

# ARTICLE

## CONGRESSIONAL ACCESS TO NATIONAL SECURITY INFORMATION

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*Recent presidential administrations have invoked a broad executive privilege to justify withholding national security information from Congress and the courts. This Article argues that such a broad claim of privilege rests on a mischaracterization of the President's constitutional role. The author explains that the other branches of the United States government need access to national security information to fulfill their constitutional duties. In particular, the author argues that Congress must have access to this information to effectively exercise its own powers with regard to war and national security. The Article proposes that Congress enact legislation giving the Judiciary access to this information so that it can properly enforce the separation of powers and vindicate individual rights.*

In debates over access to executive branch information, the President often receives a heightened privilege when documents involve national security information. Writing for the Court in the Watergate Tapes Case, Chief Justice Warren Burger rejected an “absolute, unqualified” presidential privilege to be independent of judicial process.<sup>1</sup> However, in careless and overbroad dicta, Justice Burger appeared to allow information to remain privileged if the President claimed a “need to protect military, diplomatic, or sensitive national security secrets.”<sup>2</sup> A footnote drew attention to the fact that the case only addressed access to information by the Judiciary, and not by Congress: “We are not here concerned with . . . congressional demands for information.”<sup>3</sup>

Despite the Court's dicta in *Nixon*, courts have long gained access to information regarding military issues, diplomacy, and national security. As the Court noted in 1962: “[i]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>4</sup> In recent decades, as a result of congressional legislation, courts have had increasing access to national security documents through such statutes as the 1974 amendments to the Freedom of Information Act,<sup>5</sup> the Foreign Intelligence Surveillance Act of 1978,<sup>6</sup> and the Classified Information Procedures

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<sup>1</sup> *United States v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 712 n.19.

<sup>4</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962).

<sup>5</sup> Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (2006)).

<sup>6</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of 50 U.S.C.).

Act of 1980.<sup>7</sup> To the extent the judiciary decides to defer to executive branch arguments for secrecy in national security matters, such deference has no direct application to Congress, as Article I of the Constitution vests in Congress explicit powers and responsibilities concerning national security issues.<sup>8</sup>

The purpose of this Article is to identify the duties and needs of Congress to obtain national security information from the Executive Branch. The Article begins by examining claims by the Office of Legal Counsel in the Department of Justice that the President's roles as Commander in Chief, head of the Executive Branch, and "sole organ" of the United States in external relations, vest in the President a preeminent position in controlling national security information. It concentrates next on changes that place federal judges increasingly closer to secret and classified documents. The Article concludes by examining the state secrets privilege, which is invoked by the Executive Branch to keep documents from private litigants. Federal courts vary widely in interpreting their duties when the Executive Branch claims this privilege. Some courts insist that the trial judge should receive the disputed documents and examine them in camera.<sup>9</sup> Others adopt judicial standards ranging from "deference"<sup>10</sup> to "utmost deference"<sup>11</sup> to treating the privilege as an "absolute."<sup>12</sup>

The conflicts over access to information are primarily between the Executive Branch and the courts, but Congress has an interest in assuring that a judge maintains control over the courtroom and assures fairness to litigants who sue the Executive Branch. Congress should pass legislation that clarifies the state secrets privilege. It debated such legislation in the late 1960s and early 1970s, but decided against the bill language presented to it by an expert panel.<sup>13</sup> The frequency with which the Bush administration has invoked the state secrets privilege in recent years has triggered new interest in legislation to strengthen judicial independence and the adversary process by limiting the privilege. On May 31, 2007, the Constitution Project released a report recommending that Congress conduct hearings to investigate the scope of the privilege and "craft statutory language to clarify that judges, not the Executive Branch, have the final say about whether disputed evidence is

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<sup>7</sup> Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C.A. App.3 (2006)). For further discussion of these statutes, see *infra* Part II.A.

<sup>8</sup> U.S. CONST. art. I, § 8 (vesting in Congress the power to "declare War," "raise and support Armies," "provide and maintain a Navy," and "define and punish Piracies").

<sup>9</sup> *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951).

<sup>10</sup> *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006) (internal quotation marks omitted) (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 335 (2005)).

<sup>11</sup> *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007), *cert denied*, 2007 WL 1646914 (internal quotation marks omitted) (citing *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

<sup>12</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006).

