National Security Reporting Requirements:
Managing the Tension Between Secrecy and Accountability

Daniel S. Severson

Submitted for the completion of joint degrees in law and public policy

Harvard University
Cambridge, MA

May 4, 2016

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.”
—James Madison

“The music in this drama is provided by two competing choruses, one singing ‘The Urge to Secrecy’ and the other, ‘The Ode to Democracy and Accountability.’”
—Gerald Wetlaufer

“Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote them.”
—Benjamin Hoadley, Bishop of Bangor

INTRODUCTION

In a democracy, there is a tension between secrecy and accountability with regard to intelligence activities. Secrecy is sometimes necessary to preserve and protect national security. The government must keep secrets in order to conduct military and intelligence activities to defend the nation and to advance its interests. But secrecy also threatens to undermine democratic accountability—timely scrutiny and the opportunity for effective feedback. In order for a government to be by, for, and of the people, the people must know what the government does in their name. In any democracy, a recurring problem is therefore how to balance secrecy and accountability appropriately.

This Article examines efforts to manage this tension—in particular, I explore the possibilities and limitations of reporting requirements mandating disclosure of classified information and legal reasoning regarding intelligence activities. Congress has long required the Executive to disclose intelligence activities to particular congressional committees. These reporting requirements allow Congress to monitor U.S. intelligence activities to ensure that they protect and advance the nation’s interests and remain within the bounds of the law. New requirements go further, requiring the disclosure of legal justifications for intelligence activities.

In an age of international terrorism, the revelation of controversial U.S. government programs has called into question whether our democratic system properly balances secrecy and accountability. When the legal justifications for those programs were revealed, the public was shocked to learn of the government’s expansive legal interpretations. This led the public and lawmakers to denounce “secret law” and to call for the executive branch to disclose more of its legal opinions related to national security. In response, Congress passed new reporting requirements mandating the disclosure not just of intelligence activities but also of the Executive’s legal reasoning. This is a significant and underappreciated development in the history of intelligence oversight and separation of powers.

This Article describes these new reporting requirements, assesses their significance in light of prior precedent, analyzes their costs and benefits, and considers alternatives. The central thesis of the Article is that in a democracy the tension between secrecy and accountability never disappears. Reporting requirements do not resolve the tension; they merely shift it. A requirement that the executive branch disclose its legal reasoning to Congress has benefits and costs: the requirement increases accountability, but it also encroaches on deliberative process and encourages executive evasion through informal legal advice. I conclude that reporting requirements are just one tool for managing the tension between secrecy and accountability, and that managing this tension most effectively requires thinking about the specific values to be served.

The Article is divided into four parts. Part I describes the public problem—a tension between secrecy and accountability in national security activities in a democracy. National security activities pose a heightened risk of abuse because the
executive branch wields great coercive power and conducts these activities in secret. Two incidents in particular highlight the problem of democratic accountability for intelligence activities—the telephone bulk metadata surveillance program conducted under section 215 of the USA PATRIOT Act and the use of enhanced interrogation techniques against detainees in the war on terror. The revelation of these activities led to a public outcry and a demand for legal justification. When the legal opinions were disclosed, the public learned that the executive branch had interpreted statutes and its own authorities in novel and expansive ways to justify these controversial policies.

These incidents led scholars and lawmakers to call for the disclosure of secret executive branch legal opinions. Indeed, a growing literature contends that “secret law” creates a distinct problem for accountability. I argue that this concern mistakes the nature of the problem, however. The problem is not the existence of secret legal opinions per se—even when those legal opinions adopt novel or expansive interpretations. Rather, the problem involves risk—the risk that the Executive will abuse its power and conduct inappropriate or unlawful intelligence activities in secret. Framed in this way, one could argue that democratic accountability would best be served by simply disclosing the intelligence activities rather than the legal justifications for them. Yet I identify three distinct functions disclosure of legal opinions serve: they (1) help Congress exercise its legislative and oversight function; (2) promote the political accountability of Congress; and (3) force ex ante deliberation in the executive branch.

In response to calls for reform, Congress recently enacted new reporting requirements that mandate disclosure of executive branch legal reasoning on national security activities—a novel approach. Starting in 2004, and updated as recently as June 2015 with the USA FREEDOM Act, Congress passed a statute requiring disclosure of a summary of significant legal interpretations made before the FISA courts, including the actual pleadings and associated legal memoranda that the executive branch submits to those courts. With the Intelligence Authorization Act of 2014, Congress also now requires two additional reporting requirements: the various General Counsel in the intelligence community must provide summaries to the congressional intelligence committees of “significant legal interpretations” of the U.S. Constitution and federal laws. In addition, Congress requires the executive branch to create a process to review for official publication significant opinions of the Department of Justice’s Office of Legal Counsel (“OLC”) that are provided to the intelligence community. The statute also requires the provision of classified OLC opinions to Congress.

Part II describes these new statutory requirements. I explain why the executive branch may have agreed to these new mechanisms and analyze to what extent they represent a significant and underappreciated concession by the executive branch in light of prior court precedent and assertions of privilege by OLC.

Part III considers whether these reporting requirements should be expanded. To highlight the benefits and costs involved, I propose a new reporting provision that would require the President to disclose legal opinions supporting a specific set of
activities—foreign intelligence surveillance relating to U.S. persons that is conducted outside of FISA and pursuant to Executive Order 12333. I explain the possible justifications for such a proposal and its political feasibility. I conclude that disclosure of full executive branch legal opinions to congressional committees provides benefits for accountability but also entails significant costs, particularly in infringing on the executive branch deliberative process and incentivizing executive evasion. In the end, reporting requirements do not solve the tension between secrecy and accountability; they merely shift the tension.

Part IV reconsiders the possibilities and limitations of reporting requirements of legal opinions. If the goal is to best manage the tension between secrecy and accountability, Part IV explores two potential ways to manage the tension more carefully. First, we can try to decrease the costs of reporting legal opinions. Part of the problem in trying to manage this tension is unknowns. While I identify the types of costs and benefits of reporting requirements, their magnitudes remain unknowable up front. Decreasing the costs of disclosing legal opinions can bolster their appeal as a tool for calibrating secrecy and accountability in a democracy.

Second, we can look to other tools besides disclosure to Congress to help manage this tension. Part I identifies three basic functions that disclosure of executive branch legal reasoning serve: (1) helping Congress exercise its legislative and oversight function, (2) improving the political accountability of Congress; and (3) forcing ex ante deliberation in the executive branch. In Part IV, I consider whether other tools might serve these values better.

