, and personal self-government are therefore impinged. Sloppy legal work risks going unreviewed, creating substantively poor and procedurally problematic precedents.

In contrast to deep secrets, shallow secrets allow the people to know that there is a secret that they do not know, and ask their public officials to investigate. Shallow secrecy allows for protection of classified fact. It facilitates outcomes with broader buy-in, that are better reasoned, refined through dialogue, better documented, crafted over a longer period of time, and more widely publicized.<sup>371</sup> Shallowly secret law is therefore imbued with more legitimating qualities.

Part I of this article documented secret law’s existence in all three branches, while Part II explained that its presence is an exception to an overall constitutional norm against secret law that is stronger than the constitutional norm against secret fact. If the republic chooses the “Reform It” option outlined in Part III, because of the problems with deep secrecy any secret law we tolerate must be a shallow secret to the public. To ensure that, I posit two mechanisms: bell ringers, and an expectation of explanation.

#### 1. *Proposal: Bell Ringers, to Keep All Secret Law a Shallow Secret to the Public*

By bell ringers I mean notification mechanisms that inform the public when secret law is created. Ideally, bell ringers also should provide information about when secret laws are modified or withdrawn; which entity is creating the legal authority; what entities are governed by it; its effective and declassification dates; and some basic reference to subject matter. For example, a notice such as this might be posted online and published in the *Federal Register*:

##### LEGAL NOTICE REGARDING A NON-PUBLISHED LEGAL AUTHORITY

Issuing Entity: Office of Legal Counsel, Department of Justice

Index Number: 2017 DOJ 0001

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<sup>369</sup> Pozen, *supra* note 18, at 291.

<sup>370</sup> One is reminded of President Richard Nixon’s (in)famous statement of presidential legal near-omnipotence, that appears to collapse law and action into one: “when the President does it, that means it is not illegal.” *See Not Even Earplugs Could Help*, TIME, May 30, 1977, <http://content.time.com/time/magazine/article/0,9171,914938,00.html>.

<sup>371</sup> See Pozen, *supra* note 18, at 275.

Subject: Surveillance<sup>372</sup>

Entity Concerned: Federal Bureau of Investigation

Date of this Notice: March 5, 2017

Effective Date (if different): March 15, 2017

Expiration (sunset) Date: March 15, 2021

Declassification / Publication Date: March 15, 2021

By keeping all secret law a shallow secret, bell ringers provide the people basic notice of a law's existence, without risking classified factual details or giving an adversary or surveillance target any idea how to frustrate government action. Bell ringer notices would also allow tracking of legal authorities as they are created, modified, terminated, and declassified.<sup>373</sup> This would be facilitated by use of index numbers such as under FOIA.

There are precedents for bell ringers in each branch. There are also differing levels of need for them in each branch. As noted, the Executive Branch is the one prone to law that is deeply secret to the public *and* the other branches because it alone does not have to share its internal law with another branch for that law to control government activity. In contrast, Congress and the FISC share their secret law with the Executive Branch they regulate, and automatically announce creation of secret law via passage of Public Law and (we anticipate) through the automatic declassification or public summary requirements of the USA FREEDOM Act. All three branches, however, can make better use of bell ringers to prevent deep legal secrecy and inform the public of the existence of secret law.

From the advent of classified addenda 36 years ago, Congress's Public Law provisions giving classified addenda legal force have been functioning as public bell ringers. Unclassified report language, such as incorporation report language provisions, has been doing this work as well. Congress has done the best job of the three branches in bell ringing all of its secret law creation. Still, there is room for greater clarity. Incorporation statutory provisions and accompanying incorporation report language has often been quite explicit about giving classified addenda an inferentially significant part or in full the force of law. However, as this article's empirical study and discussion in Parts I.A.1 and VI explain, other provisions are more ambiguous. The language used in Congress's references to classified addenda have changed

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<sup>372</sup> The notice might go beyond stating a general subject to providing some effects typology. For example, the notice could state whether the legal authority impacts funding, government organization, information sharing, privacy, etc.

<sup>373</sup> A secondary benefit of these published, indexed bell ringer notices, at least regarding secret *law* in the Executive Branch, would be a vast reduction in litigation about government refusals to acknowledge the existence of FOIA'd documents (*Glomar* responses) and the number or description of documents ("no number, no list" responses), and refusals to share indexes of documents (*Vaughn* indexes). *See, e.g.*, N.Y. Times v. U.S. Dep't of Justice, 753 F.3d 123 (2d Cir. 2014) (FOIA filers contested these government responses regarding OLC targeted killing memoranda).

over time and vary by Act and committee. The clearest bell ringing would involve statutes (and associated report language) stating explicitly and consistently in all instances in which they intend to give legal force to classified addenda. Any other statutory references to the classified addenda should be equally clear that the addenda provide additional information but are not made law by reference. Over the decades, the Intelligence Committees in their IAAs have been the most explicit and consistent in their references to the classified addenda, and the other committees should follow their lead. Because classified addenda may exist that are not referenced in statutes and reports, every statute and report that has a classified addenda associated with it should state that clearly.

Going a step farther, a congressional bell ringer that would also govern secret law in the other branches would be a non-delegation doctrine for secret law, or a requirement of a clear statement (potentially along with criteria) before the other branches could create secret law. FISA provides a precedent: Congress has explicitly authorized the FISC to write classified orders, and provided guidance about protecting incidentally collected communications of U.S. persons. Of course, the Executive Branch may push back, considering its incentives for secrecy, desire for flexibility and speed in providing guidelines for agency activities, and general resistance to legislated restrictions.<sup>374</sup>

Because it is the branch prone to deep legal secrecy, the Executive Branch is most in need of bell ringers to ensure the shallow secrecy of its creation of unpublished binding legal authorities. As discussed in Part I.A.2 above, it is not clear how many classified executive orders

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<sup>374</sup> The non-delegation doctrine has not been aggressively enforced by the courts for many decades, such as in *Panama Refining v. Ryan*, 293 U.S. 388 (1935) (Congress provided no criteria for presidential regulation of interstate shipment of petroleum). Courts have deferred to agencies in view of their ability to handle regulatory complexity, using the low bar of congressional provision of an “intelligible principle” to guide the agency’s work; *see Whitman v. American Trucking Assocs.*, 531 U.S. 457 (2001); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). However, there is an argument for its restoration regarding secret law: in view of rule of law and self-government concerns, where Congress authorizes secret law in the other branches or delegates authority to create it, Congress must cabin that authority with criteria (including for example principles in this list) in order to tether Executive and Judicial Branch secret law more firmly to the Legislative Branch, which has the greatest lawmaking legitimacy and greatest electoral accountability under the Constitution. *See* Legislative Vesting Clause, art. I, § 1, cl. 1 (“All legislative Powers herein granted shall be vested” in Congress). A similar but different way to do this principle’s “tethering” work might be to require a clear statement from Congress in Public Law for it or another branch to create secret law. *See* Jonathan Manes, SSRN abstract, Secret Law (May 12, 2015) (mention in abstract of a clear statement rule for secret law); Jonathan F. Mitchell, *Legislating Clear Statement Regimes in National Security*, 43 GA. L. REV. 1059 (2009) (national security statutes requiring a clear statement by Congress in future legislation authorizing action contrary to them have failed to win Executive Branch compliance, and must be buttressed by procedural checks such as points of order against vague or ambiguous bills that the Executive Branch might construe as a constructive amendments). As Trevor Morrison notes, the courts have applied clear statement rules most notably to protect “otherwise underenforced constitutional values.” Morrison, *supra* note 19, at 1213-14. Here, that is the general but not complete constitutional norm against secret law discussed in Part II.

with legal force, unpublished OLC opinions, and other unpublished agency rules exist. Existing bell ringer precedents already operating regarding the Executive Branch are its increasing voluntary declassification and publication of documents in recent years, the indexes of requested agency decisions that agencies must provide under FOIA,<sup>375</sup> and the statutory requirement for the Attorney General to notify Congress if the Justice Department decides not to defend a statute.<sup>376</sup> The Executive Branch ought to create a single public docket that lists each unpublished legally binding document in a timely fashion after its creation, and a brief mention of subject matter. There is no immediate danger to classified fact or deliberative space if the Executive Branch notifies the public when it creates secret law<sup>377</sup>

In the Judicial Branch, FISC opinions may have been deeply secret to the public but have consistently been reported to the agencies it regulates and the Congress that oversees FISA. Over its four decade existence the FISC has only published opinions in a few exceptional instances. It has never posted a public docket of classified opinions. The FISC has, in short, done a poor job of bell ringing. In this context, the USA FREEDOM Act's requirement of either redacted declassification of opinions or release of an unclassified summary creates a valuable bell ringer. Indeed, it promises (dependent on Attorney General and Director of National Intelligence declassification review) to go beyond mere bell ringing to providing legal substance. The FISC could also provide the public more information about its "classic FISA" warrants and other orders that are not opinions for the purposes of the USA FREEDOM Act's publication requirement and ought not be published or else risk tipping off their surveillance targets.

It is true that activists, reporters, and the public generally (not to mention foreign intelligence services) would be interested in the secret laws they are now aware are being created, but to which they are being denied access. They may redouble efforts to surface them. On the other hand, in our accelerated information age culture, the novelty of the secret law bell being rung may wear off for the public, and foreign intelligence services are much more likely to be interested in classified fact than law. Additionally, a more functional oversight mechanism for secret law generally should also have the offsetting effect of reducing incentives for government employees to leak.<sup>378</sup>

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<sup>375</sup> See 5 U.S.C. § 552(a)(2) (2012).

<sup>376</sup> See 28 U.S.C. § 530D(a)(1)(B)(ii) (2012). A similar provision was found in Senator Feingold's proposed OLC Accountability Act, S. 3501, *supra* note 188.

<sup>377</sup> As Elizabeth Goitein rightly states. *See* Goitein, *supra* note 17.

<sup>378</sup> A second variety of bell ringer is ex post, informing the public of a potential problem with secret law: for example, when compliance with a secret law is at issue, or when a secret law in some entity's judgment runs afoul of the cardinal principle above and potentially conflicts with the law known to the public. (Ex post bell ringers would have a more complicated sibling in the notion of the warrant canary: as a means around gag orders imposed on recipients of warrants – such as via National Security Letter –

## 2. Proposal: An Expectation of Explanation

Also operating to keep all secret law at *least* a shallow secret should be an expectation of explanation in the minds of public officials: a presumption that legal secrets are increasingly unlikely to remain secret despite the best efforts of conscientious clearance-holders, and a sense of normative obligation to explain the legal basis of secret activities to the extent practical.

A “front page rule” has been urged by a growing number of practitioners and scholars, from the President’s Review Group on surveillance to scholars and former OLC officials Jack Goldsmith and Marty Lederman.<sup>379</sup> The idea is that the government should not do anything in secret that it would be embarrassed or unable to defend were it to become public. The idea runs against decades of deeply embraced conventional thinking that assumes that sometimes unsavory things need to be done and argued in the shadows, and that secrets can be kept. The rule’s advocates rightly point out that secrets are not reliably staying secret anymore.

Whether a front page rule makes sense for secret fact is beyond the scope of this article. But it should apply with special force to secret law because secret law is less tolerated by the publicity principle and our constitutional norms than is secret fact. The front page rule would especially disfavor deeply secret law, which tends to create scandal when revealed. In the case of shallowly secret law, the front page rule would dictate not writing law or making arguments that when revealed would not reflect well on those who did the legal work, nor upon the United States. It would also suggest proactive publication of secret law with appropriate redaction of classified fact, so as to control the narrative better and gain legitimacy.<sup>380</sup>

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an entity such as an internet service provider issues a standard statement every day saying it has not been served with a search warrant. When not present, the canary signals to the public that the entity has been served). This bell ringer would build on existing statutory requirements requiring the Director of National Intelligence and other intelligence actors to notify Congress of violations of the law. *See* 50 U.S.C. § 3091; IAA for 2015, *supra* note 99, at § 323.

<sup>379</sup> *See* PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD 170 (Dec. 12, 2013), available at [http://justsecurity.org/wp-content/uploads/2013/12/2013-12-12\\_rg\\_final\\_report.pdf](http://justsecurity.org/wp-content/uploads/2013/12/2013-12-12_rg_final_report.pdf); Goldsmith, ODNI Legal Conference Speech, *supra* note 163; Marty Lederman, *The “Front Page Rule,”* JUST SECURITY, Dec. 30, 2013, <http://justsecurity.org/5184/front-page-rule/> (noting the report’s endorsement of the rule and related media and practitioner discussion); and Lederman, *Highlights of the Report of the President’s Review Group on Intelligence and Communications Technologies*, JUST SECURITY, Dec. 22, 2013, <http://justsecurity.org/4903/highlights-prgict/> (identifying key report recommendations).

<sup>380</sup> Goldsmith argues that voluntary publication of formerly classified legal authorities (with appropriate redaction of classified fact) makes sense both because “government lawyers tend to have too much confidence in the adequacy or persuasiveness of legal conclusions made in secret,” and disclosing before leaks builds credibility and legitimacy. Goldsmith, ODNI Legal Conference Speech, *supra* note 163; *accord* Swire, *supra* note 317.

The legitimacy point is an important one. It is not enough to accept grimly that legal secrets are no longer being kept, and therefore do preemptive damage control. Instead, to the extent compatible with protecting secret fact and deliberative space, intelligence leaders and top legal officers should understand a normatively valuable expectation of explanation.