<sup>13</sup> See Pub. L. No. 93-12, 87 Stat. 9 (1973); see also LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* Case 140-45 (2006).

subject to the state secrets privilege.”<sup>14</sup> On August 13, 2007, the American Bar Association House of Delegates adopted a statement on state secrets recommending that Congress “enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervenor).”<sup>15</sup>

## I. CONTROL OVER NATIONAL SECURITY INFORMATION

The Executive Branch’s views establishing a broad privilege to withhold national security information from the other branches result from a mischaracterization of the President’s constitutional roles. In 1996, the Office of Legal Counsel (the “OLC”) in the Department of Justice prepared a memo that set forth what it considered to be the principles governing access to national security information:

[T]he President’s roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President.<sup>16</sup>

This memo’s analysis rests on faulty generalizations and misconceptions about the President’s roles as Commander in Chief, head of the Executive Branch, and “sole organ” of the nation in its external relations. The next three sections will look at these respective roles and how they affect access to security information.

### A. *Commander in Chief*

The Constitution empowers the President to be Commander in Chief, but the scope of that power must be understood in the context of military

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<sup>14</sup> THE CONSTITUTION PROJECT, REFORMING THE STATE SECRETS PRIVILEGE, at ii (2007), [http://www.constitutionproject.org/pdf/Reforming\\_the\\_State\\_Secrets\\_Privilege\\_Statement1.pdf](http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf).

<sup>15</sup> Report to the House of Delegates, 2007 A.B.A. SEC. OF INDIVIDUAL RTS. AND RESPONSIBILITIES 116A, available at <http://www.fas.org/sgp/jud/statesec/aba081307.pdf>.

<sup>16</sup> Memorandum from Christopher H. Schroeder, Acting Assistant Attorney Gen., Office of Legal Counsel, Dep’t. of Justice, to Michael J. O’Neil, Gen. Counsel, Cent. Intelligence Agency 4 (November 26, 1996) [hereinafter OLC Memo] (quoting Brief for Appellees, *Am. Foreign Serv. Ass’n. v. Garfinkel*, 488 U.S. 923 (1988) (No. 87–2127)) (copy on file with author).

responsibilities that the Constitution grants to Congress. Article II reads as follows: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>17</sup> For the militia, Congress—not the President—does the calling. The Constitution vests in Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”<sup>18</sup>

A key purpose of the Commander in Chief Clause is to preserve civilian supremacy. Attorney General Edward Bates explained in 1861 that the President is Commander in Chief “not because the President is supposed to be, or commonly is, in fact, a military man, a man skilled in the art of war and qualified to marshal a host in the field of battle. No, it is for quite a different reason.”<sup>19</sup> A soldier knows that whatever military victories might occur, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”<sup>20</sup>

The Constitution protects civilian supremacy by delegating war powers to both the President and the elected members of Congress. To associate civilian supremacy solely with the President would undermine democratic principles, constitutional limits, and the republican system of government. Article I empowers Congress to declare war, raise and support armies, and make rules for the land and naval forces. The debates at the Philadelphia Convention make clear that the Commander in Chief Clause does not grant the President unilateral, independent authority other than the power to “repel sudden attacks.”<sup>21</sup> Roger Sherman, for example, said that the President should be able “to repel and not to commence war.”<sup>22</sup> The consensus at the debate was that taking the country from a state of peace to a state of war was to be done through a deliberative process that included congressional debate and approval, either by a declaration or authorization of war.<sup>23</sup> George Mason told his colleagues that he was for “clogging rather than facilitating war.”<sup>24</sup>

At one point in the debates, Pierce Butler wanted to give the President the power to make war, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it.”<sup>25</sup> No one joined Butler in those sentiments. Elbridge Gerry said that he “never expected to hear in a republic a motion to empower the Executive alone to declare

<sup>17</sup> U.S. CONST. art. II, § 2.

<sup>18</sup> *Id.* art. I, § 8, cl. 15.

<sup>19</sup> 10 Op. Att’y Gen. 74, 79 (1861).

<sup>20</sup> *Id.*

<sup>21</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1937).

<sup>22</sup> *Id.* at 318.

<sup>23</sup> LOUIS FISHER, PRESIDENTIAL WAR POWER 1–16 (2d ed. 2004).

<sup>24</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (Max Farrand ed., 1937).