While I offer some suggestions for mitigating the costs of disclosure requirements and other ways to achieve these desired values, I do not purport to provide a panacea to the public problem identified here. Indeed, “[d]emocratic accountability for secret intelligence activities is one of the hardest problems in constitutional government because public debate and review of these activities are inconsistent with the intelligence mission.”¹ In a democracy, the tension between secrecy and accountability with regard to intelligence activities never disappears. It never should, for that would signal either harm to self-governance and accountability or damage to national security. My hope is that the analysis will advance the discussion toward best managing the tension between secrecy and accountability for U.S. intelligence activities.²

¹ Jack Goldsmith, Power and Constraint 94 (2012).
² The analysis presented here could also inform other policy issues that involve a tension between secrecy and accountability. One example may be institutions that handle allegations of sexual assault, as they must balance confidentiality and accountability in handling cases.
I. THE PROBLEM

A. Secrecy and Accountability

A government must keep secrets in order to conduct intelligence activities in the interest of national security. But any democratic government must provide sufficient accountability for such activities.

Secrecy undermines accountability – the opportunity for timely scrutiny and effective feedback. When activities are conducted in secret, it reduces the capacity of the people, through their elected representatives, to understand, evaluate, and amend their options. This lack of accountability dilutes the connection between the people and the government; it undermines self-governance.

To address the problem of accountability in national security, Congress has imposed various reporting requirements on the President for activities related to national security. Enhanced oversight began in the late 1970s, after the Church and Pike Committee Reports concluded that there was inadequate accountability for the intelligence community. Among the reforms passed, Congress set up special intelligence committees in the House and Senate and required the executive branch to report to them.

Today, the reporting requirements are extensive. The President must report any illegal intelligence activities, and the President must keep Congress “fully and currently informed” of all U.S. intelligence activities, including any “significant anticipated intelligence activity and any significant intelligence failure.” The congressional intelligence committees can request “any information or material concerning intelligence activities” including the generic “legal basis” for such activities. The President must consult with Congress and provide a written policy justification before providing arms to foreign governments. After the Iran-Contra scandal, Congress strengthened reporting requirements, including by mandating that the President certify that planned covert actions comply with U.S. law. The reporting requirements on intelligence activities, intelligence failures, illegal conduct, and large expenditures are so exhaustive that Jack Goldsmith has concluded “[n]othing of significance happens

---

3 50 U.S.C. § 3091(b).
in American intelligence without the intelligence committees, or some subset, knowing about it.”

Despite these extensive requirements, the revelation of controversial government programs has called into question whether Congress exercises sufficient oversight, and the executive branch sufficient restraint, over intelligence activities. Since September 11, 2001, a series of unauthorized and government disclosures have revealed controversial intelligence activities, such as detention, interrogation, targeted killings, and surveillance, undertaken in the fight against terrorism. Disclosures have also revealed secret legal interpretations made within the executive branch to justify these programs.

In the war on terror, two incidents in particular have called into question the balance of secrecy and accountability with regard to intelligence activities. Early in the Bush Administration, OLC issued memos concluding that statutory prohibitions on torture did not apply to the President in his Commander-in-Chief capacity and that interrogation techniques only amounted to torture when pain approached the sensations of “organ failure, impairment of bodily function, or even death.” The so-called torture memos also included extremely broad claims of inherent presidential authority. After they were leaked, the opinions drew withering criticism and in 2003 then head of OLC Jack Goldsmith withdrew them. OLC subsequently issued a new legal opinion in 2004.

Another example involves surveillance. Section 215 of the USA PATRIOT Act allowed the government to seek an order from the Foreign Intelligence Surveillance Court (“FISC”) compelling the production of a “tangible thing” that is “relevant” to an investigation. After September 11, the Bush Administration developed and received FISC approval for an aggressive interpretation of this provision: when collected in bulk,

---

the telephone metadata records of millions of Americans count as a “tangible thing” that is “relevant” to a terrorism investigation because the government could analyze the data to track the contacts of terrorism suspects. Scholars criticized this interpretation as inconsistent with the statutory text,\(^\text{16}\) and the U.S. Court of Appeals for the Second Circuit rejected the government’s reasoning in a subsequent case.\(^\text{17}\)

When the legal justifications for these activities emerged, the public was shocked to learn that the executive branch had construed authorities in expansive ways. Scholars and the public have since focused on the problems of so-called “secret law.”

Specific interest groups have warned that legal interpretations made in secret are dangerous to democratic accountability.\(^\text{18}\) In 2011, the Brennan Center for Justice issued a report on overclassification of national security decisions, a product of secrecy. The report emphasized that the people require information in order to debate issues and to hold their elected representatives accountable, and the report highlighted how secret executive branch legal interpretations regarding warrantless surveillance and the OLC torture memos improperly cut out Congress and the public.\(^\text{19}\) The report concluded that “[o]verclassification . . . corrodes democratic government.”\(^\text{20}\)

Lawmakers have also expressed concern about secret legal interpretations in the executive branch.\(^\text{21}\) In 2008, Senator Russell Feingold chaired a Senate subcommittee hearing on secret law and accountability, noting the dangers to accountability and effective oversight of the executive branch’s secret legal interpretations.\(^\text{22}\) Other

---


\(^\text{17}\) Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 795 (2d Cir. 2015) (holding telephony metadata program not authorized by section 215).


\(^\text{20}\) Id. at 1.

\(^\text{21}\) By secret executive branch legal interpretations, I mean interpretations taken by Departments and agencies of the executive branch on matters of national security without notice to Congress or the public. This can include pronouncements by OLC that are binding throughout the executive branch, as well as interpretations by general counsel and their line attorneys. I mean to include the entire national security establishment, from the Executive Office of the President to the relevant Departments (Defense, Justice, State, Homeland Security, etc.) and agencies (CIA, NSA, FBI, etc.). Each of these entities has a stake in the legality and legitimacy of its intelligence operations. While the President and Department heads may face the most political pressure to ensure legitimate conduct, over the long run the intelligence agencies will be effective only with the support of the public.

Senators have emphasized that the government’s reliance on secret interpretations of surveillance laws has resulted “in every case” in “eventual public disclosure, followed by an erosion of public trust that makes it harder for intelligence agencies to do their jobs.” In decrying secret law, Senator Ron Wyden argued in the Senate that American voters “have a right to know how the law is being interpreted so that [they] . . . can ratify or reject decisions made on their behalf.”