Former State Department Legal Adviser Harold Hongju Koh describes the “duty to explain” as a transparency norm and “a loyalty that government legal advisers owe not just to their clients and ministers, but also to their publics.” Top government lawyers should be expected “to explain in public the international legal basis supporting the action that their government has taken.”<sup>381</sup> Diplomatic ministries have a broader communication responsibility – embracing all aspects of U.S. foreign activity – than do intelligence agencies, and so extending the duty to explain to the spy world faces challenges. In the intelligence world secrecy is the default, no espionage agency can credibly swear off all potential violations of foreign law, and the legal definition of covert action stipulates no acknowledgement of the role of the United States.<sup>382</sup> Even so, because the constitutional norm against secret law is stronger than against secret fact, and because of the repugnance in particular of deeply secret law, intelligence officials and legal officers should perceive a normative and not simply practical expectation of explanation. Intelligence officials should look for opportunities to surface secret law that does not need to be classified. They should explain to the greatest practical extent the legal architecture for classified U.S. activities.<sup>383</sup> When deliberately created (for example through bell ringers) shallow secrecy reflects this expectation of explanation. Explaining in reasonably timely fashion why authorizations, rules, or opinions on a particular subject have been created and kept secret signals aversion to deeply secret law, and emphasizes that the rule of law operates regarding all U.S. activities.

#### **D. The Anti-Inertia / Public Official Responsibility Principle**

The expectation of explanation also reflects another important principle for governing secret law. Today’s public officials should take responsibility affirmatively for all existing secret law, in the sense of both words: its secrecy, and its legal force.

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<sup>381</sup> Harold Hongju Koh, *The Legal Adviser’s Duty to Explain*, 41 YALE J. INT’L L. \_\_ (forthcoming 2016).

<sup>382</sup> See 50 U.S.C. § 3093 (2012); see also Koh, *supra* note 301 (critiquing covert action).

<sup>383</sup> More can be done but credit is due for encouraging progress. The Intelligence Community in recent years has embraced unprecedented openness, via declassification of facts and law. *See* IC on the Record, *supra* note \_\_\_. Robert Litt, ODNI General Counsel, has taken a remarkably responsive and proactive approach to public explanation of the Intelligence Community’s legal reasoning. *See* Aftergood, *ODNI: Annexes to Intelligence Bills Are Not ‘Secret Law’*, *supra* note 10 (praise for Litt, who emailed secrecy critic regarding legal status of IAA classified addenda).

Taking responsibility counter-acts inertia, to which the law and bureaucracies are prone. Unless law is limited in duration, it by definition has inertia: it remains in effect until repealed or otherwise invalidated. Inertia is generally problematic insofar as it allows past decisions to bind the republic in the present, regardless of present merit. Current officials may intentionally, passively, or unknowingly continue past policies without having to take responsibility and re-evaluate them in light of current circumstances. This hazards self-government in the senses of leader and policy choice. The longer it goes without being reaffirmed through amendment, re-enactment, or implementation, the greater the legitimacy of a law becomes questionable.<sup>384</sup> Generally, we tolerate this inertia – and its legitimacy-undermining aspects are mitigated – because the law is public and can be changed.

Secrecy makes inertia in the case of secret law especially problematic. If the law is deeply secret, today's officials and the public may not be aware that a governing law exists at all. Where an inherited secret law is a shallow secret, its content nevertheless may remain secret. The public and many public officials live under yesterday's secret law, unknowing.

Secret law inertia flips the constitutional norm against secret law on its head. Rather than the default being no secret law, classification inertia of many years<sup>385</sup> and indefinite legal force inertia make the default to be secret law's automatic continuance.

Secret law inertia also runs counter to the constitutional value of political self-government in its leader selection sense. Public officials exercise power delegated to them by the sovereign electorate, and are accountable for it through elections and oversight. That delegated authority is used by public officials when they govern and when they create secret law. But classification inertia and legal force inertia also allow officials to evade actively taking responsibility for secret law that predates their term but continues to operate on their watch.

This concern is quite real. New administrations do not automatically review all inherited unpublished OLC opinions, but continue to enjoy the benefit of their availability as precedent. The same may be true of executive orders. In the Judicial Branch, there is no requirement for new FISC judges – appointed for seven year terms – to read all precedents, either. In Congress, only a tiny fraction of Members of Congress take the opportunity to read classified addenda as bills move through the legislative process. We can infer that even fewer Members review classified addenda from prior years that may still have provisions in force. This lack of mandatory review of inherited secret law in the three branches stems from busy schedules, incentives for Members of Congress in particular to maintain plausible deniability, and lack of a forcing mechanism.

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<sup>384</sup> This is the foundation of the desuetude doctrine. See [cite]. Cf., [\_\_]

<sup>385</sup> Classified National Security Information, Exec. Order No. 13,526, § 1.5(b) (2009).

The contrast with Army appropriations is instructive. As Akhil Amar notes, by setting U.S. House terms at two years and limiting availability of funding for the Army to two years, the Framers built into the Constitution a default of no Army – and therefore a fail-safe end to risk of tyrannous use of the Army by the President – unless each elected Congress affirmatively decides to fund it.<sup>386</sup> Every Member must take responsibility for continuance on their watch of an exception to a key constitutional norm understood by the Framers, that against standing armies.

All three branches can take a cue from the Army Appropriations Clause and create expiration dates for the legal force and classification of secret law.

### 1. Proposal: Automatic Sunset<sup>387</sup>

Automatic sunsets require regular renewed engagement with an institution’s secret law as there is turnover in public officials, and an affirmative decision to continue the legal status quo. A sunset of a secret law or a public law that has secret legal interpretations or references is doubly powerful because it also sunsets in relevant part other secret legal authorities that interpret or are dependent on it. All three branches should employ sunsets.

From the data collected in this article’s empirical study, one can infer that the majority of the contents of Congress’s classified addenda govern only a single fiscal year’s funding, personnel, and activities. Insofar as Congress creates secret law that applies for multiple years or indefinitely, there is no clear reason why those provisions should not instead have an expiration date. For example, Congress could mirror the Army Appropriations Clause in automatically sunsetting after two years any legal force given to classified addenda. The next elected Congress can always extend the provisions.

It is also valuable for Congress to include sunsets in Public Laws that can be expected to receive secret legal interpretations by the other branches. Bipartisan outcry after revelation in June 2013 of the FISC’s aggressive secret interpretation of § 215 of the USA PATRIOT Act to allow bulk telephony metadata collection was not enough to prompt Congress to act legislatively. (Congress narrowly voted down an amendment in July 2013 to defund the program, and then did nothing else for nearly two years, despite broad support for reform of the program).<sup>388</sup> It was

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<sup>386</sup> See U.S. CONST., art I, § 2, cl. 1 & § 8, cl. 12; AMAR, *supra* note 288, at 116.

<sup>387</sup> For mention of such an idea, see MacIntosh, *supra* note 9 at 17 (speculating that secret laws “properly have a half-life – their correctness tends to decay,” and that public officials have a responsibility to review them).

<sup>388</sup> The USA FREEDOM Act was all but given up for dead despite Obama Administration, intelligence community, and bipartisan and bicameral congressional support, until the combination of the Second Circuit ruling and automatic sunset created enough momentum to secure passage several days after § 215 and other authorities in the USA PATRIOT Act lapsed. See Steve Vladeck, *Whither the Section 215 Reauthorization Debate?*, JUST SECURITY, March 19, 2015, <https://www.justsecurity.org/21263/section-215-reauthorization-debate/> (little discussion in Congress of passing bill); Steve Vladeck, *The End of the*

instead the automatic sunset of § 215, together with public knowledge of how the provision had been interpreted in secret, that finally prompted Congress to halt the program's inertia and enact reforms in the USA FREEDOM Act.<sup>389</sup> It is encouraging that Congress has included sunsets in the USA FREEDOM Act.<sup>390</sup> All Members of Congress are now clearly on notice that national security legislation receives secret interpretations in the other branches, and should take statute sunsets as moments to inquire with the other branches and vote on that basis.<sup>391</sup>

In the Judicial Branch, based on what we know the FISC's orders generally do come with temporal limitations. Increments of months or a year are common. They are imposed by Congress and by the court to require decisionmakers to re-engage and oversight to be ongoing rather than happen at a single moment.<sup>392</sup> Expiration dates on surveillance orders also temporally limit government investigative authority and therefore duration of privacy impact. However, any FISC precedents that do not terminate on their face and remain unpublished are problematic – especially because the regular turnover in FISA court membership (terms are seven years) could undermine institutional memory. Going forward, if the FISC wants a construction of law to continue in force beyond a few years and remain secret, it should have to revisit it regularly. Any classified constructions of law by the FISA court predating the USA FREEDOM Act that do not terminate on their face, or otherwise continue to have precedential effect, could be sunsetted en bloc. New FISA court rulings that are redacted and published in accordance with the USA FREEDOM Act need not sunset because their secrecy problem is solved. But where the USA FREEDOM Act's alternative of publication of an unclassified summary results in a cryptic summary that does not give the public much meaningful notice of the law, an automatic sunset should still apply. The FISA court could adopt these limitations in its jurisprudence, or Congress could legislate it.

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*Snowden Affair*, JUST SECURITY, Nov. 19, 2014, <https://www.justsecurity.org/17582/snowden-affair/> (outlook for reform grim after Senate failure to move forward with bill).

<sup>389</sup> The USA FREEDOM Act was all but given up for dead despite Obama Administration, intelligence community, and bipartisan and bicameral congressional support, until the combination of the Second Circuit ruling and automatic sunset created enough momentum to secure passage several days after § 215 and other authorities in the USA PATRIOT Act lapsed. *See* Steve Vladeck, *Whither the Section 215 Reauthorization Debate?*, JUST SECURITY, March 19, 2015, <https://www.justsecurity.org/21263/section-215-reauthorization-debate/> (little discussion in Congress of passing bill); Steve Vladeck, *The End of the Snowden Affair*, JUST SECURITY, Nov. 19, 2014, <https://www.justsecurity.org/17582/snowden-affair/> (outlook for reform grim after Senate failure to move forward with bill).

<sup>390</sup> *See, e.g.*, USA FREEDOM Act, *supra* note 13, § 705.

<sup>391</sup> The contrast is with the several reauthorizations of § 215 prior to 2015, when only a handful of Members chose to inform themselves of how it had been interpreted in secret by the FISC.

<sup>392</sup> *See, e.g.*, 50 U.S.C. § 1805(d) (durations of 90, 120, 365 days).

The greater secret law management challenge regarding the duration of secret legal authorities is found in the Executive Branch. For reasons of the norm against secret law, the rule of law, and self-government (and without danger to classified fact or deliberative space), the people may reasonably expect that a new administration to take responsibility and affirmatively act to extend the legal force of any inherited legal authorities upon which it relies but does not publish.<sup>393</sup> New legal authorities should have an expiration date – ideally included in a bell ringer notice – requiring renewal at the least during the next four-year presidential term.<sup>394</sup>

## 2. Proposal: Early Automatic Declassification and Publication

Also included in bell ringer notices should be the secret law’s declassification date. An *earlier* declassification and publication date for secret law than secret fact would reflect the stronger constitutional norm against secret law than against secret fact, and a different secrecy/non-secrecy balance point for the competing constitutional values.<sup>395</sup>

Under Executive Order 13526 (2009), the declassification clock for classified documents varies from 10 to 25 years.<sup>396</sup> An accelerated declassification date could coincide with a sunset of its legal force, or not. As with automatic declassification dates generally, the option for extension of classification means that this classification expiration date would in actuality be a required moment of reconsideration. Public officials would have to revisit the law’s secrecy and take responsibility for it. Additionally, anticipating eventual publication is both realistic and should tend to enhance the quality of legal analysis at the outset.

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<sup>393</sup> The 19 former OLC lawyers who urged publication of OLC opinions as a default also argue for withholding publication where OLC advises against a decision as unlawful and policymakers comply and do not make it. “For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation.” Proposed OLC Principles, *supra* note 181, at 1352 (recommendation 6). This recommendation is now reflected in the subsequent 2010 BARRON OLC BEST PRACTICES MEMO, *supra* note 179, at 6. This is a reasonable accommodation for deliberative space, supporting the rule of law.

<sup>394</sup> Congress’s recent stipulation (*see* NDAA for 2016, *supra* note 88, § 1045a) of Executive Branch “thorough review” every three years of the legally binding interrogation rules in the (unclassified) U.S. Army Field Manual is a valuable guidepost. However, a sunset is a stronger mechanism, with a fail-safe of no legal authority without an affirmative re-authorization.

<sup>395</sup> A default for declassification of secret law ahead of secret fact would also reflect a normative preference for avoidance of the appearance of ex post or retroactive law. This appearance – and perhaps practical reality in view of the public – could occur if the fact of a secret activity is publicized ahead of publication of its legal authority. Declassification of the law that is literally “after the fact” appears to provide retroactive blessing for activities that when revealed seemed to lack legal foundation, even if in reality the secret law was created ahead of initiation of programs relying on that secret authority.

<sup>396</sup> Classified National Security Information, Exec. Order No. 13,526, § 1.5(b) (2009).

In the case of unpublished but unclassified legal authorities – such as many OLC memos – this expiration date principle would mean adoption of an automatic publication date. OLC now employs a “presumption that it should make its significant opinions fully and promptly available to the public,” but makes exceptions including opinions with sensitive national security information, inference with law enforcement, other legal prohibition, protection of Executive Branch deliberative processes, attorney-client privilege, lack of public interest, and where OLC does not regard the opinion as “significant.”<sup>397</sup> OLC therefore retains significant latitude.

Of course, regular review of secret law nearing the expiration of its legal force and classification would have costs in terms of time, personnel, and money. Additional review will expose secret legal documents to additional eyes, inevitably driving up risk of leaks. These costs would need to be balanced against the benefits discussed here.

### E. The Plurality of Review Principle

The foregoing principles and proposals are powerful tools. Selected individually or as a unified agenda, they may be sufficient to make secret law tolerable. However, these steps would only provide guidelines for creation of secret law, and impose mechanisms to keep it a shallow secret or automatically expire. These steps may favor – but do not require regarding Executive Branch secret law – what we can call plurality of review: review by multiple legal actors of draft secret law before its finalization, and review by other branches once it has been created.