<sup>25</sup> *Id.* at 318.

war.”<sup>26</sup> Mason was against giving the power of war to the Executive “because [he was] not <safely> to be trusted with it.”<sup>27</sup> At the Pennsylvania ratifying convention, James Wilson assured his colleagues that the Constitution’s system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress.”<sup>28</sup>

The Framers entrusted Congress with the power to initiate war because they believed that Executives, in their search for fame and personal glory, had a natural bias to favor war at the cost of the interests of their country.<sup>29</sup> John Jay explicitly made this point in his essay in *Federalist* No. 4. He warned:

[a]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as, a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families, or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctioned by justice, or the voice and interests of his people.<sup>30</sup>

One might read “absolute monarchs” to apply only to royal regimes, not to the democratic system of the United States, but the Framers based their judgment on human nature, not on any particular form of government.<sup>31</sup> James Madison called war:

the true nurse of executive aggrandizement . . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.<sup>32</sup>

The costly and misconceived military operations in Korea, Vietnam, and Iraq pursued by Harry Truman, Lyndon B. Johnson, and George W. Bush underscore the miscalculations and partisan calculations that accompany presidential wars.<sup>33</sup> Unless Congress and the federal courts have access to executive

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 319.

<sup>28</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1896).

<sup>29</sup> See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997).

<sup>30</sup> THE FEDERALIST NO. 4 (John Jay).

<sup>31</sup> FISHER, *supra* note 23, at 8–10.

<sup>32</sup> JAMES MADISON, *Letters of Helvidius, No. IV*, in 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 171, 174 (Gaillard Hunt ed., 1906).

<sup>33</sup> FISHER, *supra* note 23, at 97–104, 128–44, 211–35.

branch information, the President and his advisers can initiate military activities on insufficient and erroneous grounds.

### B. *Head of the Executive Branch*

The Framers placed the President at the head of the Executive Branch to provide unity, responsibility, and accountability. The Framers expressed the principle of unity in the Constitution by placing upon the President, and no one else, the duty to “take Care that the Laws be faithfully executed.”<sup>34</sup> The delegates at the Philadelphia Convention rejected the proposal for a plural executive, deciding to vest the executive duties in one person. Said John Rutledge: “A single man would feel the greatest responsibility and administer the public affairs best.”<sup>35</sup>

The Framers’ placement of the President at the head of the Executive Branch does not support an inference that Congress should be denied access to information within the Executive Branch necessary to discharge its legislative and oversight duties. The Framers never intended to make the President personally responsible for executing all of the laws.<sup>36</sup> Instead, he was to take care that the laws be faithfully executed, including laws that limited his control over certain decisions within the Executive Branch.<sup>37</sup> To assure that the laws are faithfully executed, Congress has an independent duty to supervise federal agencies and departments.<sup>38</sup> To fulfill that duty it needs access to executive branch information, including information about national security affairs.

From an early date, Congress directed certain subordinate executive officials to carry out specified “ministerial” functions without interference from the President. In 1789, during debate on the creation of the Department of the Treasury, James Madison insisted that the Comptroller should not serve at the pleasure of the President. The role of the office was to determine the legality of public expenditures, and Madison argued that this function was “not purely of an Executive nature.”<sup>39</sup> It seemed to Madison “that they partake of a Judiciary quality as well as Executive . . .”<sup>40</sup> He questioned whether the President “can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States.”<sup>41</sup> As a result of this debate and others, Congress created a number of officers

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<sup>34</sup> U.S. CONST. art. II, § 3.

<sup>35</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 65.

<sup>36</sup> *See infra* notes 39–50 and accompanying text.

<sup>37</sup> *See id.*

<sup>38</sup> LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 3–25 (2004).

<sup>39</sup> 39 1 ANNALS OF CONG. 636 (Joseph Gales ed., 1789).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 638.

operating independently from the President so long as they were faithfully executing the laws.<sup>42</sup>

Even the heads of executive departments do not serve solely as political agents of the President. They perform legal duties assigned to them by Congress. In 1803, Chief Justice John Marshall distinguished between two types of duties for a Cabinet head: ministerial and discretionary. Congress may direct a Secretary to carry out certain activities as ministerial duties. Discretionary duties are owed to the President alone. When a Secretary performs ministerial duties he is bound to obey the laws: "He acts . . . under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose."<sup>43</sup>

The dispute over ministerial duties reappeared in 1838. In *Kendall v. United States*, the Court held that Congress could mandate that certain payments be made to authorized individuals and that neither the head of the department nor the President could deny or control these ministerial decisions.<sup>44</sup>

On many occasions Attorneys General have advised Presidents that they had no legal right to interfere with administrative decisions made by auditors and comptrollers in the Treasury Department, pension officers, and other officials.<sup>45</sup> The President is responsible for seeing that administrative officers faithfully perform their duties, "but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties."<sup>46</sup>

Executive agencies, including those in the field of national security, have a direct responsibility to Congress, the body that created them. In 1854, Attorney General Caleb Cushing advised department heads that they had a threefold relation: to the President, to execute his will in cases in which the President possessed a constitutional or legal discretion; to the law, which directs them to perform certain acts; and to Congress, "in the conditions contemplated by the Constitution."<sup>47</sup> Agencies are created by law and "most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it

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<sup>42</sup> LOUIS FISHER, *THE POLITICS OF SHARED POWER* 111–12, 127–32 (4th ed. 1998).