A recent study concludes that allegations that the U.S. government is producing “secret law” are increasingly common and that such allegations are “well founded.” Some commentators argue that secret law is “un-American” insofar as it frustrates political accountability and self-governance.

Apparently in response to these concerns, as described below, Congress has passed new reporting requirements that require disclosure of the executive branch’s legal reasoning. Given Congress has already imposed a set of reporting requirements, why would disclosing secret legal interpretations further promote accountability? If the concern is with accountability for the activities themselves—such as torture or warrantless surveillance—more robust reporting requirements on the activities would ensure that Congress knows about and can halt or revise such activities. I will argue that disclosure of executive branch legal interpretations serves three distinct values beyond disclosure of the activities themselves. But before proceeding, understanding the nature of secret executive branch legal interpretations helps frame the ostensible concerns with “secret law.”

B. The Nature of Secret Legal Interpretations

Various factors push the executive branch to draw expansive and creative legal interpretations of national security authorities. They include the President’s constitutional duties, the intelligence community’s mission and culture, and the increasing legalization of national security decision making in an age of international terrorism.

In carrying out his constitutional duties, the President must necessarily interpret the laws. Under the Constitution, the President has specific legal responsibilities. The

---


President is “vested” with “the executive Power.”27 He takes an oath to “preserve, protect and defend the Constitution of the United States.”28 Under the Take Care Clause, the President “shall take Care that the Laws be faithfully executed . . . .”29 In order to faithfully execute the laws, the president must necessarily interpret those laws.

While the President is ultimately responsible for legal interpretation in the execution of his duties, pursuant to the Opinions Clause, the President may seek advice, including legal advice, from Department heads.30 Since 1789, the Attorney General has provided the primary advisory function on legal interpretation,31 a function that the Attorney General has in turn delegated to the Office of Legal Counsel.32 A vast literature discusses the precise contours of the President’s interpretive power, including to what extent the President has a duty to refuse to enforce unconstitutional laws.33 Whatever the precise scope of interpretive power, “the executive branch has an independent constitutional obligation to interpret and apply the Constitution.”34

In fulfilling this obligation, the executive branch often interprets the law to support strong executive power. Jack Goldsmith has emphasized that several factors “lead OLC (and the executive branch generally) to take a broader, and perhaps much broader, view of presidential power than the Supreme Court.”35 These factors include the pressure to help facilitate the President’s policy goals, a pressure sometimes in tension with the “best view” of the law; a reliance on Supreme Court dicta, especially ones that favor presidential power, because many issues do not reach the courts; and a heavy reliance on executive branch opinions and precedents, as well as “undertheorized statements” by presidents in signing statements and speeches.36

The tendency to adopt legal interpretations that protect executive power is amplified in the area of national security. Part of the problem is that the Supreme Court decides few cases involving foreign affairs and national security powers. When it does, the decisions are highly context-specific, which makes them less suitable as precedent in

27 U.S. Const. art. II, § 1, cl. 1.
28 U.S. Const. art. II, § 1, cl. 8.
29 U.S. Const. art. II, § 3.
30 U.S. Const. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .”).
32 General Functions, 28 C.F.R. § 0.25 (2014).
36 Id. at 135.
other contexts. As Justice Holmes famously said, “[g]reat cases . . . make bad law.” A particular problem is case law that emerges from decisions in exigent circumstances, both because judges face pressure to distort ordinary judgment and because such justifications—while appropriate under emergencies—risk influencing legal interpretation in ordinary cases.38

Another factor is the intelligence community’s culture of “playing to the edge”—that is, using the maximum authority within the bounds of the law.39 The national security establishment faces tremendous pressure to prevent the next terrorist attack and thwart other threats to national security. It therefore has an incentive to push policy as far as the law will allow. Because many of these decisions involve classified information to protect national security, the result is expansive legal interpretations rendered in secret.

The number of such decisions is expanding as national security decision making has become increasingly legalized and the nature of hostilities has changed. In the late 1970s, Congress opened investigations into abuses by the intelligence community, which resulted in the enactment of FISA and new oversight regimes. Since then, the number of lawyers in the CIA has risen significantly.40 The Department of Defense has hundreds of lawyers, and lawyers have played key roles in recent national security decisions.41 Unlike traditional wars, the new threat environment presents many more novel legal issues and applications. In addressing these unconventional and elusive threats, the executive branch has an incentive to undertake new and controversial activities in the interest of national security. From targeted killings to surveillance to detention, national security activities increasingly require legal authorization and legal reasoning, and incentives push toward expansive and novel interpretations.

C. Values Served in Disclosing Legal Opinions

Expansive interpretations rendered in secret have led some commentators and lawmakers to decry “secret law.” This concern is misplaced. To be sure, a secret criminal law would raise serious constitutional questions, as it would fail to provide fair notice to parties so that they can arrange their primary conduct. In the American legal system, a fundamental role of courts is to prevent the enforcement of an

39 See generally MICHAEL HAYDEN, PLAYING TO THE EDGE (2016); see also Margo Schlanger, Intelligence Legalism and the National Security Agency’s Civil Liberties Gap, 6 HARV. NAT’L SEC. J. 112, 151–52 (2015).
40 See JACK GOLDSMITH, POWER AND CONSTRAINT 87 (2012) (“[T]he CIA legal staff would expand nearly tenfold as the Agency transformed itself from being indifferent to the law to being preoccupied with it.”).
41 See generally CHARLIE SAVAGE, POWER WARS (2015).
unconstitutional law against a private party. Secret law would prevent potential defendants from changing their conduct or effectively challenging the validity of laws. The secret legal interpretations described here do not involve sanctions for private conduct, however. Instead, the secret legal interpretations bind the executive branch, constraining the manner and scope of the intelligence activities it conducts.

The problem is not accountability for secret legal interpretations; rather, the concern is accountability for the secret activities. A shoddy legal opinion with expansive interpretations of the President’s inherent constitutional authority may arguably undermine the legitimacy of the government and its perceived adherence to the rule of law, but the American people will care far more about the actual activities—such as torture or warrantless surveillance—conducted on their behalf. If abuse of power is the primary concern, then why aren’t reporting requirements sufficient to serve accountability? Reporting requirements ensure that Congress remains informed so that it can shape and restrict the Executive’s intelligence activities. If Congress does not get enough information, then it can calibrate reporting requirements to ask for more specific information. What values does disclosure of legal opinions serve that other reporting requirements do not?