These problems are not as significant for the secret law produced by Congress or the FISC, for structural reasons. Legislation gets reviewed at multiple legislative stages by differing casts of legislators, and by two parties. At the stage of enactment by presidential signature it is shared with shared with the Executive Branch (and informally it is shared earlier for agency comment). In the FISA court, the USA FREEDOM Act has provided an amicus and greater appellate review of orders that automatically go to agencies.

The processes of Congress and the FISC regarding secret law are not perfect, but they do build in *ex ante* internal and *ex post* inter-branch review that Executive Branch lacks. The Executive Branch lacks these structural requirements, and is able to regulate its own actors in the field. This deeply secret law risk drives risk of weak drafting *ex ante*, and the problems this article has discussed in terms of constitutional values of the rule of law and self-government. It also creates risk that lawyers in all three branches who work with secret law may not know of all secret law that is relevant to their analysis or legislative or regulatory drafting.

The proposals below on internal Executive Branch review, review by multiple branches, and creation of a three-branch “secret law legal corps” go toward fostering plurality of review of

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<sup>397</sup> BARRON OLC BEST PRACTICES MEMO, *supra* note 179, at 5-6. OLC now regards publication as especially important when OLC finds a statute unconstitutional and “where the Executive Branch acts (or declines to act) in reliance on such a conclusion.”

classified legal authorities. Their primary cost, of course, of additional distribution of classified materials is additional risk of leaks, one to be balanced against anticipated benefits.

### 1. Proposal: Better Institutionalized Internal Executive Branch Checks

In the wake of OLC’s production of memoranda on interrogation and other matters that were roundly condemned as sloppy when revealed, and which were produced in an atmosphere in which only a nearly limitless minority view of Executive power was tolerated,<sup>398</sup> practitioners and scholars have emphasized integrity and ethical conduct by individuals as an internal check against poor legal work within the Executive Branch and bad process that prevents draft secret legal documents from being reviewed by key stakeholders. This is vitally important. Lawyers must exercise independent judgment and stand up for the law despite pressures of time, consequence, and personality (to include groupthink and more direct pressure).<sup>399</sup> Lawyers must also not conclude that something is legal simply because it escapes review by the courts or Congress, or would not lead to legal liability.<sup>400</sup> Aggregated individual integrity and normative conduct shapes institutional culture, which matters immensely, as well.<sup>401</sup>

Other important ideas advanced in recent years to provide internal Executive Branch checks include: inter-agency consultation requirements (all agencies with equities must be consulted); intra-agency consultation requirements, such as the “two deputy rule” for review of legal opinions by multiple supervisors and colleagues (now embraced by OLC); and internal “dissent channels” allowing internal whistleblowing instead of leaks and other external whistleblowing that puts classified information at greater risk.<sup>402</sup>

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<sup>398</sup> See, for example, multiple accounts of intimidation of OLC lawyers and Pentagon officials by staff of the Office of the Vice President: GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at \_\_; MAYER, *supra* note 183, at \_\_.

<sup>399</sup> See MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 1983) (stating lawyer must provide “independent professional judgment and render candid advice”); BAKER, *supra* note 21, at 307–26 (obligations of the national security lawyer); Shane, *supra* note 13, at 519–20.

<sup>400</sup> The 19 former OLC lawyers made this point, in reaction in large part to the 2002 OLC interrogation opinion’s focus on how CIA personnel could evade being held liable. See Proposed OLC Principles, *supra* note 181, at 1350; Johnsen, 81 IND. L.J., *supra* 179, at 1346–47; OLC 2002 INTERROGATION MEMORANDUM, *supra* note 180, at \_\_.

<sup>401</sup> See GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 179, at 33; Pozen, *supra* note 18, at 336.

<sup>402</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 Yale. L.J. 2314, 2314, 2347 (2006) (advocating internal checks, including allowing the minority party in Congress to appoint internal agency ombudsmen in the event that Congress and the presidency are in the hands of the same party); BARRON OLC BEST PRACTICES MEMO, *supra* note 179, at 4 (calling for OLC to maintain internal checks, including review of opinions by two deputies); Pozen, *supra* note 18, at 333–35 (recommending and listing internal checks).

Steps to further enhance internal plurality of review could include a requirement that any classified or unpublished Executive Branch document to have internal legal force must meet specific criteria, such as a presidential or Attorney General signature, review by the National Security Council's inter-agency Lawyers' Working Group, or issue by OLC on the signature of two senior officials. (Recall that national security matters are exempted from the APA's usual public notice and comment obligations). Statute is one implementation option, perhaps together with enactment of a requirement for any Executive Branch legal authority to be shared with Congress.<sup>403</sup> In view of certain Executive Branch objection, executive order is another route. Informal implementation, or implementation on the signature of lower level officials, is another.

## 2. Proposal: Secret Law is Available to More than One Branch

The Constitution's lawmaking process envisions a role for all three branches, and accordingly publicity to more than one branch. As noted, this is not a problem for the secret law written by Congress nor the FISC because it must be shared with the Executive Branch. Sharing with at least one other branch is a plurality of review step that would combat deep Executive Branch legal secrecy in inter-branch terms (and if implemented in connection with bell ringers, deeply secret aspects of Executive Branch secret law whose basic existence is a shallow secret to the public). Another branch will have the opportunity to reject, endorse, or revise the secret law through some contextual combination of formal and informal process. Generally, more good process means higher quality appraisal and institutional buy-in, tending to favor more sustainable policies and legal theories.<sup>404</sup> Weak legal arguments are less likely to be advanced.<sup>405</sup>

It makes the most sense for Congress to be the other branch to which the Executive Branch automatically shares its unpublished legal authorities, in view of Congress's lawmaking role. Here again, implementation methods include statute, executive order, and lower level or more informal internal Executive Branch implementation.

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<sup>403</sup> Or, Congress could bundle the new internal Executive process reforms with the reporting requirements in the OLC Accountability Act and Executive Order Integrity Act. *See supra* notes 188 & 168.

<sup>404</sup> *See BAKER, supra* note 25.

<sup>405</sup> For discussions of the value of inter-branch consultation, see KOH, *supra* note 381; Pozen, *supra* note 18, at 300-33 (recommending congressional-executive consultation). Cf., Katyal, *supra* note 402, (claiming decline in value of Congress as a check on the Executive Branch).

A question to be resolved on a contextual basis or bright-line rule is whether to share a classified summary of a legal authority,<sup>406</sup> the full classified document, a “tear-line” redaction,<sup>407</sup> or a full declassification that could be released to the public.<sup>408</sup> There is precedent for this inter-branch sharing: NSA and DoJ now share surveillance interpretations with congressional committees with some regularity.<sup>409</sup>

A risk applicable to all of these plurality of review proposals is obviously greater potential for leaks. Another is that sharing secret law with another branch will prompt creation of a second piece of secret law to govern the first. For example, after reviewing a classified presidential directive on intelligence collection, Congress responds with a provision in a classified annex. In this way, efforts to increase intra-branch transparency and dialogue regarding secret law could cause secret law to metastasize. Ultimately, risk to classified information and risk of secret law metastasization must be balanced against the benefit in terms of constitutional values and better drafted law.

### 3. Proposal: A Secret Law Legal Corps

To ensure that secret law is fully analyzable and discoverable in all three branches, and to serve plurality of review goals, a cadre of lawyer “super users” with clearances high enough to see it all could be created spanning all three branches.

Access to classified information is elaborately restricted for security clearance holders by classification level, distribution restrictions and controls, and individual Sensitive Compartmented Information (SCI) and Special Access Program (SAP) compartments at the Top Secret level. In this context, a lesson of the failure of the U.S. government to “connect the dots” and detect the 9/11 plot was that an important “need to share” intelligence must be balanced against the traditional and more restrictive “need to know” standard.<sup>410</sup> Threats may only be

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<sup>406</sup> An example in current law is that the core intelligence oversight statute requires merely that the legal basis for an intelligence activity be shared with the congressional intelligence committees. *See* 50 U.S.C. §§ 3092(a)(2), (b)(2) (2012).

<sup>407</sup> A “tear-line” document is one in which highly sensitive information supporting the document’s otherwise general and less sensitive discussion is confined to a section at the bottom. In paper form, the sensitive information could be protected by tearing off the bottom section. A tear-line could be used with varying levels of classification, or to bifurcate classified and unclassified information. Some suggest a tear-line approach in publication of secret surveillance law. *See* Rumold, *supra* note 163, at 180-86.

<sup>408</sup> As noted above, this principle can readily admit some exceptions, such as the general lack of necessity to share covert action findings with the Judicial Branch.

<sup>409</sup> Goldsmith, ODNI Legal Conference Speech, *supra* note 163.

<sup>410</sup> **[9/11 Commission].** Another way to think about this challenge is discoverability: creating processes that keep relevant classified information shallow secrets for clearance holders. “Discoverability means users can ‘discover’ selected values (e.g., who, what, where, when), but cannot gain access to the

detected or opportunities perceived when multiple pieces of classified information (together with unclassified information) are brought together.

Classification presents a special problem for lawyers. Interpretation of the law requires broad knowledge of the law – both primary authorities and controlling constructions of it in legal opinions – and reasoning by analogy. Due to classification, the risk exists that not even secret law’s clearance-possessing practitioners may be aware of conflicts and discontinuities among secret legal authorities and between secret legal authorities and public ones. Additionally, lawyers practice collegially and improve their work by sharing it with colleagues. Compartmentalization impedes collegial practice. Less vetted legal work drives up risk of inadvertent creation of ambiguities and conflicts, accidental departures from the public meaning of public law, or otherwise poor work.

As a prophylactic, Congress via statute could create a professional, non-partisan, senior cadre of lawyers – a “secret law legal corps” – in all three branches of government with “super user” clearance status regarding secret law.<sup>411</sup> They would be able to discover and see it all, and provide depth in terms of all secret law today and institutional memory as they advise a shifting cast of politically elected and appointed principals over the years. For reasons of protecting classified information, just as there are a very limited number of super users in government generally, the community of legal super users should be appropriately limited, as well. But to

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underlying information until the user requesting access is authorized and authenticated.” *See* Markle Foundation Task Force on National Security in the Information Age, *Discoverability: Improve Information Sharing, Create a Trusted System, Facilitate Access to Critical Data* (2009), [http://www.markle.org/sites/default/files/MTFBrief\\_Discoverability.pdf](http://www.markle.org/sites/default/files/MTFBrief_Discoverability.pdf).

<sup>411</sup> Although not addressing themselves directly to secret law, other scholars have offered somewhat similar but importantly different ideas. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 24 (2008), urges creation of an Executive Branch “cadre of informational ombudsmen” with top clearances charged with ensuring that the Article II branch “deploys information collection techniques legally and nonarbitrarily.” Balkin’s Executive Branch cadre is more programmatic and extends to secret fact, while my suggestion here is focused on secret legal authorities. After the Iran-Contra scandal, KOH, *supra* note 169-71 (1990), proposed a Legislative Branch officer: addition of a Congressional Legal Advisor – a sort of legal Comptroller General – in the office of a Foreign Policy Monitor proposed by Alton Frye, *Congress and President: The Balance Wheels of American Foreign Policy*, 49 YALE REV. 1, 11-15 (1979). This Advisor would coordinate the work of congressional committee staff counsels, liaise between Executive Branch legal staffs, and provide independent legal assessments of international and foreign relations law analogous to the independent budget assessments of the Congressional Budget Office. These thoughtful ideas merit careful attention. However, they are more complex than the “super user” advisor corps I recommend focused on secret law, would presumably have greater authority, would involve creating new offices and hiring new staff. For each of these reasons, the Balkin and Koh entities would likely engender even greater resistance than what I propose. At base, my “super user” corps merely involves giving a select group of lawyers already serving in the three branches all-access clearances regarding secret law, and allowing them to talk to each other. Together with the other reform ideas discussed in this article, this empowerment of carefully vetted and cleared lawyers would likely prove to be a valuable and reasonably doable step.

reflect rule of law constitutional values – including the proper functioning of separation of powers and checks and balances – that secret law super user cadre ought to include lawyers in all relevant agencies and in all three branches.

This suggestion is certain to engender strong resistance from those most concerned about leaks and most protective of confidential deliberative space: national security traditionalists and presidential power adherents.<sup>412</sup> Carefully vetted and monitored, and double bound by their law license’s obligation of confidentiality and their security clearance’s obligation of protecting classified information, however, one could reasonably expect these legal super users to display the highest reliability regarding sensitive information entrusted to them.

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Taken together, the principles and proposals outlined here reflect a judgment that in seeking to reform secret law, primary reliance cannot be placed on courts. The FISC’s jurisdiction is narrowly restricted to FISA. The rest of secret law escapes judicial review due to classification, the state secrets doctrine, executive privilege, and other justicability and judicial deference doctrines.<sup>413</sup>

These principles and proposals, if adopted singularly or as a unified agenda of transparency and accountability steps, would also have some cost in terms of risk to classified fact. There likely would be some cost to deliberative space, as well, as lawyers became more risk adverse in their advisement and engagement in depth with classified fact. As a lawyer and national security professional, I regard these as the most serious of considerations. It is important to emphasize, however, that such incremental additional risk would be incurred in the service of vital constitutional values of the rule of law and self-government, ones that this study has demonstrated are in uncomfortable tension with secret law in all three branches. A full understanding of national security includes these values. Our task in the interest of national security, therefore, is to manage the friction between and risks among liberty and security. The best policies, such as bell ringers, or creation of an overall better oversight mechanism, protect them both rather than asking us to choose. Our republic cannot endure, and we would not want it

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<sup>412</sup> Another objection might be that there are already too many lawyers involved in national security. For discussion, see JACK GOLDSMITH, POWER AND CONSTRAINT, *supra* note 333, at \_\_ (a consequence of 9/11 and subsequent controversies with legal angles is a massive lawyering-up of national security); Carrie Cordero, *Thoughts on the Proposals to Make FISA More Friendly*, LAWFARE, Aug. 12, 2013 (arguing that there are enough lawyers involved in NSA oversight already), <https://www.lawfareblog.com/thoughts-proposals-make-fisa-more-friendly>; Steve Vladeck, *Defriending FISA: A Response to Carrie Cordero*, LAWFARE, Aug. 12, 2013 (disagreeing with Cordero), <https://www.lawfareblog.com/defriending-fisa-response-carrie-cordero>.