<sup>43</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803).

<sup>44</sup> *Kendall v. United States*, 37 U.S. (1 Pet.) 524 (1838). *See also* *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885); *United States v. Schurz*, 102 U.S. 378 (1880); *Clackamus County, Or. v. McKay*, 219 F.2d 479, 496 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 901, 909 (1955).

<sup>45</sup> 1 Op. Att'y Gen. 624 (1823); 1 Op. Att'y Gen. 636 (1824); 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 705 (1825); 1 Op. Att'y Gen. 706 (1825); 2 Op. Att'y Gen. 480 (1831); 2 Op. Att'y Gen. 507 (1832); 2 Op. Att'y Gen. 544 (1832); 4 Op. Att'y Gen. 515 (1846); 5 Op. Att'y Gen. 287 (1851); 11 Op. Att'y Gen. 14 (1864); 13 Op. Att'y Gen. 28 (1869).

<sup>46</sup> 19 Op. Att'y Gen. 685, 686–87 (1890).

<sup>47</sup> 6 Op. Att'y Gen. 326, 344 (1854).

see[s] fit, interpose by legislation concerning them, when required by the interests of the Government.”<sup>48</sup>

These limitations on the President’s authority to direct the activities of executive officials were recognized by Chief Justice William Howard Taft when he wrote broadly about the power of the President to remove executive officials. Looking to the congressional debates of 1789, Taft concluded that the executive officials served at the President’s pleasure and could be removed, but he also acknowledged that two classes of executive officials required a measure of independence, the first class being ministerial and the second being quasi-judicial:

Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.<sup>49</sup>

In recent years, federal courts have repeatedly directed the President to carry out laws to which he personally objected or with which he had failed to comply as enacted.<sup>50</sup> The President is head of the Executive Branch, but what the Executive Branch does depends on statutory direction from Congress, in matters of both domestic and national security policy.

### C. “Sole Organ” in Foreign Affairs

During debate in the House of Representatives in 1800, John Marshall said that the President “is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>51</sup> Justice George Sutherland later included that sentence in dicta in his *Curtiss-Wright* opinion in 1936 to suggest that the President’s authority in foreign affairs is exclusive, plenary, independent, inherent, and extra-constitutional.<sup>52</sup> However, Justice Sutherland took Marshall’s statement out of context to imply a position Marshall never held.

<sup>48</sup> *Id.*

<sup>49</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926).

<sup>50</sup> *E.g.*, *Train v. City of New York*, 420 U.S. 35 (1975); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988); *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875 (3d Cir. 1986), *aff’d on reh’g*, 809 F.2d 979 (3d Cir. 1986); *Nat’l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

<sup>51</sup> 10 ANNALS OF CONG. 613 (1800).

<sup>52</sup> *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318–20 (1936).



At no time in Marshall's career, as Secretary of State, member of Congress, or Chief Justice of the Supreme Court, did he ever suggest that the President could act unilaterally to make foreign policy in the face of statutory limitations. As a Justice, in a war powers case concerning a proclamation issued by President John Adams to naval commanders during the Quasi-War with France, Marshall ruled that the proclamation was invalid because it conflicted with a statute governing the seizure of foreign vessels.<sup>53</sup> As a legislator, Marshall made his "sole organ" comment in the context of a particular situation. The floor debate concerned the decision by President Adams to turn over to England someone charged with murder. Because the case was already pending in an American court, some members of Congress objected that Adams had violated the doctrine of separation of powers and should be impeached or censured.<sup>54</sup> In his floor speech, Marshall denied that there were any grounds to find fault with the President.<sup>55</sup> He argued that by carrying out an extradition treaty with England, Adams had discharged his constitutional duty to see that the law was faithfully executed and was not attempting to make national policy single-handedly or to act unilaterally without law. He further argued that in this case, Adams was carrying out a policy made jointly by the President and the Senate through the treaty-making process.<sup>56</sup> He provided that in other cases the President carried out policy made through the statutory process and that only after national policy had been formulated by the collective effort of both branches did the President become the "sole organ" in implementing the policy.<sup>57</sup>

In reaction to Justice Sutherland's analysis of Marshall's "sole organ" statement, Justice Robert Jackson in 1952 stated that the most that can be drawn from Sutherland's opinion is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."<sup>58</sup> Jackson specifically downplayed Sutherland's opinion, noting that "much of the [Sutherland] opinion is *dictum*."<sup>59</sup> In 1981, the D.C. Circuit similarly cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization."<sup>60</sup>

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<sup>53</sup> See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804).