Disclosure of the executive branch’s legal opinions relating to national security to Congress serves three distinct functions. First, it helps Congress exercise its legislative and oversight functions. A serious legal opinion must understand and grapple with the full set of facts of a given intelligence activity. With access to detailed analysis and facts, Congress can better understand the programs and their flaws. Congress can then decide whether to keep, amend, or scuttle such programs or their authorizations.

Legal opinions also give insight into how the Executive interprets the laws that Congress enacts. Legal opinions reveal how the Executive interprets statutes, regulations, and technical terms in ways Congress cannot anticipate. This may prove particularly important if the Executive adopts a legal theory broader than the planned activity Congress has endorsed. Knowing how the Executive interprets its authorities helps Congress provide more specific and tailored statutes to effect its legislative intent. This may prove particularly important with regard to surveillance authorities, where rapidly changing technology can make statutes quickly obsolete.

---


43 Disclosure of legal opinions might also help Congress by uncovering additional activities that Congress did not know exist. The current reporting requirements on intelligence activities broadly cover “significant intelligence activities.” The statutory language sweeps broadly, and it seems unlikely that the executive branch would interpret the word “significant” narrowly so as to underreport. Still, what counts as “significant” is in the eye of the beholder. Legal opinions on one program could refer to other programs that Congress considers significant but that the Executive either inadvertently failed to disclose or considered ancillary. If the concern is principally accountability for the activities rather than the legal opinions, Congress could simply require more fine-grained disclosure of activities. However, Congress may not know what to look for because the President has a significant information advantage with regard to intelligence reports and classified information.
Second, disclosure promotes political accountability for secret intelligence activities within Congress. Consider section 215 of the USA PATRIOT Act. The government had advanced, and the FISA courts approved, a novel interpretation of the word “relevant” to authorize the bulk telephony metadata program. If the congressional committees get mandated access to legal interpretations, then in the event the program leaks the committee members will have a harder time running for political cover and denying knowledge. Thus, the public can more readily hold their elected representatives accountable for sanctioning activities the public determines are impermissible.

Third, disclosure forces more ex ante deliberation within the executive branch. As a matter of law, knowledge that legal opinions will be disclosed means executive branch attorneys will tend to avoid excesses and write more cautious, reasoned, prudent, and balanced opinions. Disclosure ensures timely and contextual scrutiny. And it may dampen groupthink or other psychological and behavioral biases among policymakers whose decisions would otherwise go unchallenged. Numerous scholars have highlighted these problems.44

As a matter of policy, disclosure institutionalizes the “Front Page Rule”—an informal principle according to which government officials should not conduct activities that they could not justify to the American people if they appeared on the front page of the newspaper. Someone who expects her legal reasoning to be placed on the front page of a newspaper is less likely to adopt harebrained policies and will think twice before approving certain activities. If Congress and the public do not support certain intelligence activities and their legal justifications, then the intelligence community will lose trust and could suffer loss of resources or future restrictions.45

Thus, the benefits of disclosing national security legal opinions to Congress are threefold—helping Congress better exercise its legislative and oversight function, improving the political accountability of Congress, and forcing more ex ante deliberation in the executive branch.


45 The President’s Review Group and several scholars have admonished the intelligence community to take this rule seriously. See PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, EXEC. OFFICE OF THE PRESIDENT, LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS 170 (2013) [hereinafter PRG] (“[W]e should not engage in any secret, covert, or clandestine activities if we could not persuade the American people of the necessity and wisdom of such activities were they to learn of them as the result of a leak or other disclosure.”); Jack Goldsmith, My Speech at ODNI Legal Conference: “Toward Greater Transparency of National Security Legal Work,” Lawfare (May 12, 2015, 8:30 AM), https://www.lawfareblog.com/my-speech-odni-legal-conference-toward-greater-transparency-national-security-legal-work; see also Samuel J. Rascoff, Presidential Intelligence, 129 HARV. L. REV. 634, 678 (2016).
D. The Scope of the Problem

Before proceeding, it is important to underscore what the problem is and is not. The problem is not that the executive branch has conducted activities in secret or that it has drawn expansive legal interpretations to justify such activities. Aggressive national security operations are sometimes necessary and justified. Creative interpretation is often necessary and desirable, especially when fighting elusive and potentially devastating threats with underspecified authorities. Moreover, Congress and the public have often approved of such expansive interpretations.

Nor is the problem that the government made the wrong policy decision. While the current system can lead to illegal and unwise decisions, it can also produce good policy outcomes.46

The problem is simply one of balancing secrecy and accountability. Secrecy is necessary for conducting national security. But the President’s unilateral prosecution of secret intelligence activities necessarily frustrates accountability—meaningful and timely scrutiny and feedback. To what extent can new reporting requirements help manage this tension?

II. Disclosure of Legal Opinions to Congressional Committees

This Part describes new reporting requirements that oblige the Executive to turn over to congressional committees periodically and without further request written legal opinions related to intelligence activities. Scholarship has devoted insufficient attention to reporting requirements.47 I explain why the executive branch may have agreed to these provisions and analyze to what extent they represent a significant and underappreciated concession by the President in light of prior court precedent and executive branch assertions of privilege and control over access to classified information.

A. New Requirements

As amended by the USA FREEDOM Act, 50 U.S.C. § 1871(c)(1) provides that the

46 PCLOB’s report concludes that the section 702 programs are “valuable and effective.” Recently released FISC opinions about programmatic surveillance under section 702 show the system can work well; the FISC pushed back when the government revealed NSA had been incidentally collecting Americans’ Internet communications while targeting foreigners abroad. See, e.g., Memorandum Opinion (Foreign Intel. Surv. Ct. Oct. 3, 2011); see also Benjamin Wittes & Lauren Bateman, The NSA Documents, Part II: The October 2011 Opinion, LAWFARE (Aug. 22, 2013, 8:13 AM), https://lawfare.inmclient.com/nsa-documents-part-ii-october-2011-fisc-opinion (analyzing the opinion).

Attorney General “shall submit” to the intelligence and judiciary committees:

not later than 45 days after the date on which the [FISC] or the [FISCR] issues a decision, order, or opinion, including any denial or modification of an application under [FISA], that includes significant construction or interpretation of any provision of law or results in a change of application of any provision of [FISA] or a novel application of any provision of [FISA], a copy of such decision, or opinion and pleadings, applications, or memoranda of law associated with such decision, order, or opinion.48

The last clause is a significant and underappreciated provision. Unlike other national security reporting requirements, this provision mandates for the first time the disclosure of the Executive’s written legal reasoning.49 Moreover, the executive branch must do so affirmatively, that is, without waiting for a further request from the committees.