<sup>413</sup> Several scholars make this point, including BAKER, *supra* note 25, at \_\_; Laura K. Donohue, *National Security Law Pedagogy and the Role of Simulations*, 6 J. NAT’L SEC. L. & POL’Y 489, 529-30 (2013); Morrison, *supra* note 19 at 1225 (quoting former OLC head Walter Dellinger).

to endure, without both and continual striving to balance and achieve a favorable friction between them.

Ultimately, each example of secret law, and each suggested principle here, requires careful evaluation on a case-by-case basis, in the context of an overall national policy decision about whether secret law as it exists today in all three branches is something we can live with as is, must end, or can govern better.

## V. CONCLUSION

This study has taken a fresh and broad look at increasingly common recent allegations of secret law in all three branches. It has found them well founded. Indeed, in the case of the Legislative Branch, this article's empirical study shows that the extent of the practice goes well beyond even what critics have alleged. Secret law is an important and under-studied phenomenon, warranting greater attention by scholars, practitioners, and the public.

In the context of an emerging literature focused on particular aspects of secret law's current incarnations, this article has taken a wider view. It expands the conversation with a first deep dive into the public record of four decades of classified legislative work that has been largely overlooked by everyone except a small community of practitioners. In normative terms, this article is – to borrow a metaphor from historian John Lewis Gaddis – a work of lumping rather than splitting.<sup>414</sup> Inevitably, that means that this article will raise more questions than it could address, much less resolve. That is this article's intent. My endeavor here is to stimulate additional research, reflection, and debate about secret law, especially about approaches to governing the phenomenon.

The future of secret law is, ultimately, public. It is in the hands of public decisions made by the people and their elected and appointed public officials. Before they choose the next president, the people can ask candidates to articulate in public an approach to it. Deliberations in the sunlight will be better for a clearer and deeper understanding of the law our government writes in secrecy's shadows.

## VI. (UNCLASSIFIED) ADDENDUM

How does one study Congress's use of classified addenda when none of the addenda have surfaced publically and there are only limited descriptions of their contents in the public record? This article's approach is close reading and empirical analysis of references to classified addenda in Public Laws and unclassified legislative reports. This final Part to this article provides a guide to this study's methodology and the data presented in summary in Table 1 (in Part I.A.1 above) and in detail in Table 2 immediately below.

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<sup>414</sup> JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT* vii (1982) (describing his history of U.S. grand strategy in the Cold War as a work of lumping trends rather than splitting hairs).

## A. Legislative Empirical Study Methodology

The temporal scope of this study is 36 years: the 18 Congresses, each roughly two years long, since the advent of the classified addenda in the 95<sup>th</sup> Congress (1977-78).<sup>415</sup> The legislative scope of this study is the three annual statutes through which Congress governs classified programs and in connection with which Congress consistently writes classified addenda: annual IAAs, NDAs, and DOD Appropriations Acts.<sup>416</sup> This study excludes bills and reports associated with measures that do not become law.<sup>417</sup>

Moving left to right, the tables present first *contextual information* (Columns A and B), then data about *statutory references* to classified addenda (Columns C through F), and finally data about *reports* with associated classified addenda (Columns G through L). The three parts of the tables are separated by heavy black lines.

### 1. Contextual Information

Column A indicates the particular Congress and the years during which it was in session.<sup>418</sup> Column B shows the total number of all laws that were enacted during each Congress.<sup>419</sup>

### 2. Statutory References to Classified Addenda

Next, the tables present information about *statutory references* to classified addenda. Column C shows the first data this study collects and analyzes: *the number of Public Laws* that purport to give a classified addendum in whole or in part the status of law. Column D tabulates the *number of provisions* in these Public Laws one might reasonably read as giving all or part of an addendum the force of law. (More on this below). Note that some Acts have more than one

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<sup>415</sup> I reviewed a sampling of earlier NDAs and DOD Appropriations Acts to determine whether they contained references to classified addenda, and found none. Again, the IAAs were not written before the period analyzed here.

<sup>416</sup> The year associated with legislation on this table is the fiscal year (FY) mentioned in the Act's title. That is the FY to which the Act pertains rather than the calendar year of enactment. Generally but not always bills for a particular FY are enacted during the prior calendar year.

<sup>417</sup> In particular, the IAAs for 1978 and 2006-09. The study scores two addenda associated with JESs for the IAA for 1991, even though the first version was vetoed, because the bill ultimately did become law.

<sup>418</sup> In recent decades, generally but not always a session of Congress is confined to a single calendar year. A new Congress is not sworn in until several days after January 1, and on rare occasions legislation is enacted during the brief period in which a session bleeds over into a second year.

<sup>419</sup> Data in Column B is official U.S. government data from <https://www.govtrack.us/congress/bills/statistics>.

such provision arguably creating secret law. Column E zeroes in on perhaps the most consequential statutory provisions, *incorporation provisions in Public Law*: the number of times statutes use often standard language to try to give the force of law en bloc to a classified addendum in whole or in evidently sizable part. Column F identifies the Public Law number and sections of the statutes, statutory provisions, and classified addenda tabulated in Columns C, D, E, and H.<sup>420</sup>

The dataset reflects both methodological decisions and some ball and strike calling as I coded often cryptic and ambiguous references to classified addenda.

In Column D, I scored statutory provisions as arguably creating secret law where the statutory text might *reasonably* be read, using usual methods of statutory interpretation, to give all or part of a classified addendum legal force.<sup>421</sup> I take this inclusive, reasonableness-based approach to capture provisions for further analysis employing multiple statutory interpretation approaches. In particular, this methodological decision provides room for a purposivist view that when construing somewhat ambiguous statutory references, great weight ought to be given to Congress's three-decade project of using classified addenda to do detailed legislative regulation of classified activities. A more restrictive reading – for example, a hypothetical textualist reading that some or all of these Public Law provisions fail to give parts of the classified report addenda the force of law – is not unreasonable.<sup>422</sup> That, however, is an interpretive decision beyond the scope of this article and which if employed in this empirical study would fail to capture provisions purposivist analysis might reasonably read differently.

A few examples illustrate this study's methodology.

Scoring Public Law provisions that might reasonably be read to give classified addenda provisions legal force easily captures text that is quite clear. Examples of statutory incorporation provisions include defense Act provisions stating that a classified annex “is hereby incorporated into this Act,” and IAA provisions stating that “amounts authorized to be appropriated under this Act, and the authorized personnel ceilings...are those specified in the classified Schedule of

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<sup>420</sup> Classified addenda do not have publically known numbers. This table in Column F therefore lists instead the section of the Public Law referring to a classified document, and in Columns I and K the number of the reports to which classified addenda are appended.

<sup>421</sup> The dataset is too large to allow discussion of each individual provision. Often I have provided a brief description of the provision, and where warranted offer additional thoughts on why a provision or addendum is or is not scored, or in which Congress it is scored.

<sup>422</sup> This would reflect textualist skepticism of reports generally. See *supra* discussion in Part I.A.1. An alternative textualist view might be that the plain text of the Public Law is often clear that the classified addenda provisions are binding. Matters for further inquiry include positing a textualist interpretive approach to secret law, and what this study's data might show if recoded along those lines.

Authorizations.<sup>423</sup> An example of a non-incorporation provision that is an easy call is this cap on personnel in an appropriations bill: the Office of the Director of National Intelligence “shall not employ more Senior Executive employees than are specified in the classified annex.”<sup>424</sup>

In contrast, this study does not score secret law creation where the statutory text cannot reasonably be read to suggest that the addenda content it references is made legally binding. For example, I do not score a provision concerning kill or capture operations against suspected terrorists overseas in the NDAA for 2014 that ambiguously mentions that DOD support to unspecified “operations conducted under the National Security Act of 1947” is “addressed” in the classified annex.<sup>425</sup> We do not know what the addendum says, but the statutory term “addressed” seems too soft for us reasonably to infer a legal obligation.

A tougher call is presented by Public Law provisions that reference passages in addenda that identify or describe programs or other information. Depending on how extensive particular classified descriptions are and the granularity with which those descriptions regulate government authority,<sup>426</sup> we can posit that these referenced passages in the addenda fall somewhere on a spectrum running from mere (classified) facts referenced in law to stipulations that the statute makes quasi-statutory. In other words, to what extent are these provisions referencing secret fact or creating secret law? For example, the DOD Appropriations Acts for 2005 and 2006 state that \$1.8 billion and \$3 billion, respectively, of the Iraq Freedom Fund “shall only be for classified programs, described in further detail in the classified annex.”<sup>427</sup> One could read this statutory language narrowly to put the force of law only behind the statute’s earmark of the funding “for classified programs,” with their identification and any other description in the addenda being

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<sup>423</sup> See supra notes 99 & 105.

<sup>424</sup> There are several such provisions. *See, e.g.*, DOD Appropriations Act for 2012, Pub. L. No. 112-74, 125 Stat. 786, § 8106 (2011).

<sup>425</sup> See NDAA for 2014, § 1041. I have also excluded bare statutory earmarks of funding that do not reference classified addenda. *See, e.g.*, DOD Appropriations Act for 1982, Pub. L. No. 97-114, 95 Stat. 1565-1575 (1981) (in Air Force aircraft procurement account, \$102,800,000 “shall be available only for a classified program,” without reference to classified addenda).

<sup>426</sup> Some reports state generally that the discussion in the addenda is extensive. *See, e.g.*, IAA for 1980, H.R. Rep. 96-512 at 5 (1979) (JES stating that the classified annex provides “a detailed description of program and budget authority”). But we do not know that a classified addendum’s content is on a particular matter is extensive unless the Public Law or a report tells us. *See, e.g.*, DOD Appropriations Act for 1991, S. Rep. No. 101-521 at 170 (1990) (committee bill provision “based on the extensive rationale set forth in the classified annex”).

<sup>427</sup> See DOD Appropriations Act for 2005, Pub. L. No. 108-287, 119 Stat. 951, 1005 (2004) (\$1.8 billion in Iraq Freedom Fund); DOD Appropriations Act for 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2733 (2005) (\$3 billion).

non-binding report language. This interpretation would be informed by Congress failing to use here language it has used in other Acts that statutorily incorporates or otherwise explicitly gives addenda content the force of law. A still narrow but more congressionally sympathetic reading would put the force of law at least behind the addendas' identification of the classified programs. More generously, one could read the statutory text to make the classified addendas' programmatic descriptions about the Iraq funding legally binding in full, to include any limitations, footnotes, or other stipulations. The latter two interpretations reasonably understand the Public Law provisions to create secret law.

They also admit purposivist analysis, a standard statutory interpretation method.<sup>428</sup> A purposivist interpretation would recognize the unique necessities of classified budgeting under the Legislative-Executive "accommodation" on intelligence. As discussed in Part I.A.1, this four decade inter-branch pact allows detailed legislative regulation of classified activities while protecting classified information. This "accommodation" is reflected in the broad understanding that the classified addenda can have the force or at least effect of law. Without endorsement here, to allow room for purposivist interpretation I have in Column D scored the Iraq Freedom Fund provisions and others like them as reasonably viewed as creating secret law.

Again, some ball and strike calling on similar cryptic Public Law provisions has been inevitable, carrying with it some inherent imprecision. Our understanding of the classified addenda phenomenon, and of these provisions in particular, would be improved and classified fact need not be endangered by additional public discussion of them by Legislative and Executive Branch officials.<sup>429</sup>

### 3. Reports and Classified Addenda

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<sup>428</sup> See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 497-513 (5th ed. 2014).

<sup>429</sup> The best recent guidepost in the public record was provided by ODNI General Counsel Litt's May 2015 blog-posted letter indicating that the Intelligence Community regards the statutory incorporation provisions in the IAAs (usually § 102) as giving legal force to the classified Schedules of Authorization, but that the IAA's classified addenda are otherwise merely advisory reports. *See* Aftergood, *ODNI: Annexes to Intelligence Bills Are Not 'Secret Law'*, *supra* note 10 (quoting email from ODNI General Counsel Robert Litt to Aftergood). Note that Litt was addressing only the IAAs, which among the three kinds of statutes analyzed in this study have most consistently included explicit statutory incorporation provisions and have least often included other ad hoc statutory provisions one might read to create secret law in the addenda. This limitation to Litt's comment, together with clear statements in OMB SAPs that other ad hoc provisions might create "secret law" (*see* IAA FOR 2010 OMB SAP, *supra* note 10, at 6), at the least leave as an open question the Executive Branch's view of the potential secret law-creating effect of other statutory provisions. A related question this article saves for the future is the interpretive weight actors outside the Executive Branch should give to Executive Branch interpretations of statutes that purport to create secret law governing federal agencies.

Moving on to this study’s data on *reports with associated classified addenda*, Column G tallies *incorporation report language in last-in-time reports*, usually Joint Explanatory Statements (JESs) associated with conference reports of enacted laws.<sup>430</sup> Generally, these provisions reference and buttress incorporation statutory provisions.