<sup>54</sup> 6 ANNALS OF CONG. 552 (1800).

<sup>55</sup> *Id.* at 605–06.

<sup>56</sup> *Id.* at 597, 613–14.

<sup>57</sup> *Id.* at 613–14.

<sup>58</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Powell, J. concurring).

<sup>59</sup> *Id.*

<sup>60</sup> *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981). For an evaluation of the deficiencies of Justice Sutherland's dicta, see Louis Fisher,

The OLC reference to the “sole organ” implies an exclusive and independent role for the President in foreign and national security affairs. In context, however, John Marshall clearly stated that President Adams was operating under treaty and statutory authority as shaped and enacted by the legislative branch. Adams was not attempting to create national policy on his own—he was carrying out the will of Congress. As such, lawmakers had every right to determine whether the President was faithfully carrying out congressional policy formulated in statutes and treaties, and thus they should have been able to obtain foreign and national security information from the executive branch to assure compliance.

## II. CHANGING ROLE OF THE COURTS

In the period immediately after World War II, federal courts regularly deferred to presidential decisions in military and diplomatic affairs. In 1948, in *Chicago & Southern Air Lines, Inc. v. Waterman*, the Supreme Court said:

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.<sup>61</sup>

The Court’s judicial deference was not afforded solely to the President. “Such decisions,” said the Court, “are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.”<sup>62</sup>

The *Waterman* decision was overly deferential when issued, compared not only with contemporary standards but even with those established much earlier. Federal courts had often decided cases involving military and diplomatic affairs, as reflected in Chief Justice Marshall’s ruling in *Little v. Barreme*.<sup>63</sup> From 1789 to World War II, federal courts would rarely avoid ruling on a case because it involved foreign affairs or national security.<sup>64</sup> In 1952, the Supreme Court struck down President Truman’s decision to seize steel mills as part of his effort to prosecute the war in Korea.<sup>65</sup> Yet a year later, the Court avoided a clash with the Executive Branch over national security documents. A district court had ordered the United States, as defendant, to produce a military accident report to permit the court, *in camera*, to determine

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*Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139 (2007).

<sup>61</sup> 333 U.S. 103, 111 (1948).

<sup>62</sup> *Id.*

<sup>63</sup> 6 U.S. (2 Cranch) 169 (1804) (finding a commander of a warship of the United States actionable for damages because he acted pursuant to a presidential proclamation that exceeded the policy established by Congress in a statute).

<sup>64</sup> Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466 (2005).

<sup>65</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

whether it contained matter relevant to a tort claims case.<sup>66</sup> The Supreme Court reversed, ruling that the judiciary “should not jeopardize the security which the [government’s] privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”<sup>67</sup> As explained in Section III, the Court was misled about the contents of the accident report.

### A. *Statutory Authorizations*

Judicial attitudes of the 1940s and early 1950s have been superseded by grants of congressional authority to the courts. In 1973, the Supreme Court decided that it lacked authority to examine certain documents in camera merely to sift out “nonsecret components” for release.<sup>68</sup> Congress responded by passing an amendment to the Freedom of Information Act (“FOIA”),<sup>69</sup> clearly authorizing courts to examine executive records in judges’ chambers to determine if the records fit into one of the nine categories of FOIA exemptions.<sup>70</sup> The Foreign Intelligence Surveillance Act (“FISA”) of 1978<sup>71</sup> requires a court order to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information.<sup>72</sup> The statute created the FISA Court to review applications submitted by government attorneys.<sup>73</sup> Congress granted more authority to courts in 1980, when it passed the Classified Information Procedures Act (“CIPA”).<sup>74</sup> The Act establishes procedures allowing a judge to screen classified information to determine whether it could be used during a criminal trial.<sup>75</sup>

In the late 1960s, efforts were made to define and narrow the state secrets privilege, which had been used by the Executive Branch to withhold documents and testimony from federal courts and private litigants. An advisory committee, appointed by Chief Justice Earl Warren, began working on a draft of proposed rules of evidence in 1965. Its initial report defined “secrets of state” in this manner: “A ‘secret of state’ is information not open or theretofore officially disclosed to the public concerning the national defense or

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<sup>66</sup> *Brauner v. United States*, 10 F.R.D. 468 (D. Pa. 1950), *aff’d sub nom.* *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951).