Since introducing this provision, Congress has made this disclosure requirement more rigorous and specific with each piece of successive legislation. Congress first introduced section 1871 on December 17, 2004 with the Intelligence Reform and Terrorism Prevention Act of 2004.50 The law provided that the Attorney must provide to the four relevant congressional committees a semiannual report that provides (1) “a summary of significant legal interpretations” of FISA involving matters before the FISA courts, including interpretations presented in applications or pleadings filed with those courts, as well as (2) copies of all decisions or opinions (but not including orders) of the FISA courts “that include significant construction or interpretation” of FISA.51 The first report had to cover the prior six-month period.

Congress tightened these requirements with the FISA Amendments Act of 2008.52 That statute specified that the Attorney General must submit not only a summary of significant legal interpretations but also the actual pleadings and other “memoranda of law associated” with FISA court rulings. The statute also provided that the Attorney General must make these submissions within 45 days after a FISA court ruling, thereby allowing the committees the ability to oversee the Executive’s legal work in something closer to real time. As before, the Attorney General needed to submit

48 50 U.S.C. § 1871(c)(1) (emphasis added). Congress also requires “a summary of significant legal interpretations of [FISA] involving matters before the [FISC] or the [FISCR], including interpretations presented in applications or pleadings filed with” those courts. Id. § 1871(a)(4).


51 Id.

copies of FISA rulings, but Congress also wanted to see “pleadings, applications, or memoranda of law associated with” such rulings going back five years.

Finally, in 2015, Congress further amended the law, making it even stricter. Compared to the 2008 version, the current statute has two new features. First, the Attorney General must now submit to the committees FISA rulings that “den[y] or modif[y]” the government’s application. This language would allow Congress to see whether and to what extent the FISA courts push back on the Executive’s legal interpretations. This is significant because the FISC’s formal approval rate is high, but the government benefits from feedback from the FISC to make successful applications. Further, Congress broadened the scope of the reporting to include not just “significant legal interpretations” but rather legal interpretations including a “significant construction or interpretation of any provision of law or results in a change of application of any provision of [FISA] or a novel application of any provision of [FISA] . . .”53 With this ratchet effect, Congress tightened the reporting requirements to try to better understand what legal arguments the Executive advances before the FISA courts and how those courts evaluate them.

In the Intelligence Authorization Act for Fiscal Year 2014, Congress added two other reporting requirements that mandate disclosure of legal interpretations by the Executive. First, 50 U.S.C. § 3109 amends the National Security Act and provides that “the General Counsel of each element of the intelligence community shall notify the congressional intelligence committees, in writing, of any significant legal interpretation of the United States Constitution or Federal law affecting intelligence activities conducted by such element by not later than 30 days after the date of the commencement of any intelligence activity pursuant to such interpretation.”54 Starting on July 7, 2014, subject only to an exception for covert action, with their notifications to the congressional committees the General Counsel must provide “a summary of the significant legal interpretation and the intelligence activity or activities conducted pursuant to such interpretation.”55

Second, Congress also amended 28 U.S.C. § 521. That provision provides that “[t]he Attorney General, from time to time . . . shall cause to be edited, and printed in the Government Publishing Office, such of his opinions as he considers valuable for preservation in volumes . . .”56 Dating from 1966, that provision directs the Attorney General to publish his legal opinions. By delegation, OLC now writes those opinions and periodically publishes such opinions. However, OLC has not always released its opinions regularly, and OLC withholds opinions involving classified information altogether.

With the Intelligence Authorization Act of 2014, Congress added to the statutory notes a requirement that “the Attorney General shall, in coordination with the Director of National Intelligence, establish a process for the regular review for official publication of significant opinions of the Office of Legal Counsel of the Department of Justice that have been provided to an element of the intelligence community . . . .” The review process applies “a presumption that significant opinions of the Office of Legal Counsel should be published when practicable, consistent with national security and other confidentiality considerations.” Official publication is not required when it would reveal classified information or “would conflict with preserving internal Executive branch deliberative processes or protecting other information properly subject to privilege.” If an opinion would be selected for official publication but for the fact that it contains classified information, the executive branch must make that opinion available to the appropriate congressional committees.

Taken together, these statutory provisions require the executive branch to disclose its legal reasoning and other classified information to congressional committees. In many ways, these provisions chart new territory in requiring the President to disclose to the rival political branch legal interpretations on which he relies to conduct national security policy.

B. A Major Concession

Presidents of both major parties did not oppose these provisions. President Obama did not issue a signing statement for the Intelligence Authorization Act of 2014. As for the reporting requirement under FISA, Congress introduced it in 2004, and then ratcheted up the provision with the FAA in 2008 and the USA FREEDOM Act in 2015. For the passage of those Acts of Congress, neither President Bush nor President

61 Note that the new reporting requirements do not include private rights of action. To enforce the statutes, Congress would therefore need to resort to political pressure, including by exercising its subpoena and impeachment powers. Congress can further obtain judicial resolution by seeking enforcement of its subpoena in a civil action. According to the Supreme Court, the “issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking.” Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 505 (1975) (holding legislators have absolute immunity in their legislative functions, including issuing subpoenas). See also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 137 (1984). But the courts will hesitate to resolve such disputes, instead encouraging the political branches to make every effort to settle it. See United States v. AT&T, 551 F.2d 384, 394–95 (D.C. Cir. 1976).
Obama issued a signing statement reserving presidential power to avoid or limit full enforcement of those provisions, or construing their language narrowly. Indeed, the legislative history includes a background paper submitted to Congress by DOJ and the DNI asserting that the government faithfully complied with the requirement to disclose to the congressional committees pleadings submitted to the FISC.64

By contrast, President Obama issued a signing statement when Congress revised the reporting requirement for covert actions with the Intelligence Authorization Act for Fiscal Year 2010. The covert action statute requires the executive branch to provide to the congressional intelligence committees “any information or material concerning covert actions,” and the Act of 2010 added “(including the legal basis under which the covert action is being or was conducted).”65 With his signing statement President Obama stipulated that “my Administration understands [the] 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.”66 That presidents did not issue similar signing statements for the three other reporting requirements described above suggests that the government saw no fundamental separation of powers objection or interference with the President’s ability to assert executive privilege.