Next, Column H tabulates the *number of last-in-time reports with classified addenda*, based on statutory and report references. Column I identifies the last-in-time reports. Moving on to committee reports earlier in the legislative process, Column J tabulates the *number of House and Senate reports coming earlier in the legislative process with classified addenda*. Column K identifies these committee reports. Finally, Column L in Table 2 provides – for each Congress, and for the 36 year duration of this study – *grand totals of the number of reports with classified addenda*, totaling data in Columns H and J.

This study presents what we know with confidence about the frequency with which Congress produces classified addenda associated with reports issued in connection with the three annual national security Acts studied here. No known public source or study tells us how many classified addenda Congress has actually written (at all, much less by year and by Act). Accordingly, this study’s dataset is built based on references the most authoritative sources in the public record: the statutes and reports. Based on close reading of these primary documents, this study tabulates the number of reports that we know have classified addenda.

The number of classified addenda Congress has is somewhat higher than the number of reports-with-addenda tabulated here, for several reasons. First, this study does not include supplemental appropriations Acts, which sometimes have associated classified addenda (again, this study looks only at IAAs, NDAs, and DOD Appropriations Acts).<sup>431</sup> A follow-on study will analyze the supplementals and other Acts.<sup>432</sup> Second, this study analyzes the public legislative record, but Public Laws and reports that do not reference classified addenda may still have them. More information from Congress on this point – for example, a statement by each committee about its history of addenda production, and going forward a “bell ringer” statement

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<sup>430</sup> This study tabulates the total number of statutory provisions that purport to create secret law, but does not tabulate the total number of report provisions referencing classified addenda (in other words, there is no equivalent here for reports to Column D’s data for statutes). This decision tracks the statutory interpretation principle that report language is valuable in interpreting statutory text but cannot create law.

<sup>431</sup> See, e.g., Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery of 2006, Pub. L. No. 109-234, 120 Stat. 418 (2006); H.R. Rep. No. 109-494, at 78 (2006) (reference to classified addendum in conference report JES).

<sup>432</sup> Follow-on study will look systematically at supplementals and at whether other annual Acts and non-repeating Acts have had associated classified report addenda. As noted in text *supra*, at least some supplementals have classified report addenda. Spot-checks of the legislative record associated with other national security-related Acts beyond the three annual Acts studied here – such as appropriations Acts for the Energy Department, foreign operations, and homeland security, and authorization Acts for foreign affairs-related activities – have not shown classified addenda references.

(see Part IV *supra*) in every bill or report about the existence of a classified addenda – will enrich the electorate’s understanding of the classified legislative work of their elected representatives, without endangering classified information. Third, some reports reference multiple classified addenda associated with a single statute or report.<sup>433</sup> Furthermore, addenda nomenclature has varied over time, among Acts, and among committees, and the reports do not consistently explain how the addenda are organized. In the context of uncertainty, I have been conservative and only scored a single classified addendum per report where there is a reference to one in a statute or report. Again, more information from Congress would be helpful and without risk to classified information.

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Finally, a closing observation: in addition to serving its primary purposes, this empirical study as reflected in Table 2 below documents the predictable legislative “regular order” for many decades regarding Congress’s annual intelligence and defense Acts – and its collapse in recent years. Increasingly, what some scholars charitably term unorthodox lawmaking has become not an exception but commonplace.<sup>434</sup> Usual committee and floor consideration stages are bypassed. House-Senate conferences are done informally. Joint explanatory statements at the conference phase – often the most authoritative legislative history – are dropped into the *Congressional Record* or issued ad hoc by individual committees rather than printed regularly in conference reports. Sometimes they are skipped entirely. Major annual policy and funding bills are rolled together in massive omnibuses or cromnibuses with a bewildering array of topics, titles, and divisions.<sup>435</sup> Key authorization and appropriations measures are often enacted many months late, after multiple continuing resolutions. Among its other costs, the regular order’s collapse makes the legislative record harder to research and therefore the law harder to understand.<sup>436</sup> The increasing complexity of legislative process underscores the importance for all lawyers who construe legislation (and that is virtually all lawyers) being trained in legislation.<sup>437</sup> The nation’s legislature should also note that in burying its enactments and

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<sup>433</sup> See, e.g., IAA for 1997, S. Rep. 104-258, at 2 (1996) (Senate intelligence committee report explains that its classified supplement contains a classified annex with “the same status as any Senate Report” and a classified schedule of authorizations that the bill text incorporates by reference).

<sup>434</sup> The term unorthodox lawmaking originates with BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U. S. CONGRESS (1st ed. 1997). For discussion of these phenomena, *see also* ID. (4th ed. at 52) (rate of bypassing of committees and other empirical data).

<sup>435</sup> A cromnibus combines two aspects of unorthodox lawmaking: continuing resolutions when regular appropriations run out, and omnibus bills containing multiple bills.

<sup>436</sup> For a similar point, see Abbe R. Gluck, Anne Joseph O’Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1799-1800, 1803, 1839 (2015) (noting *inter alia* that legislative history for omnibus bills is often either outdated or non-existent, causing confusion).

<sup>437</sup> For further discussion of the importance of teaching legislation in law school, and my institution’s approach, *see* Dakota S. Rudesill, Christopher J. Walker & Daniel Tokaji, *A Program in Legislation*, 65 J.

explanations under legislative trainwrecks, Congress is creating a new process of restricting public access to the law.

### B. Table 2: Tracking Congress's Library of Secret Law

These abbreviations are used in Table 1 above and Table 2 immediately below:

*IAA* – Intelligence Authorization Act.

*NDAA* – National Defense Authorization Act.

*DOD Approps* –Department of Defense Appropriations Act.

*JES* – Joint Explanatory Statement of a conference committee, usually included along with the final statutory text in a Conference Report (although sometimes a *JES* is filed in the *Congressional Record* separate from a Conference Report, for example if there was an informal rather than formal House-Senate conference). Sometimes these statements are termed a “statement of managers.” For consistency I have termed them all *JESs*.

*HPSCI* – House Permanent Select Committee on Intelligence.

*SSCI* – Senate Select Committee on Intelligence.

*SASC* – Senate Armed Services Committee.

*HASC* – House Armed Services Committee.

*incorp* – Statutory or report language provision (usually fairly standard language) that explicitly or implicitly incorporates a full Classified Schedule, entire classified annex, or other addendum into the statute in full or in evident significant part.

*supp* – Provision authorizing or appropriating additional (supplemental) funding. Where doing incorporation work, I use the term “*supp. incorp*”).

*cond* – Ad hoc statutory provision that conditions a process, program, or funding based on stipulations in a classified addendum.

*repro* – Statutory provision that bars (with exceptions) reprogramming of funds delimited in the classified annex, and thereby implicitly gives the funding levels in the annex the force of law.

*report* – Statutory provision that gives the force of law to reporting requirements in a classified addendum.

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LEGAL ED. 70 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2509477](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509477). Teaching legislation, along with creating legislative clerkships, also will likely have the effect over time of emphasizing legislation’s constitutional and professional importance, in turn incentivizing more lawyers to get the firsthand legislative work experience that will increase their sophistication as statutory interpreters and reduce the dramatic relative shortfall in legislative work experience within the legal profession’s most influential ranks. *See* Dakota S. Rudesill, *Closing the Legislative Experience Gap*, 87 WASH. U. L. REV. 699 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1544947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1544947).

**TABLE 2:**  
**TRACKING CONGRESS'S LIBRARY OF SECRET LAW – DETAIL**

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H	Column I	Column J	Column K	Column L
Congress and Session (calendar year)	Total Number of Laws Enacted	Statutes creating secret law: Number of <u>Pub. Laws</u> reasonably read to give a classified addendum in part or in full the status of law	Instances of creation of secret law: Number of times Pub. L. can be reasonably read to give a classified addendum in part or in full the status of law	Instances of en bloc creation of secret law: Number of times Pub. L. <u>incorporates</u> entire classified Schedule, Annex or large part thereof into law	Pub. L. and section Nos.	Number of times controlling report language references <u>incorporation</u> of an entire classified Schedule, Annex, or large part thereof into law	Number of <u>last-in-time reports</u> (usually joint explanatory statements (JESs)) <u>with classified addenda</u> , based on references in Public Law or last-in-time report	Pub. L. and Rpt. Nos. with which classified addenda are associated	Number of committee reports <u>with classified addenda</u> , based on references in Public Law or a report	Pub. L. and committee Rep. Nos. with which classified addenda are associated	Total number of reports <u>with classified addenda</u> referenced in Public Law or reports (Columns H+J)
<b>TOTAL (1977-2014)</b>	<b>10,082</b>	<b>68</b>	<b>124</b>	<b>61</b>		<b>43</b>	<b>94</b>		<b>177</b>		<b>271</b>
<b>95<sup>th</sup> Cong. (1977-78)</b>	<b>804</b>	<b>1</b> <i>1</i> <hr/> <b>0</b>	<b>1</b> <i>1</i> <hr/> <b>0</b>	<b>1</b> <i>1</i> <hr/> <b>0</b>	IAA 1979, Pub. L. 95-370, § 101(b) (incorp) <hr/> [DOD Approps 1978 Pub. L. 95-111 No provisions]	<b>0</b> <i>0</i> <hr/> <b>0</b>	<b>3</b> <i>1</i> <hr/> <b>1</b>	IAA 1979, JES, H.R. Rep. 95-1420 <hr/> DOD Approps 1978 JES H.R. Rep. 95-565	<b>7</b> <i>3</i> <hr/> <b>2</b>	IAA 1979, S. Rep. 95-744 (SSCI) S. Rep. 95-1028 (SASC) H.R. Rep. 95-1075 <hr/> DOD Approps 1978 H.R. Rep. 95-451 S. Rep. 95-325	<b>10</b>

		0	0	0	[DOD Approps 1979 Pub. L. 95-457 No provisions]	0	1	DOD Approps 1979 JES H.R. Rep. 95-1764	2	DOD Approps 1979 H.R. Rep. 95-1398 S. Rep. 95-1264	
<b>96<sup>th</sup> Cong.</b> <b>(1979-1980)</b>	<b>736</b>	2	4	3	IAA 1980, Pub. L. 96-100, § 101(b) (incorp) § 401 (supp incorp) <sup>438</sup>	2	3	IAA 1980, JES, H.R. Rep. 96-512	8	IAA 1980, S. Rep. 96-71, H.R. Rep. 96-127	11
		1	2	2	IAA 1981, Pub. L. 96-450, § 102 (incorp) § 103 (repro)	1	1	IAA 1981, JES, H.R. Rep. 96-1350	2	IAA 1981, S. Rep. 96-659, H.R. Rep. 96-659	
		1	2	1	[DOD Approps 1980 Pub. L. 96-154 No provisions]	0	1	DOD Approps 1980 JES H.R. Rep. 96-696	2	DOD Approps 1980 H.R. Rep. 96-450 S. Rep. 96-393	
		0	0	0	[DOD Approps 1981 Pub. L. 96-527 No provisions]	0	0	[DOD Approps 1981 JES H.R. Rep. 96-1528 no references]	2	DOD Approps 1981 H.R. Rep. 96-1317 S. Rept 96-1020	
<b>97<sup>th</sup> Cong.</b> <b>(1981-1982)</b>	<b>529</b>	2	4	4	IAA 1982, Pub. L. 97-89 § 102 (incorp) § 401 (supp incorp)	2	4	IAA 1982 JES H.R. Rep. 97-332	8	IAA 1982 H.R. Rep. 97-101 S. Rep. 97-57	12
		1	2	2	IAA 1983,	1	1	IAA 1983 JES	2	IAA 1983	

<sup>438</sup> Authorizes funds for the current fiscal year (1979) as specified in the classified Schedule of Authorizations. I have scored this supplemental funding provision (and other similar provisions in subsequent years) – and indeed scored it as an incorporation provision (a supplementary one) – in addition to the standard language (here in § 101(b)) which designates the Schedule as having the force of law because they are doing separate work. § 401 concerns authorization of additional funding for the current fiscal year, while § 101(b) authorizes funding for the following fiscal year that is the focus of the Act generally. For this reason, and under the Rule Against Surplusage (*see Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574-75 (1995) (“communication” not be read to be redundant)), separate parts of a statute should not be construed as doing identical work.

					Pub. L. 97-269 § 102 (incorp) § 401 (supp incorp) <sup>439</sup>			H.R. Rep. 97-779		H.R. Rep. 97-486 S. Rep. 97-379	
		0	0	0	[NDAAAs No provisions]	0	1	NDAA 1983 JES H.R. Rep. 97-749	0	[NDAA 1983 H&S cmte rep. addenda no references]	
		0	0	0	[DOD Approps 1982 No provisions]	0	1	DOD Approps 1982 JES H.R. Rep. 97-410	2	DOD Approps 1982 H.R. Rep. 97-333 S. Rep. 97-273	
		0	0	0	[DOD Approps 1983 No provisions]	0	0	[DOD Approps 1983 JES H.R. Rep. 97-980 No addenda references]	2	DOD Approps 1983 H.. Rep. 97-943 S. Rep. 97-580	
<b>98<sup>th</sup> Cong.</b>	<b>677</b>	<b>2</b>	<b>2</b>	<b>2</b>		<b>1</b>	<b>5</b>		<b>9</b>		<b>14</b>
(1983- 1984)		1	1	1	IAA 1984, Pub. L. 98-215 § 102 (incorp)	1	1	IAA 1984 JES H.R. Rep. 98-569	2	IAA 1984 H.R. Rep. 98-189 S. Rep. 98-77	
		1	1	1	IAA 1985, Pub. L. 98-618 § 102 (incorp)	0	1	IAA 1985 S. Rep. 98-481 <sup>440</sup>	1	IAA1985 H.R. Rep. 98-743	
		0	0	0	[NDAAAs No provisions]	0	1	NDAA 1984 JES H.R. Rep. 98-352	1	NDAA 1984 H.R. Rep. 98-213	
		0	0	0	[DOD Approps 1984 No provisions]	0	1	NDAA 1985 JES H.R. Rep. 98-1080	1	NDAA 1985 H.R. Rep. 98-691	
		0	0	0		0	0	DOD Approps 1984 JES H.R. Rep. 98-567	2	DOD Approps 1984 H.R. Rep. 98-427 S. Rep. 98-292	

<sup>439</sup> Authorizes funds for the current fiscal year (1982) as specified in the classified Schedule of Authorizations.