<sup>67</sup> *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

<sup>68</sup> *EPA v. Mink*, 410 U.S. 73, 81 (1973) (declining to examine documents regarding a planned underground nuclear test); *see FISHER, supra* note 13, at 130–36.

<sup>69</sup> Freedom of Information Act, Pub. L. No. 93–502, 88 Stat. 1562 (codified at 5 U.S.C. § 552 (2006)).

<sup>70</sup> *Id.*; *see* H.R. REP. NO. 93–1380, at 8–9, 11–12 (1974); *FISHER, supra* note 13, at 136–40.

<sup>71</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–5111, 92 Stat. 1783 (codified in scattered sections of 50 U.S.C.A.).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1788, § 103; *see FISHER, supra* note 13, at 145–52.

<sup>74</sup> Classified Information Procedures Act, Pub. L. No. 96–456, 94 Stat. 2025 (1980) (codified at 18 U.S.C.A. App. 3, § 3 (2006)).

<sup>75</sup> *Id.*; *see FISHER, supra* note 13, at 152–53.

the international relations of the United States.”<sup>76</sup> The chief officer of the executive department administering the subject matter that the secret concerned would be required to make a showing to the judge, “in whole or in part in the form of a written statement,” allowing the trial judge to hear the matter in chambers, “but all counsel [would be] entitled to inspect the claim and showing and to be heard thereon.”<sup>77</sup> Under the proposed rule, the judge would be able to “take any protective measure which the interests of the government and the furtherance of justice may require.”<sup>78</sup>

The Committee identified several options for when a judge sustains a claim of privilege for a state secret in a case involving the government as a party. When sustaining the claim deprived a private party of “material evidence,” the judge could make “any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.”<sup>79</sup> The advisory committee prepared two more drafts, but in 1973 Congress blocked passage of all the rules of evidence, including the one on state secrets.<sup>80</sup>

### B. *The Significance of Egan*

The 1996 OLC memo<sup>81</sup> relied in part on *Department of the Navy v. Egan*<sup>82</sup> to maximize presidential power over classified documents.<sup>83</sup> As explained below, *Egan* is fundamentally a case of statutory construction and should not be read to grant the President any type of exclusive control over classified documents. The dispute in *Egan* involved the Navy’s denial of a security clearance to Thomas Egan, who worked on the Trident submarine. After the denial, Egan was discharged from the Navy and sought review of his discharge by the Merit Systems Protection Board (“MSPB”). The Supreme Court upheld the Navy’s action by ruling that the denial of a security clearance is a sensitive call of discretionary judgment committed by law to the executive agency that had the necessary expertise for protecting classified information.<sup>84</sup> The conflict in this case was entirely within the Executive Branch (Navy versus MSPB). It was not between Congress and the Executive Branch or the judiciary and the Executive Branch.

The focus on questions of statutory interpretation appeared at each stage of the lawsuit. The Justice Department stated in its brief: “The issue in

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<sup>76</sup> Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts and Magistrates, 46 F.R.D. 161, 273 (1969).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 273–74.

<sup>80</sup> FISHER, *supra* note 13, at 141–44.

<sup>81</sup> *See id.*

<sup>82</sup> 484 U.S. 518 (1988).

<sup>83</sup> OLC Memo, *supra* note 16, at 6–7.

<sup>84</sup> *Egan*, 484 U.S. at 529–30.

this case is one of statutory construction and ‘at bottom . . . turns on congressional intent.’”<sup>85</sup> The Court directed the parties to respond to this question: “Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision [by the Navy] to deny or revoke the security clearance.”<sup>86</sup>

The specific statutory questions concerned 5 U.S.C. §§ 7512, 7513, and 7701. The Justice Department, after analyzing the relevant statutes and their legislative history, could find no basis to conclude that Congress intended the MSPB to review the merits of security clearance determinations.<sup>87</sup> The entire oral argument before the Court on December 2, 1987 focused on the meaning of statutes and what Congress intended by them.<sup>88</sup> At no time did the Justice Department suggest that classified information could be withheld from Congress. The Court examined the “narrow question” of whether the MSPB had statutory authority to review the substance of a decision to deny a security clearance.<sup>89</sup>