The Executive has historically raised strong objections to disclosure of classified information and internal legal advice to Congress. Historically, the Executive has asserted that it need not disclose information by citing separation of powers principles, control over access to national security information, and executive privilege. The new reporting requirements mark a departure from and potentially challenge OLC precedents. In the following sections, I explain why the Executive may have agreed to these requirements and the extent to which they mark a concession by the Executive.

1. National Security and Separation of Powers

The reporting requirements mandate that the executive branch disclose memoranda of law associated with FISC orders, significant legal interpretations given to the intelligence community, and classified information to Congress. Regular disclosure of legal interpretations and classified information marks a major concession by the Executive, though several factors may explain why the Executive did not object on separation of powers grounds to the three reporting requirements.

64 S. REP. 112-174, 19 (“The Government has complied with the substantial reporting requirements imposed by FISA to ensure effective congressional oversight of these authorities,” including by “provid[ing] summaries of significant interpretations of FISA, as well as copies of relevant judicial opinions and pleadings.”) (emphasis added).


Compared to prior OLC positions on separations of powers, the new reporting requirements appear to mark a significant concession by the President.

The constitutional separation of powers reflects the Framers’ “concern over the ‘encroaching nature’ of power.”\(^{67}\) In interpreting the separation-of-powers principle, the Supreme Court has stated that legislation may be unconstitutional if it prevents a coordinate branch “from accomplishing its constitutionally assigned functions.”\(^{68}\) If legislation may disrupt such functions, then the Court will “determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”\(^{69}\)

Using this analysis as a guide, OLC has defended executive prerogatives in assessing reporting requirements. OLC has acknowledged that “the conduct of investigation into, and oversight concerning, executive actions is generally well within the power of Congress.”\(^{70}\) So it has concluded that simple reporting requirements are clearly constitutional, as are so-called “report-and-wait” requirements—statutes that empower executive agencies to take actions only after providing notice or a report to Congress and a specified time period has elapsed.\(^{71}\)

However, OLC has indicated that concurrent reporting requirements—those that require executive agencies to submit reports simultaneously to the President and Congress—raise serious separation-of-powers questions, especially those regarding foreign affairs or national security. “Many conceivable concurrent reporting requirements, particularly ones touching on the President’s responsibility for the conduct of foreign affairs and for national defense, would have a serious negative impact on the President’s performance of his ‘constitutionally assigned functions.’”\(^{72}\)

At times, OLC has taken particularly strong views on the President’s ability to withhold information from Congress on separation-of-powers grounds. For instance, the National Security Act allows the President to withhold prior notification of covert actions from Congress, so long as he informs the congressional committees “in a timely fashion” and provides a written statement explaining why he did not give prior notice.\(^{73}\) OLC concluded that this phrase should be read to leave the President with


\(^{69}\) Id.


\(^{71}\) See id. at 173–74.

\(^{72}\) Id. at 175. OLC also indicated that unduly burdensome reporting requirements can interfere with the President’s constitutional duty to take care that the laws are faithfully executed. See id.

\(^{73}\) 50 U.S.C. § 3093(c).
“virtually unfettered discretion” to choose the appropriate moment for notifying Congress.74 In reaching this conclusion, OLC asserted the President’s broad and inherent authority in foreign affairs: “the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of ‘oversight’ activities.”75

Given the Executive’s traditionally vigilant defense of executive prerogatives on separation-of-powers grounds, the new reporting requirements can be seen as a major concession by the Executive. The new statutes require the President to provide to Congress legal reasoning and classified information supporting intelligence activities. While Congress has a legitimate need for information to support its legislative and oversight functions, the new reporting requirements touch on information relating to intelligence activities, which “lie[] at the heart of the President’s executive power.”76 Several reasons explain presidential acquiescence.

First, the requirements are not invalid on separation-of-powers grounds. The new reporting requirements oblige the Executive to report summaries of significant legal interpretations given to the intelligence community, disclose FISC orders and associated legal memoranda, and provide a review process for official publication of OLC opinions and the disclosure of classified OLC opinions to Congress. None of these requirements “prevents the Executive Branch from accomplishing its constitutionally assigned functions.”77 As discussed below, the scope of disclosure is narrow, so the risk of leaks and consequent disruption of intelligence operations is low. The discretion and time delays built into these requirements, also described below, permit the executive branch to initiate intelligence operations first and provide legal reasoning later. Even if there were potential for such reporting requirements to disrupt intelligence operations, there is a “need to promote objectives within the constitutional authority of Congress”—namely, accountability in the form of timely scrutiny and effective feedback for intelligence activities.78

Second, the President does not have a strong separation-of-powers argument for defying these reporting requirements. Justice Jackson’s famous concurrence in Youngstown Steel, later accepted by the full Court,79 provides the leading framework for addressing conflict over national security between the two political branches.

---

74 The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act, Memorandum from Charles J. Cooper, Assistant Attorney Gen., to the Attorney General 173–74 (Dec. 17, 1986).
75 The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act, Memorandum from Charles J. Cooper, Assistant Attorney Gen., to the Attorney General 169 (Dec. 17, 1986).
76 Id. at 165.
78 Id.
President acts pursuant to an express or implied congressional authorization, his power is at its height (category I); in the face of legislative silence, the President can rely on only his own independent powers (category II); and when the President acts against the express or implied will of Congress his power is at its “lowest ebb,” for the President must rely on his exclusive powers after the subtraction of congressional power.\(^80\)

Defying these congressionally mandated reports would present a category III case. Under Justice Jackson’s framework, the default is congressional supremacy, and the Court presumes that the President will seldom prevail in category III.\(^81\) In \textit{Zivotofsky II}, however, the Court for the first time ruled that the President won in category III by holding that the President has independent and exclusive power to recognize foreign states and that he could therefore disregard a congressional statute interfering with that power.\(^82\) While \textit{Zivotofsky II} did not involve intelligence operations, the case recognizes presidential exclusivity on the basis of functional superiority to Congress.

Invoking \textit{Zivotofsky II}, the President could argue that he has exclusive power to conduct intelligence operations abroad and that the reporting requirements would interfere with his duties as Commander-in-Chief. To support this claim, with regard to foreign intelligence surveillance, the President could argue that although the Supreme Court has not ruled on the issue the lower courts have held that there is an exception to the warrant requirement when the President conducts surveillance for foreign intelligence purposes.\(^83\)

Congress can counter that national security powers are shared, not exclusive. The Constitution entrusts the President as Commander-in-Chief, vests him with the Executive power, and charges him to take care that laws be faithfully executed.\(^84\) The Supreme Court has found that the President has broad powers in foreign affairs.\(^85\)

\(^80\) \textit{See} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).