<sup>440</sup> The IAA for 1985 was not formally conferenced. The House passed the Senate bill, making the Senate report the last-in-time report.

		0	0	0	[DOD Approps 1985 No provisions]	0	1	DOD Approps 1985 JES H.R. Rep. 98-1159	2	DOD Approps 1985 H.R. Rep. 98-1030 S. Rep. 98-634		
99 <sup>th</sup> Cong. (1985-1986)	687	2	3	2	IAA 1986, Pub. L. 99-169 § 102 (incorp) § 105 (cond) <sup>441</sup>	2	5	IAA 1986 JES H.R. Rep. 99-373	11	IAA 1986 H.R. Rep. 99-106 S. Rep. 99-79	16	
		1	2	1		1	1		2			
		1	1	1		1	1		2			
		0	0	0		0	1		1			
		0	0	0		0	1		2			
		0	0	0	[DOD Approps 1986 No provisions]	0	0	[DOD Approps 1986 JES no references] <sup>442</sup>	2	DOD Approps 1986 H.R. Rep. 99-403 S. Rep. 99-210	16	
		0	0	0	[DOD Approps 1987 No provisions]	0	1	DOD Approps 1987 JES H.R. Rep. 99-1005	2	DOD Approps 1987 H.R. Rep. 99-793 S. Rep. 99-446		
		0	0	0		2	6	IAA 1988 JES H.R. Rep. 100-432	10	IAA 1988 H.R. Rep. 100-93 S. Rep. 100-59		
		1	2	1	IAA 1988 Pub. L. 100-178 § 102 (incorp) § 104 (cond) <sup>443</sup>	1	1		2			
100 <sup>th</sup> Cong. (1987-1988)	761	2	4	2							16	

<sup>441</sup> This provision conditions funds for the Nicaraguan Contras as stipulated in the classified Schedule of Authorizations.

<sup>442</sup> Neither the JES for the DOD Appropriations Act for 1986, nor any other statute or report, references a classified addendum associated with the JES. However, report language in the JES does reference classified annexes associated with the earlier committee reports. *See* H.R. Rep. No. 99-450, at 340 (1985).

<sup>443</sup> This provision conditions funds for the Nicaraguan Contras as stipulated in the classified Schedule of Authorizations.

		1	2	1	IAA 1989 Pub. L. 100-453 § 102 (incorp) § 104 (cond) <sup>444</sup>	1	1	IAA 1989 JES H.R. Rep. 100-879	2	IAA 1989 H.R. Rep. 100-591 S. Rep. 100-334	
		0	0	0	[NDAA No provisions]	0	1	NDAA 1988 JES H.R. Rep. 100-446	1	NDAA 1988 H.R. Rep. 100-58	
		0	0	0	[DOD Approps 1988 No provisions]	0	1	NDAA 1989 JES H.R. Rep. 100-753	1	NDAA 1989 S. Rep. 100-326	
		0	0	0	[DOD Approps 1989 No provisions]	0	1	DOD Approps 1988 JES H.R. Rep. 100-498	2	DOD Approps 1988 H.R. Rep. 100-410 S. Rep. 100-235	
		1	2	0	NDAA 1990 Pub. L. 101-189 § 136 (cond) <sup>446</sup> § 165 (cond) <sup>447</sup>	0	1	DOD Approps 1989 JES H.R. Rep. 100-1002	2	DOD Approps 1989 H.R. Rep. 100-681 S. Rep. 100-402	
101 <sup>st</sup> Cong. (1989- 1990)	665	4	6	3	IAA 1990, Pub. L. 101-193, § 102 (incorp) § 104 (cond) <sup>445</sup>	4	6	IAA 1990 JES H.R. Rep. 101-367	12	IAA 1990, H.R. Rep. 101-215 S. Rep. 101-174	18
		1	2	1	[IAA 1991 enacted in next Congress]	1	1	IAA 1991 JES, H.R. Rep. 101-928	2	IAA 1991, S. Rep. 101-85 H.R. Rep. 101-725	
		0	0	0				NDAA 1990, JES H.R. Rep. 101-331	2	NDAA 1990 H.R. Rep. 101-121 S. Rep. 101-81	
		1	2	0							

<sup>444</sup> This provision conditions funds for the Nicaraguan Contras as stipulated in the classified Schedule of Authorizations.

<sup>445</sup> This provision limits funding for the Nicaraguan Contras as stipulated in the classified Schedule of Authorizations.

<sup>446</sup> This provision requires termination of the SR-71 reconnaissance aircraft program “as discussed in the classified annex.”

<sup>447</sup> This provision conditions funding for the MILSTAR satellite program on the Secretary of Defense reporting to Congress that conditions in the classified annex have been met. This is a close call. The provision is scored here in view of the purposivist point made in Part VI supra.

		1	1	1	NDAA 1991 Pub. L. 101-510 § 1409 (incorp)	1	1	NDAA 1991, JES H.R. Rep. 101-923	2	NDAA 1991 H.R. Rep. 101-665 S. Rep. 101-384	
		0	0	0	[DOD Approps 1990 No provisions]	0	1	DOD Approps 1990 JES H.R. Rep. 101-345	2	DOD Approps 1990 H.R. Rep. 101-208 S. Rep. 101-132	
		1	1	1	DOD Approps 1991 Pub. L. 101-511 § 8111 (incorp)	1	1	DOD Approps 1991 JES H.R. Rep. 101-938	2	DOD Approps 1991 H.R. Rep. 101-822 S. Rep. 101-521	
<b>102<sup>nd</sup> Cong. (1991- 1992)</b>	<b>610</b>	<b>7</b>	<b>7</b>	<b>7</b>	IAA 1991, <sup>448</sup> Pub. L. 102-88 § 102 (incorp)	<b>6</b>	<b>7</b>	IAA 1991 JES, H.R. Rep. 102-166	<b>12</b>	[IAA 1991 H&S. cmte repts written in prior Cong.]	<b>19</b>
		1	1	1	IAA 1992 Pub. L. 102-183 § 102 (incorp)	1	1	IAA 1992 JES, H.R. Rep. 102-327	2	IAA 1992, S. Rep. 102-117 H.R. Rep. 102-65	
		1	1	1	IAA 1993 Pub. L. 102-496 § 102 (incorp)	1	1	IAA 1993 JES, H.R. Rep. 102-963	2	IAA 1993 H.R. Rep. 102-544 S. Rep. 102-324	
		1	1	1	NDAA 1992 Pub. L. 102-190 § 1005 (incorp)	1	1	NDAA 1992, JES H.R. Rep. 102-311	2	NDAA 1992 H.R. Rep. 102-60 S. Rep. 102-113	
		1	1	1	NDAA 1993 Pub. L. 102-484 § 106 (incorp)	1	1	NDAA 1993, JES H.R. Rep. 102-966	2	NDAA 1993 H.R. Rep. 102-527 S. Rep. 102-352	
		1	1	1	DOD Approps 1992 Pub. L. 102-172 § 8124 (incorp)	0	1	DOD Approps 1992, JES, H.R. Rep. 102-328	2	DOD Approps 1992 H.R. Rep. 102-95 S. 102-154	

<sup>448</sup> The IAA for 1991 was pocket vetoed in calendar year 1990. In 1991, during the following 102nd Congress, the bill was changed to make it acceptable to the President, re-passed, and signed into law. Because both versions of the JES are part of the legislative history of the same measure that ultimately became law, I have scored two classified addenda associated with last-in-time reports.

		1	1	1	DOD Approps 1993 Pub. L. 102-396 § 9126 (incorp)	1	1	DOD Approps 1993 JES H.R. Rep. 102-1015	2	DOD Approps 1993 H.R. Rep. 102-627 S. Rep. 102-408	
103 <sup>rd</sup> Cong. (1993- 1994)	473	6	9	6	IAA 1994 Pub. L. 103-178 § 102 (incorp) § 104 (cond) <sup>449</sup>	4	6	IAA 1994, JES, H.R. Rep. 103- 377 <sup>452</sup>	12	IAA 1994 H.R. Rep. 103-162 S. Rep. 103-115	18
		1	2	1	IAA 1995 Pub. L. 103-359 § 102 (incorp) § 103 (cond) <sup>450</sup> § 601 (cond) <sup>451</sup>	1	1	IAA 1995, JES, H.R. Rep. 103-753	2	IAA 1995 H.R. Rep. 103-541 S. Rep. 103-256	
		1	3	1	NDAA 1994 Pub. L. 103-160 § 1103 (incorp)	1	1	NDAA 1994, JES H.R. Rep. 103-357	2	NDAA 1994 H.R. Rep. 103-200 S. Rep. 103-112	
		1	1	1	NDAA 1995 Pub. L. 103-337 § 1003 (incorp)	1	1	NDAA 1995, JES H.R. Rep. 103-71	2	NDAA 1995 H.R. Rep. 103-499 S. Rep. 103-282	
		1	1	1	DOD Approps 1994 Pub. L. 103-139 § 8108 (incorp)	0	1	DOD Approps 1994 JES H.R. Rep. 103-339	2	DOD Approps 1994 H.R. Rep. 103-254 S. Rep. 103-153	
		1	1	1	DOD Approps 1995 Pub. L. 103-335 § 8084 (incorp)	0	1	DOD Approps 1995 JES H.R. Rep. 103-747	2	DOD Approps 1995 H.R. Rep. 103-562 S. Rep. 103-321	
104 <sup>th</sup> Cong.	337	4	7	4		4	4		12		16

<sup>449</sup> This provision identifies and therefore limits funds for the Community Management Account of the CIA.

<sup>450</sup> This provision limits the availability of funds for the Community Management Account of the CIA.

<sup>451</sup> This provision limits the availability of funds for the National Reconnaissance Office (NRO).

<sup>452</sup> This JES, like many reports, references incorporation of the annex at several points. I have scored only one incorporation provision, however, because each mention is not breaking new ground beyond the original controlling report language.

(1995-1996)		1	2	1	IAA 1996, Pub. L. 104-93 § 102 (incorp) § 104 (cond) <sup>453</sup>	1	1	IAA 1996, JES, H.R. Rep. 104-427	2	IAA 1996 H.R. Rep. 104-427 S. Rep. 104-97	
		1	2	1	IAA 1997, Pub. L. 104-293 § 102 (incorp) § 104 (cond) <sup>454</sup>	1	1	IAA 1997, JES, H.R. Rep. 104-832	2	IAA 1997 H.R. Rep. 104-578 S. Rep. 104-258	
		1	1	1	NDAA 1996 Pub. L. 104-106 § 1002 (incorp)	1	1	NDAA 1996, JES H.R. Rep. 104-450	2	NDAA 1996 H.R. Rep. 104-131 S. Rep. 104-112 <sup>458</sup>	
		1	2	1	NDAA 1997 Pub. L. 104-201 § 1002 (incorp) § 1111 (cond) <sup>455</sup>	1	1	NDAA 1997, JES H.R. Rep. 104-724	2	NDAA 1997 H.R. Rep. 104-563 S. Rep. 104-267	
		0	0	0	[DOD Approps 1996 No provisions]	0	0	[DOD Approps 1996 JES addenda no clear ref.] <sup>456</sup>	2	DOD Approps 1996 H.R. Rep. 104-208 S. Rep. 104-124	
		0	0	0	[DOD Approps 1997 No provisions]	0	0	[DOD Approps 1997 JES addenda no clear ref.] <sup>457</sup>	2	DOD Approps 1997 H.R. Rep. 104-617 S. Rep. 104-286	
105 <sup>th</sup> Cong. (1997-1998)	404	4	6	4	IAA 1998, Pub. L. 105-107 § 102 (incorp)	4	5	IAA 1998, JES, H.R. Rep. 105-350	11	IAA 1998 H.R. Rep. 105-135 S. Rep. 105-25	16

<sup>453</sup> This provision limits the availability of funds for the Community Management Account of the CIA.

<sup>454</sup> This provision limits the availability of funds for the Community Management Account of the CIA.

<sup>455</sup> This provision creates the National Imagery and Mapping Agency, to include DOD and CIA elements “as specified in the classified annex.”

Related JES report language states that the DOD and CIA elements are “identified” in the classified annex. *See* NDAA for 1997, H. Rep. 104-724, at 803 (1996).

<sup>456</sup> Not scored as having a classified addendum because single reference in JES is not clear.

<sup>457</sup> Not scored as having a classified addendum because single reference in JES is not clear.

<sup>458</sup> The Senate committee report does not itself reference a classified annex, but one is scored here because the JES references a Senate classified annex. *See* NDAA for 1996, H. Rep. No. 104-450, at 844 (1995).