At different points in its opinion the Court referred to constitutional powers of the President, including those as Commander in Chief and head of the Executive Branch,<sup>90</sup> and made reference to the President’s responsibility over foreign policy.<sup>91</sup> Nevertheless, the case was decided solely on statutory grounds. In stating that courts “traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” the Court identified this fundamental exception: “*unless Congress specifically has provided otherwise.*”<sup>92</sup> The Court appears to have borrowed this thought, if not the language, from the Justice Department, which argued that: “Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.”<sup>93</sup>

During oral argument before the Supreme Court, the Justice Department and Egan’s attorney, William J. Nold, debated the statutory issues. After the Department of Justice completed its presentation, Nold told the Justices: “I think that we start out with the same premise. We start out with the premise that this is a case that involves statutory interpretation.” Nold

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<sup>85</sup> Brief for the Petitioner at 22, *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988) (No. 86-1552) (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 (1987)).

<sup>86</sup> *Id.* at (I).

<sup>87</sup> Petition for Writ of Certiorari at 4-5, 13, 15-16, 18, *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988) (No. 86-1552).

<sup>88</sup> Transcript of Oral Argument at 19, *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988) (No. 86-1552).

<sup>89</sup> *Egan*, 484 U.S. at 520.

<sup>90</sup> *Id.* at 527.

<sup>91</sup> *Id.* at 529.

<sup>92</sup> *Id.* at 530 (emphasis added).

<sup>93</sup> Brief for the Petitioner, *supra* note 83, at 21.

objected that the Department kept trying to slip in some constitutional dimensions:

What they seem to do in my view is to start building a cloud around the statute. They start building this cloud and they call it national security, and as their argument progresses . . . the cloud gets darker and darker and darker, so that by the time we get to the end, we can't see the statute anymore. What we see is this cloud called national security.<sup>94</sup>

In describing the President's role as Commander in Chief, the Court stated that the President's authority to protect classified information "flows primarily from [a] constitutional investment of power in the President and exists quite apart from any explicit congressional grant."<sup>95</sup> Thus if Congress had never enacted legislation regarding classified information, the President would be at liberty to use his best judgment to protect classified information. That is the legal and political reality when Congress is silent. But if Congress acts by statute, it can narrow the President's range of action and the courts would then seek guidance from statutory policy.

### III. THE STATE SECRETS PRIVILEGE

In 1953, in the case of *United States v. Reynolds*, the Supreme Court for the first time recognized the state secrets privilege.<sup>96</sup> The case involved questions about the authority of the Executive Branch to withhold certain documents from three widows who sued the government for the deaths of their husbands in a military plane crash over Waycross, Georgia.<sup>97</sup> As part of their suit under the Federal Tort Claims Act,<sup>98</sup> the widows asked the Air Force for the official accident report and statements taken from three surviving crew members.<sup>99</sup> Both the district court and the Third Circuit held that the government had to produce the documents.<sup>100</sup> The government refused to release the documents and lost at both levels. Without ever looking at the documents, the Supreme Court sustained the government's claim of privilege. The decision contains conflicting positions. According to the Court:

Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure

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<sup>94</sup> Transcript of Oral Argument at 19, *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) (No. 86-1552).

<sup>95</sup> *Egan*, 484 U.S. at 527.

<sup>96</sup> 345 U.S. 1, 6-7 (1953).

<sup>97</sup> *Id.* at 2-4; see also FISHER, *supra* note 13.

<sup>98</sup> 28 U.S.C. §§ 1346, 2674 (2006).

<sup>99</sup> *Reynolds*, 345 U.S. at 3; see also FISHER, *supra* note 13, at 35-36.

<sup>100</sup> *Brauner v. United States*, 10 F.R.D. 468 (D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951).

to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge, alone, in chambers.<sup>101</sup>

No persuasive case can be made that a judge examining a document in chambers risks the exposure of military matters or in any way jeopardizes national security. Judges take an oath of office to defend the Constitution in the same manner as the President, members of Congress, and executive officers.<sup>102</sup> Moreover, in deciding not to review the accident report and the statements of the surviving crew members, the Court was in no position to know if there had been "executive caprice." In short, the judiciary did what it said it could not do: abdicate to the Executive Branch.