\(^83\) Circuit courts have found that the government does not need to get a warrant to conduct searches within the United States that target foreign powers or their agents. All of the circuit courts to have addressed the issue upheld the foreign intelligence exception to the warrant requirement. \textit{See} United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970) (upholding the exception); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973) (“Restrictions upon the President’s power which are appropriate in cases of domestic security become artificial in the context of the international sphere.”); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974) (upholding warrantless foreign intelligence surveillance because “the efficient operation of the Executive’s foreign policy-making apparatus depends on a continuous flow of information . . . [and] a court should be wary of interfering with this flow”); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977) (“Foreign security wiretaps are a recognized exception to the general warrant requirement.”); United States v. Truong Dinh Hung (Truong), 629 F.2d 908, 913 (4th Cir. 1980) (same). \textit{But cf. Zweibon v. Mitchell}, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that the government would need a warrant even in a foreign intelligence investigation).

\(^84\) U.S. CONST. art. II, § 2, cl. 1; art. II, § 3.

\(^85\) \textit{See} United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936) (noting in dicta “the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations”).
including “a degree of independent authority to act,” and the courts often defer to the executive branch in foreign affairs.\textsuperscript{86}

But the Constitution also grants the Congress substantial powers over national security and foreign affairs. Indeed, of the eighteen clauses in Article I, Section 8, fifteen of them involve foreign affairs powers, including the power to declare war, raise and support armies, regulate foreign commerce, and to make all laws necessary and proper to execute the powers of the Constitution as a whole.\textsuperscript{87} The Supreme Court has said that the President “may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers.”\textsuperscript{88} The Supreme Court has also said that the Constitution “most assuredly envisions a role for all three branches when the rights of individuals are at stake.”\textsuperscript{89} Such is the case where the government’s intelligence operations affect the rights of U.S. persons, including First and Fourth Amendment rights. In short, the Constitution provides “an invitation to struggle for the privilege of directing American foreign policy.”\textsuperscript{90}

Even granting that the President has exclusive power to conduct intelligence activities, this does not mean that Congress cannot conduct reasonable oversight over those activities. Although \textit{Zivotofsky II} provides precedent for a president to claim exclusive power and to defy a statute, the Court was careful to say that its holding applied only to the recognition power and that Congress has other foreign affairs powers.\textsuperscript{91}

The reporting requirements are also distinguishable from the statute at issue in \textit{Zivotofsky II} that purported to contradict the President’s diplomatic communications. Here, the reporting requirements do not impinge on the President’s ability to communicate for the nation with “one voice” in foreign affairs; rather, the requirements are procedural and do not restrict the substance of a president’s foreign intelligence practices. Nor do the reporting requirements interfere with the Executive’s need for “secrecy and dispatch,” which the Court has sometimes invoked as justification for broad presidential power.\textsuperscript{92} Section 1871 of FISA allows the Executive 45 days to report FISC orders and associated legal opinions and a 6-month grace period from the date of

\begin{itemize}
\item \textsuperscript{86} Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 414 (2003).
\item \textsuperscript{87} See, e.g., Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177 F.3d 1142 (9th Cir. 1999) (deferring to the Executive’s position that Taiwan was not bound by China’s adherence to the Warsaw Convention).
\item \textsuperscript{88} U.S. CONST. art. I, § 8, cl. 11; art. I, § 8, cl. 12; art. I, § 8, cl. 14; art. I, § 8, cl. 18.
\item \textsuperscript{89} Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006).
\item \textsuperscript{90} Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).
\item \textsuperscript{91} Edward Corwin, \textit{The President, Office and Powers}, 1787–1984 171 (1957).
\item \textsuperscript{92} Zivotofsky \textit{ex rel.} Zivotofsky v. Kerry (\textit{Zivotofsky II}), 135 S. Ct. 2076, 2086–88, 2090, 2095–96 (2015).
\item \textsuperscript{93} See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
\end{itemize}
enactment. Section 521 gives the Attorney General 180 days to create a process for reviewing OLC opinions for official publication, but publication decisions are discretionary. And section 3109 of the National Security Act gives the various General Counsel of the intelligence community 30 days from the start of an intelligence operation to provide a summary of any significant legal interpretations authorizing such activities. These provisions give the Executive ample time to comply with the statutory requirements.

Third, and finally, historical precedent also supports the view that disclosure of these types of information is permissible. The President has already acquiesced to reporting “significant intelligence activities,” including hypersensitive covert actions, to the congressional committees. Congress has also previously asserted its authority to require the executive branch to supply the “legal basis” for intelligence activities, though the Obama Administration called for interpreting that language narrowly.94

Given the Executive’s prior vigorous defense of separation of powers, the new reporting requirements mark a significant concession by the executive branch insofar as they shift the presumption toward disclosure of legal reasoning and classified information to Congress.

2. Control over Access to National Security Information

The disclosure of classified information is often a strong argument for preventing the release of executive branch legal opinions to the public. The Executive has also asserted broad claims based on the Commander-in-Chief Clause and unitary executive theory that the President can unilaterally restrict Congress’ access to sensitive national security information.95 Although the new reporting requirements are distinguishable from past attempts by Congress to require disclosure of classified information to which the Executive objected, the Executive’s acquiescence to these new provisions marks a change in the default presumption.

Several examples illustrate the Executive’s assertion of control over access to classified information—even access by Members of Congress. In 1998, Congress considered an amendment to the Senate version of the Intelligence Authorization Act for Fiscal Year 1998 that would have directed the President to inform executive branch employees that existing statutes did not prohibit them from disclosing classified information demonstrating violations of law to Members of Congress.96


95 See, e.g., Letter from Michael Mukasey, Att’y Gen., to Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary 2–3 (Mar. 31, 2008); Letter from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Hon. Alex M. Azar II, General Counsel, Department of Health and Human Services (May 21, 2004).