		1	2	1	§ 104 (cond) <sup>459</sup>  IAA 1999, Pub. L. 105-272 § 102 (incorp) § 104 (cond) <sup>460</sup>	1	1	IAA 1999, JES, H.R. Rep. 105-780	2	IAA 1999 H.R. Rep. 105-508 S. Rep. 105-185	
		1	1	1	NDAA 1998 Pub. L. 105-85 § 1002 (incorp)	1	1	NDAA 1998, JES H.R. Rep. 105-340	2	NDAA 1998 H.R. Rep. 105-132 S. Rep. 105-29	
		1	1	1	NDAA 1999 Pub. L. 105-261 § 1002 (incorp)	1	1	NDAA 1999, JES H.R. Rep. 105-736	1	NDAA 1999 H.R. Rep. 105-532	
		0	0	0	[DOD Approps 1998 No provisions]	0	1	DOD Approps 1998 JES H.R. Rep. 105-265	2	DOD Approps 1998 H.R. Rep. 105-206 S. Rep. 105-45	
		0	0	0	[DOD Approps 1999 No provisions]	0	0	[DOD Approps 1999 JES addenda No clear ref.]	2	DOD Approps 1999 H.R. Rep. 105-591 S. Rep. 105-200	
<b>106<sup>th</sup> Cong. (1999- 2000)</b>	<b>604</b>	<b>4</b>	<b>6</b>	<b>4</b>	IAA 2000, Pub. L. 106-120 § 102 (incorp) § 104 (cond) <sup>461</sup>	<b>4</b>	<b>6</b>	IAA 2000, JES, H.R. Rep. 106-457	<b>11</b>	IAA 2000 H.R. Rep. 106-130 S. Rep. 106-48	<b>17</b>
		1	2	1	IAA 2001, Pub. L. 106-567 § 102 (incorp)	1	1	IAA 2001, JES, H.R. Rep. 106- 969 <sup>463</sup>	2	IAA 2001 H.R. Rep. 106-620 S. Rep. 106-279	

<sup>459</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>460</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>461</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>463</sup> The IAA for 2001 was vetoed as originally passed in the form of H.R. 4392. New reports were not produced when the bill was modified, re-passed, and signed, as H.R. 5630. The Public Law references the classified Schedule of Authorizations associated with the conference report to H.R. 4392. *See* IAA for 2001, Pub. L. 106-567, § 102 (2000). The prior legislative history is operative so far as it is not in conflict with the final Public Law text as modified to secure the President's signature. Accordingly, the JES and committee reports included in this table are those associated with the earlier version of the bill.

			1	1	1	§ 104 (cond) <sup>462</sup>		1	1	NDAA 2000, JES H.R. Rep. 106-301	1	NDAA 2000 H.R. Rep. 106-162	
			1	1	1	NDAA 2000 Pub. L. 106-65 § 1002 (incorp)		1	1	NDAA 2001, JES H.R. Rep. 106-398	2	NDAA 2001 H.R. Rep. 106-616 S. Rep. 106-292	
			0	0	0	[DOD Approps 2000 No provisions]		0	1	DOD Approps 2000 JES H.R. Rep. 106-371	2	DOD Approps 2000 H.R. Rep. 106-244 S. Rep. 106-53	
			0	0	0	[DOD Approps 2001 No provisions]		0	1	DOD Approps 2001 JES H.R. Rep. 106-754	2	DOD Approps 2001 H.R. Rep. 106-644 S. Rep. 106-298	
107 <sup>th</sup> Cong. (2001- 2002)	383	3	6	3		IAA 2002 Pub. L. 107-108 § 102 (incorp) § 104 (cond) <sup>464</sup>		3	5	IAA 2002, JES, H.R. Rep. 107-328	10	IAA 2002 H.R. Rep. 107-219 S. Rep. 107-63	15
		1	2	1		IAA 2003 Pub. L. 107-306 § 102 (incorp) § 104 (cond) <sup>465</sup> § 107 <sup>466</sup>		1	1	IAA 2003, JES, H.R. Rep. 107-789	2	IAA 2003 H.R. Rep. 107-592 S. Rep. 107-149	
		1	3	1		NDAA 2002 Pub. L. 107-107 § 1002 (incorp)		1	1	NDAA 2002, JES H.R. Rep. 107-333	1	NDAA 2002 H.R. Rep. 107-194	

<sup>462</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>464</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>465</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>466</sup> This provision authorizes appropriations in excess of the amounts authorized in the classified Schedule of Authorizations. For context, this Act was written between the 9/11 attacks and the start of the Iraq war in 2003.

		0	0	0	[NDAA 2003 No provisions]	0	0	[NDAA 2003 JES addenda no refs.]	1	NDAA 2003 H.R. Rep. 107-436	
		0	0	0	[DOD Approps 2002 No provisions]	0	1	DOD Approps 2002 JES H.R. Rep. 107-350	2	DOD Approps 2002 H.R. Rep. 107-298 S. 107-109	
		0	0	0	[DOD Approps 2003 No provisions]	0	1	DOD Approps 2003 JES H.R. Rep. 107-732	2	DOD Approps 2003 H.R. Rep. 107-532 S. Rep. 107-213	
<b>108<sup>th</sup> Cong. (2003- 2004)</b>	<b>504</b>	<b>4</b>	<b>14</b>	<b>2</b>	IAA 2004 Pub. L. 108-177 § 102 (incorp) § 104 (cond) <sup>467</sup> § 321 (cond) <sup>468</sup>	<b>1</b>	<b>4</b>	IAA 2004, JES, H.R. Rep. 108-381	<b>11</b>	IAA 2004 H.R. Rep. 108-163 S. Rep. 108-44	<b>15</b>
		1	3	1	IAA 2005 Pub. L. 108-487 § 102 (incorp) § 104 (cond) <sup>469</sup> § 106 <sup>470</sup> § 613 <sup>471</sup>	1	1	IAA 2005, JES, H.R. Rep. 108-798	3	IAA 2005 H.R. Rep. 108-558 S. Rep. 108-258 (SSCI) S. Rep. 108-300 (SASC)	
		1	4	1	[NDAA No provisions]	0 <sup>477</sup>	1				
		0	0	0	[NDAA No provisions]	0	0	[NDAA JESs addenda no refs.]	1	NDAA 2004 H.R. Rep. 108-106	
		0	0	0					1	NDAA 2005 H.R. Rep. 108-491	

<sup>467</sup> This provision limits and authorizes funding and personnel for the Community Management Account of the CIA.

<sup>468</sup> This provision authorizes the President to create an advisory panel in accordance with stipulations in the classified annex.

<sup>469</sup> This provision limits and authorizes funding related to the Intelligence Community Management Account of ODNI.

<sup>470</sup> This provision authorizes appropriations in excess of the amounts authorized in the classified Schedule of Authorizations of the IAA for 2004.

<sup>471</sup> This provision authorizes appropriations for a civilian linguist corps as specified in the classified Schedule of Authorizations.

<sup>477</sup> The JES lacks the usual incorporation report language. Note, however, that the JES observes that both the House and Senate bills had identical § 102 incorporation provisions, a passage that has essentially equivalent effect. *See* H.R. Rep. No. 108-798 at 27 (2004).

		1	4	0	DOD Approps 2004 Pub. L. 108-87 § 8082 (report) § 8091 (cond) <sup>472</sup> § 8117 (cond) <sup>473</sup> § 8131 (cond) <sup>474</sup>	0	1	DOD Approps 2004 JES H.R. Rep. 108-283	2	DOD Approps 2004 H.R. Rep. 108-187 S. Rep. 108-87	
		1	3	0	DOD Approps 2005 Pub. L. 108-287 § 8081 (report) § 8090(b) (cond) <sup>475</sup> 119 Stat. 1005 (cond) <sup>476</sup>	0	1	DOD Approps 2005 JES H.R. Rep. 108-622	2	DOD Approps 2005 H.R. Rep. 108-533 S. Rep. 108-284	
109 <sup>th</sup> Cong. (2005- 2006)	483	2	4	0	[No IAA 2006, 2007] _____ [NDAA No provisions]	0	3		6		9
		0	0	0		0	1	NDAA 2006 JES H. Rep. 109-360	1	NDAA 2006 S. Rep. 109-69	

<sup>472</sup> This funding condition authorized transfer of \$48 million from DOD accounts to “other activities of the Federal Government” involving contracting “related to projects described in further detail in the Classified Annex...consistent with the terms and conditions set forth therein.”

<sup>473</sup> This funding condition directs transfer of \$56.2 million from the Navy to Defense-Wide accounts “as may be required to carry out the intent of Congress as expressed in the Classified Annex....”

<sup>474</sup> After barring funding for the controversial Terrorism Information Awareness Program, previously known as Total Information Awareness (TIA), this provision authorizes a program “for Processing, analysis, and collaboration tools for counterterrorism foreign intelligence, as described in the Classified Annex” accompanying the bill. This cryptic language could support an inference that the “description” in the annex is entirely fact, as it could a reasonable inference that the “description” delimits the program and therefore is effectively law. Because a description would seem to limit the program – especially in context of the Act’s immediately prior funding bar on the TIA program – this provision is scored as creating secret law. For further discussion, see article text *supra* in Part I-A-1 and *supra* note \_\_\_\_.

<sup>475</sup> This funding condition authorizes transfer of \$185 million from Army accounts to “other activities of the Federal Government” involving contracting “related to projects described in further detail in the Classified Annex...consistent with the terms and conditions set forth therein.” The provision also facially appears to be a congressional delegation of authority to the Secretary of Defense to preempt state and local law on the basis of a claim of national security: “projects authorized by this section shall comply with applicable Federal, State, and local law to the maximum extent consistent with the national security, as determined by the Secretary of Defense.” *See also* DOD Appropriations Act for 2006, § 8082.

<sup>476</sup> This funding condition is a statutory earmark setting aside \$1.8 billion in the Iraq Freedom Fund for classified programs discussed in the classified annex. *See* supra note 427.

			1	3	0	DOD Appropriations 2006 Pub. L. 109-148 § 8073 (report) § 8082 (cond) <sup>478</sup> 119 Stat. 2733 (cond) <sup>479</sup>	0	0	[NDAA 2007 JES addenda no refs.] <sup>481</sup>	1	NDAA 2007 S. Rep. 109-254 <sup>482</sup>	
			1	1	0	DOD Appropriations 2007 Pub. L. 109-289 § 8064 (report)	0	1 <sup>480</sup>	DOD Appropriations 2006 JES H.R. Rep. 109-359	2	DOD Appropriations 2006 H.R. Rep. 109-119 S. Rep. 109-141	
			4	4	1	[No IAA 2008, 2009]	0	4	DOD Appropriations 2007 JES H.R. Rep. 109-676	2	DOD Appropriations 2007 H.R. Rep. 109-504 S. Rep. 109-292	
110 <sup>th</sup> Cong. (2007 - Jan. 2009)	460		1	1	0	NDAA 2008 Pub. L. 110-181 § 215(b) (cond) <sup>483</sup>	0	1	NDAA 2008, JES H.R. Rep. 110-477	1	NDAA 2008 S. Rep. 110-77	8
			1	1	1	NDAA 2009 Pub. L. 110-417 § 1005 (incorp)	0	1	NDAA 2009, JES Con. Rec., Sept. 23, 2008, H8718-H9081 <sup>484</sup>	1	NDAA 2009 S. Rep. 110-335	

<sup>478</sup> This funding condition concerning \$147.9 million in Army funding is identical to § 8090(b) in the DOD Appropriations Act for 2005, discussed in *supra* note 119.

<sup>479</sup> This funding condition is a statutory earmark setting aside \$3 billion in the Iraq Freedom Fund for classified programs discussed in the classified annex. Similar to provision in DOD Appropriations Act for 2005. *See supra* note 427.

<sup>480</sup> A supplemental appropriations Act passed in 2006 also had a classified addendum associated with its conference report JES, not scored here because this empirical study does not include supplemental appropriations Acts. *See supra* note 431.

<sup>481</sup> The 2006 and 2007 NDAs are unusual in two ways: the Senate (rather than the House as had been the case) had a statutory provision calling for incorporation of an annex, and the provision was dropped in conference. .

<sup>482</sup> Reference to a Senate committee report classified annex is found in the JES. *See* NDAA for 2007, H. Rep. 109-702, at 821 (2006).

<sup>483</sup> This provision assigns a program to a particular DOD office “until certain conditions specified in the classified annex...are met.”

<sup>484</sup> The JES associated with the NDAA for 2009 was placed in the *Congressional Record* rather than being issued in a conference report.

		1	1	0	DOD Approps 2008 Pub. L. 110-116 § 8066 (report)	0	1	DOD Approps 2008 JES H.R. Rep. 110-434	2	DOD Approps 2008 H.R. Rep. 110-279 S. Rep. 110-155	
		1	1	0	DOD Approps 2009 Pub. L. 110-329 § 8065 (report)	0	1	DOD Approps 2009 Cmte. Print	0	[DOD Approps 2009 H&S cmte. addenda no refs.]	
111 <sup>th</sup> Cong. (2009 – Jan. 2011)	385	2	2	1	[IAA 2010 no standard § 102] <sup>485</sup>	1	4	IAA 2010 S. Rep. 111-223 (SSCI) <sup>488</sup>	8	IAA 2010 <sup>490</sup> H.R. Rep. 111-186 S. Rep. 111-55	12
		0	0	0	NDAA 2010 Pub. L. 111-84 § 4001 (incorp)	0	1	NDAA 2010 H.R. Rep. 111-288	1	NDAA 2010 H.R. Rep. 111-166	
		1	1	1							

<sup>485</sup> The IAA for 2010 has a complicated legislative history, and ultimately became the only enacted IAA not to include the standard provision (usually § 102) incorporating into the Public Law a classified addendum. A standard § 102 was included as usual in the original House and Senate versions of the IAA for 2010 (H.R. 2701 and S. 1494), which carried classified addenda. After long delay a new bill, S. 3611, was approved by the SSCI with a report (S. Rep. 111-223) and classified addendum. S. 3611 became a full substitute amendment for H.R. 2701, cleared both chambers with textual references to classified addenda removed (note that OMB objected to Congress creating “secret law”; see OMB SAP FOR IAA FOR 2010, *supra* note 10). As amended, S. 3611 was enacted in October 2010, after the end of FY 2010. We can infer with some confidence that the Public Law lacked a standard incorporation provision because it would have been largely moot to do that legal incorporation work: the classified Schedule of Authorizations govern budget and personnel for the fiscal year, and FY 2010 was over by the time the Public Law was enacted. This table records the second SSCI report (S. Rep. 111-223), associated with S. 3611, as the last-in-time report akin to a JES, and including standard incorporation report language (*id.*, at 1). It is a tough call, but I have made this scoring decision despite the House committee in its report on the IAA for 2011 stating that there was no classified addendum with the IAA for 2010. *See* IAA for 2011, H.R. Rep. 112-72, at 7-8 (2011) (HPSCI report). (I infer the HPSCI to mean that the addendum with S. Rep. 111-223 was not subsequently regarded as authoritative by the HPSCI because the Public Law text did not reference it and FY 2010 expired before the IAA for 2010 was enacted). I have scored a classified addendum and the S. Rep. 111-223’s incorporation language because they were produced in connection with an enacted IAA, even if their status is questionable. Similarly, I have scored addenda for the House and Senate regular committee reports associated with the original bills (H.R. 2701 and S. 1494).