The Court advised the three widows to return to district court and depose the three surviving crew members, and from that stage to consider relitigating the case.<sup>103</sup> The widows' attorneys took depositions,<sup>104</sup> but after debating the emotional and financial costs of continuing the lawsuit, the women decided to settle for seventy-five percent of what they would have received under the original district court ruling.<sup>105</sup>

We now know that the accident report and the statements by the three surviving crew members contained no state secrets. After the Air Force declassified the documents in the 1990s, the daughter of one of the civilians who died in the crash gained access to the material by means of an Internet search in February 2000.<sup>106</sup> The report made mention of "secret equipment," but anyone reading newspaper stories the day after the crash was aware that a secret plane on a secret mission carried secret equipment.<sup>107</sup> The three families decided to return to court in 2003 on a petition of coram nobis, charging that the judiciary had been misled by the government and that there had been fraud against the court.<sup>108</sup> The families lost in district court and in the Third Circuit, and on May 1, 2006, the Supreme Court denied certiorari.<sup>109</sup>

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<sup>101</sup> *Reynolds*, 345 U.S. at 9–10.

<sup>102</sup> See 28 U.S.C.A. § 453 (2006).

<sup>103</sup> FISHER, *supra* note 13, at 115–18.

<sup>104</sup> *Id.* at 115–16.

<sup>105</sup> *Id.* at 117.

<sup>106</sup> *Id.* at 166–67.

<sup>107</sup> *Id.* at 1–2.

<sup>108</sup> *Herring v. United States*, 2004 WL 2040272, at \*2 (E.D. Pa. Sept. 10, 2004).

<sup>109</sup> *Herring v. United States*, 547 U.S. 1123 (2006).

The Third Circuit decided the second case on the basis of judicial finality.<sup>110</sup> Central to the appellate court's decision was avoiding having to revisit and redo an earlier decision, even if there was substantial evidence that the Executive Branch had misled the judiciary, particularly the Supreme Court. In support, the Third Circuit cited another ruling that "perjury by a witness is not enough to constitute fraud against the court."<sup>111</sup> Such a position is reasonable in cases involving private parties, because litigants are expected to expose false statements through the regular adversary process.<sup>112</sup> Perjury and misleading statements by the government, however, are far more ominous when the Department of Justice is the major litigant in court and has a unique capacity to abuse or misuse political power. The Japanese-American cases in the 1980s highlighted the corrupting influence of having officers of the court (government attorneys) present misleading documents and testimony.<sup>113</sup>

The courts should not permit litigants, especially the federal government, to mislead a court to the point where it issues a ruling it would not have issued had it received correct information. The interests at stake are not only those of a private party suing the government, but also the court's interest in the integrity and credibility of the courtroom. With such decisions, private citizens will begin to view the judiciary not as an independent branch, freely participating in the system of checks and balances, but as a trusted arm of the Executive. Congress needs to consider legislation that will restore trust in the capacity of the judiciary to assure litigants an opportunity to fairly and effectively challenge government actions that may be abusive, illegal, or unconstitutional.

#### IV. CONCLUSIONS

Much of our national security information, such as information on military plans and atomic secrets, is legitimately classified and withheld from the public.<sup>114</sup> Other information may be kept secret to hide blunders, corruption, and illegality. Unless someone looks behind the secrecy label, no one knows what is being hidden or why. Members of Congress need access to national security information to discharge their duties under Article I, give vigor to the system of checks and balances, and prevent the dangers of concentrated power. Congress must also assure that the judiciary functions with the full independence needed to protect the rights of private litigants in court and to avoid the appearance of judicial subservience to executive interests.

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<sup>110</sup> *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005).

<sup>111</sup> *Id.* at 390.

<sup>112</sup> *Id.*

<sup>113</sup> FISHER, *supra* note 13, at 171–74 (coram nobis cases vacating the convictions of Gordon Hirabayashi and Fred Korematsu because the government misled the Supreme Court).

<sup>114</sup> *See, e.g.*, 42 U.S.C. §§ 2014(i)(y), 2274 (2000).



In 1971, the D.C. Circuit ordered the government to produce documents for in camera review to assess a claim of executive privilege. The court argued that “[a]n essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive.”<sup>115</sup> Mere claims and assertions of executive power or presidential prerogatives “cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.”<sup>116</sup> The court issued an admonition that applies equally to Congress and the judiciary:

[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.<sup>117</sup>

The independent duty of Congress and the courts to exercise their coequal powers exists partly to protect their institutions. It also serves to apply effective checks on the capacity of the Executive Branch to violate individual rights and liberties. Therefore, it is not only permissible, but desirable that Congress pass legislation that gives courts access to national security documents.

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<sup>115</sup> *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 794.