<sup>487</sup> See *supra* note \_\_ [n. on table 2 with 2010 IAA leg history]

<sup>488</sup> See *supra* note \_\_ [n. on table 2 with 2010 IAA leg history]

<sup>490</sup> See *supra* note \_\_ [n. on table 2 with 2010 IAA leg history]

		0	0	0	[NDAA 2011] [Pub. L. 111-383] [§ 344 (cond)] <sup>486</sup>	0	1	NDAA 2011, JES Cmte Print <sup>489</sup>	2	NDAA 2011 H.R. Rep. 111-491 S. Rep. 111-201	
		1	1	0	DOD Approps 2010 Pub. L. 111-118 § 8065 (report)	0	1	DOD Approps 2010 Stmt in 155 Cong. Rec. H15042 (Dec. 16, 2009)	2	DOD Approps 2010 H.R. Rep. 111-230 S. Rep. 111-74	
		0	0	0	[DOD Approps 2011 enacted 112th Congress]	0	0	----	1	DOD Approps 2011 <sup>491</sup> S. Rep. 111-295	
112 <sup>th</sup> Cong. (2011 – Jan., 3 2013)	284	6	16	5	IAA 2011 <sup>492</sup> Pub. L. 112-18, § 102 (incorp) § 103 (cond) <sup>493</sup>	3	7	IAA 2011 H.R. Rep. 112-72 (HPSCI) <sup>505</sup>	6	----	13
		1	2	1		1	1		0		

<sup>486</sup> I have not scored this condition as an example of creation of secret law because of the way § 344 is worded. It conditions release of funds until DOD submits to Congress “information cited in the classified annex.” This language does not say that the addendum conditions, limits, or describes anything. It simply references information that is “cited.” This suggests a reference that is closer to statute-found fact than a statute-created legal authority.

<sup>489</sup> The JES for the NDAA for 2011 was issued as a committee print rather than a report filed with either the full House or Senate.

<sup>491</sup> The DOD Appropriations Act for 2011 was enacted in calendar year 2011, in the 112th Congress. However, the addendum associated with the Senate report was produced during 2010 in the 111th Congress so the committee report addendum is scored in the 111th Congress. There evidently was no House committee-passed bill or report and therefore no associated classified addendum scored.

<sup>492</sup> The IAA for 2011 was passed in calendar year 2011 during the 112<sup>th</sup> Congress, not as it normally would have been in calendar year 2010 during the 111<sup>th</sup> Congress. Also, like several that followed, the IAA for 2011 was not formally confereed. The House committee’s report is effectively the last-in-time report, and therefore its classified addendum is cited in the Act’s standard § 102 as the location of the controlling Schedule of Authorizations.

<sup>493</sup> This provision limits and authorizes funding and personnel for the Intelligence Community Management Account of ODNI.

<sup>505</sup> See *supra* note \_\_ (IAA for 2011 legislative history).

		1	3	1	IAA 2012 <sup>494</sup> Pub. L. 112-87, § 102(a) (incorp) § 102(c) (cond) <sup>495</sup> § 104 (cond) <sup>496</sup>	1	1	IAA 2012 H.R. Rep. 112-87 (HPSCI) <sup>506</sup>	1	IAA 2012 S. Rep. 112-43
		1	3	1	IAA 2013 <sup>497</sup> Pub. L. 112-277, § 102 (incorp) § 103 (cond) <sup>498</sup> § 104 (cond) <sup>499</sup>	1	1	IAA 2013 S. Rep. 112-192 (SSCI) <sup>507</sup>	0	----
		0	0	0	[NDAA 2012 No provisions]	0	1	NDAA 2012 JES H.R. Rep. 112- 329 <sup>508</sup>	1	NDAA 2012 H.R. Rep. 112-78
		1	1	1	NDAA 2013 Pub. L. 112-239 § 4001 (incorp)	0	1	NDAA 2013, JES H.R. Rep. 112-705	0	[NDAA 2013 H&S cmte addenda no refs.]

<sup>494</sup> The IAA for 2012 was not conference-referred. Instead, differences were resolved through “ping pong.” Both the House and Senate committees produced bills and reports with classified addenda. The Senate passed the House-passed bill with an amendment the House accepted. (The 1964 Civil Rights Act offers a roughly analogous process history, minus the classified addenda; see WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 2–21 (5th ed. 2014). The Public Law’s citation (Pub. L. 112-87, § 102) to the House bill’s committee report and classified addenda make clear HPSCI’s committee work is last-in-time for our purposes.

<sup>495</sup> In the IAA for 2012, § 102(a) is the standard “incorporation” language, while § 102(c) is a condition (“cond”) provision, stating that an appropriations restriction for the FBI is contained in the classified annex.

<sup>496</sup> This provision limits and authorizes funding and personnel for the Intelligence Community Management Account of ODNI.

<sup>497</sup> The IAA for 2013 was not formally conference-referred. The Senate committee report was the last-in-time report.

<sup>498</sup> This provision authorizes and limits the DNI’s authority to adjust personnel limits in the classified Schedule of Authorizations.

<sup>499</sup> This provision limits and authorizes funding related to the Intelligence Community Management Account of ODNI.

<sup>506</sup> See *supra* note 53 (IAA for 2012 legislative history).

<sup>507</sup> See *supra* note 56 (IAA for 2013 legislative history).

<sup>508</sup> The reference to this classified addendum for the NDAA for 2012 is found in the Senate committee report for the following year’s NDAA. See NDAA for 2013, S. Rep. No. 112-173, at 173 (2012).

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		1	3	0	DOD Approps 2011 <sup>500</sup> Pub. L. 112-10 § 8062 (report) § 8112 (cond) <sup>501</sup> § 9011 (cond) <sup>502</sup>	0	1	--- <sup>509</sup>	0	---		
		1	4	1	DOD Approps 2012 Pub. L. 112-74 § 8061 (report) § 8093 (repro/incorp) § 8106 (cond) <sup>503</sup> § 8126 (cond) <sup>504</sup>  [DOD Approps 2013 enacted during 113th Cong.]	0	1	DOD Approps 2012 JES H.R. Rep. 112-331	2	DOD Approps 2012 H.R. Rep. 112-10 S. Rep. 112-77		
		0	0	0		0	0	---	2	DOD Approps 2013 H.R. Rep. 112-493 S. 112-196		
113 <sup>th</sup> Cong. (2013 - Jan. 2015)	296	7	19	7	IAA 2014 <sup>510</sup> Pub. L. 113-126 § 102 (incorp) § 103 (cond) <sup>511</sup> § 104 (cond) <sup>512</sup> § 303 (supp)	2	7	IAA 2014 S. Rep. 113-120 (SSCI) <sup>523</sup>	9	0	---	16

<sup>500</sup> The DOD Appropriations Act for 2011 was passed after fiscal and calendar years 2011 were underway, in April 2011, as part of a larger law, the Department of Defense and Full Year Continuing Appropriations Act of 2011.

<sup>501</sup> This condition caps the number of ODNI senior executive employees at a limit specified in the classified annex.

<sup>502</sup> This condition makes funds available for transfer “as specified in the classified annex.”

<sup>503</sup> This condition caps the number of ODNI senior executive employees at a limit specified in the classified annex.

<sup>504</sup> This condition restricts use of a newly established transfer fund to “the purposes described in the classified annex.”

<sup>509</sup> In a highly unusual step even in this era of irregular order, there evidently was no JES nor anything akin to it produced in relation to the final version of the DOD Appropriations Act for 2011. The Public Law references a classified annex associated with the Act, not a JES nor other report. The Senate committee-passed report from the prior 111th Congress had an addendum that appears to be separate. For these reasons, I have not scored the Senate committee report, nor its classified addendum, as last-in-time.

<sup>510</sup> The IAA for 2014 was not formally conferred. The Senate committee bill passed the Senate and was adopted by the House. The Senate committee report is the last-in-time report, and has an addendum.

<sup>511</sup> This condition conditions variation from caps on the number of ODNI civilian employees contained in the classified annex.

<sup>512</sup> This provision limits and authorizes funding related to the Intelligence Community Management Account of ODNI.

<sup>523</sup> See *supra* note \_\_ (IAA for 2014 legislative history).

		1	1	1	§ 313 (cond) <sup>513</sup> § 314 (cond) <sup>514</sup>	1	1	IAA 2015, JES 160 Cong. Rec. S6464-65 (daily ed. Dec. 9, 2014) <sup>524</sup>	2	IAA 2015 S. Rep. 113-233 H.R. Rep. 113-463	
		1	1	1	NDAA 2014 Pub. L. 113-66 § 4001 (incorp) [§ 1041 (cond)] <sup>516</sup>	0	1	NDAA 2014 JES H. Cmte. Print	1	NDAA 2014 H.R. Rep. 113-20	
		1	1	1	NDAA 2015 Pub. L. 113-291 § 4001 (incorp)	0	1	NDAA 2015 JES H. Cmte Print	2	NDAA 2015 H.R. Rep. 113-146 S. Rep. 113-176	
		1	3	1	DOD Approps 2013 <sup>517</sup> Pub. L. 113-6 § 8060 (report)	0	1	DOD Approps 2013 – 159 Cong. Rec. S1287 (daily ed. Mar. 11, 2013) (S cmte) <sup>525</sup>	0	----	

<sup>513</sup> This provision requires a declassification review of documents recovered in connection with the 2011 U.S. raid that killed Osama bin Laden “in the manner prescribed in the classified annex.”

<sup>514</sup> This provision requires merger of two programs “as directed in the classified annex.”

<sup>515</sup> The IAA for 2015 was not formally conference. A JES was inserted into the *Congressional Record*, and appears to have had its own classified annex despite the Public Law in § 102 referencing the classified Schedule of Authorizations connected to the HPSCI’s bill and report. See 160 CONG. REC. S6, 464-65 (daily ed. Dec. 9, 2014); Pub. L. 113-293, § 102; H.R. Rep. No. 113-463 (2014). The table therefore records an addendum in connection with both the JES and the House report.

<sup>516</sup> I have not scored this provision for the reasons discussed in-text in Part VI above. *See also* *supra* note \_\_. [n. in Part VI above]

<sup>517</sup> The DOD Appropriations Act for 2013 was passed after fiscal and calendar years 2013 were underway, in March 2013, as part of a larger law, the Consolidated and Further Continuing Appropriations Act of 2013. The House and Senate committees approved their classified addenda in connection with their bills in 2012 during the 112th Congress, so they are scored in the 112th Congress. The Senate *Congressional Record* statement serving as JES and its classified addendum are scored for the 113th Congress, when the conference stage ended and the bill was enacted.

<sup>524</sup> *See supra* note \_\_ (IAA for 2015 legislative history).

<sup>525</sup> The House and Senate committees inserted separate statements into the *Congressional Record* in lieu of a conference report or JES or other unified statement. These statements, and the statute, reference a single classified annex to the Act, scored in Column H. The statute states that the Senate statement serves as the JES. *See* DOD Appropriations Act, Pub. L. No. 113-6, 127 Stat. 198, 199 (2013); 159 CONG. REC. S1287 (daily ed. Mar. 11, 2013) (Senate statement serving as JES); 159 CONG. REC. H1029 (daily ed. Mar. 6, 2013) (House statement).

			1	3	1	§ 8090 (repro/incorp) § 8100 (cond) <sup>518</sup>		0	1	DOD Approps 2014 JES 160 Cong. Rec. H475 (Jan. 15, 2014)	2	DOD Approps 2014 H.R. Rep. 113-113 S. Rep. 113-85	
			1	4	1	DOD Approps 2015 Pub. L. 113-235 § 8062 (report) § 8094 (repro/incorp) § 8103 (cond) <sup>521</sup> § 8134 (cond) <sup>522</sup>		0	1	DOD Approps 2015 Stmt in Cong Rec H9307 (Dec. 11, 2014) <sup>526</sup>	2	DOD Approps 2015, S. Rpt. 113- 211 H. Rpt. 113-473	

<sup>518</sup> This condition caps the number of ODNI senior executive employees at a limit specified in the classified annex.

<sup>519</sup> The DOD Appropriations Act for 2014 was passed after fiscal and calendar years 2014 were underway, in January 2014, as part of a larger law, the Consolidated Appropriations Act of 2014. I have not found a JES or other similar last-in-time report, nor references to associated addenda.

<sup>520</sup> This condition caps the number of ODNI senior executive employees at a limit specified in the classified annex.

<sup>521</sup> This condition caps the number of ODNI senior executive employees at a limit specified in the classified annex.

<sup>522</sup> This provision requires that procedures in the classified addendum be followed.

<sup>526</sup> The DOD Appropriations Act for 2015 is contained in a larger Consolidated and Further Continuing Appropriations Act. In lieu of a formal conference report with a JES, an explanatory statement was inserted into the *Congressional Record* on Dec. 11, 2014.