96 For background and analysis of the dispute, see Michael J. Glennon, Congressional Access to Classified Information, 16 BERK. J. INT’L L. 126 (1998).
Clinton threatened a veto, and Congress ultimately removed the provision from the final authorization act.\textsuperscript{97} OLC has concluded that Congress cannot create so-called “rights of disclosure” statutes that authorize lower-level executive branch officials to bypass presidential classification procedures and disclose classified or privileged information to Members of Congress without official authorization and based on their own assessment of Congress’ “need to know.”\textsuperscript{98} Without any judicial support, OLC determined that this would unconstitutionally interfere with the President’s chain of command, supervision over subordinates, and exercise of executive powers.\textsuperscript{99}

The Executive has also asserted that it can control the scope and timing of congressional access to classified information. In a letter from 2008, OLC objected to the OLC Reporting Act of 2008, which would have required submission of classified information reports to the House and Senate intelligence and judiciary committees. OLC argued that the bill unconstitutionally “purport[ed] to prescribe the content, timing, and recipients of any classified disclosures the Executive Branch chooses to make . . . .”\textsuperscript{100} In response to the disclosure of the NSA’s Terrorist Surveillance Program (“TSP”) and Congress’ consideration of amending FISA, the Bush Justice Department asserted that only the House and Senate intelligence committees, not the judiciary committees, would be “read into” the TSP.\textsuperscript{101} In the event, Congress moved forward with legislation amending FISA without challenging this assertion fully.\textsuperscript{102}

The Executive’s acquiescence to the new reporting requirements is notable because these examples demonstrate that the Executive has historically fought congressional efforts to control access to classified information. Several reasons may explain the recent lack of presidential resistance.

First, unlike other past examples, the new reporting requirements leave the President broad discretion to determine the content of disclosure. The new reporting requirements provide specific exceptions for the Executive to protect national security. Section 1871 permits the “Attorney General, in consultation with the Director of National Intelligence, [to] authorize redactions of materials . . . provided to the committees of Congress . . . if such redactions are necessary to protect the national security of the United States and are limited to sensitive sources and methods information or the identities of targets.”\textsuperscript{103} Section 3109 of the National Security Act,
which requires disclosure of significant legal interpretations affecting intelligence activities, includes a caveat: reporting is only required “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters . . . .” 104 The statute that requires a review process for publishing OLC opinions also leaves the Executive wide latitude. While the statute creates a presumption that “significant opinions of the Office of Legal Counsel should be published when practicable,” Congress specified that the Executive’s decision is “discretionary” and “not subject to judicial review.” 105 Furthermore, the statute provides that classified opinions be made available to Congress—but not all classified OLC opinions, only those that would be published “but for the fact that publication would reveal classified information or other sensitive information relating to national security.” 106

Second, the reporting requirements involve a limited scope of disclosure. The courts have suggested that disclosure to all 435 Representatives in the House might hinder the “[t]he President’s need . . . to minimize the risk of disclosure outside of Congress.” 107 Here, however, disclosure would be limited to congressional committees with relevant jurisdiction and cleared staff. 108

Third, while Congress’ investigatory power may not be absolute, the reporting requirements differ from the “rights of disclosure” statutes. Rather than disrupting the chain of command by deputizing lower-level executive branch officials to inform Congress of violations of law, the reporting requirements direct high-level officials (the Attorney General, DNI, and General Counsel) to provide summaries of significant legal interpretations used to support intelligence activities.

Fourth, the Executive’s acquiescence may reflect the view that, although the Supreme Court has not definitively resolved the issue, the case law and historical practice supports the notion that the President cannot unilaterally determine congressional access to classified information. Control over access to national security information is a specific inter-branch contest on which the courts have sometimes, though rarely, opined.

*United States v. AT&T* is the case most directly on point. 109 There, the Oversight and Investigations Subcommittee of the House Interstate and Foreign Commerce Committee issued subpoenas to AT&T to investigate alleged executive abuse of warrantless national security wiretap authority. The executive branch sought to prevent

---

108 See 50 U.S.C. § 3109 (congressional intelligence committees);
AT&T from complying with the congressional subpoena. In a rare inter-branch conflict over national security investigations to reach the courts, the U.S. Court of Appeals for the D.C. Circuit considered the Subcommittee and Justice Department’s respective absolute claims to investigation and to regulate national security information. The AT&T court concluded that neither claim is absolute, and that a judicial determination is only available after the political branches have exhausted options for settling their differences.\textsuperscript{110} OLC has since acknowledged as much: “Both the Executive branch and Congress have recognized that [disclosure of classified information] must be conducted through the secure channels established by the Branches working in cooperation.”\textsuperscript{111}

A subsequent Supreme Court case, \textit{Department of the Navy v. Egan}, touched the President’s power to regulate and control classified information. The narrow holding of that case was that the Merit Systems Protection Board could not review the substance of the Executive’s denial or revocation of a security clearance in the course of reviewing an adverse action against a government employee.\textsuperscript{112} The Court said that the Executive’s “authority to classify and control access to information bearing on national security . . . exists quite apart from any explicit congressional grant.”\textsuperscript{113} Yet, this power is not absolute. The Court qualified its view: “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” “unless Congress specifically has provided otherwise.”\textsuperscript{114}

In fact, Congress has passed legislation that regulates control over classified information. This includes the Atomic Energy Act, the Classified Information Procedures Act (“CIPA”), FISA, and the Freedom of Information Act (“FOIA”).\textsuperscript{115}

In short, neither Congress nor the President has absolute power over access to classified information, and both branches must cooperate to reach an agreement. By permitting the President discretion in disclosing national security information, the new reporting requirements are consistent with court precedent and prior practice. At the same time, the requirements dilute the Executive’s prior assertions of power to control congressional access to classified information.

\textbf{3. Executive Privilege}

Executive privilege is a judicial doctrine that enables the President to withhold

\textsuperscript{111} Memorandum Opinion from Christopher H. Schroeder, Acting Assistant Attorney General, OLC, to General Counsel, Central Intelligence Agency (Nov. 26, 1996), http://www.usdoj.gov/olc/nuccio.op.htm.
\textsuperscript{112} \textit{See} Dep’t of the Navy v. Egan, 484 U.S. 518, 520, 529-30 (1988).
\textsuperscript{113} Dep’t of the Navy v. Egan, 484 U.S. 518, 527 (1988).
\textsuperscript{114} \textit{Id.} at 530 (emphasis added).
\textsuperscript{115} The Senate and House intelligence committees have also established rules and procedures for handling classified information and addressing unauthorized disclosures by members and staff.
information from the public or Congress under certain circumstances. This can take several forms, including military or state secrets, presidential communications, and deliberative process privileges. When invoked to protect military or state secrets, executive privilege is designed to protect the public interest in national defense. When invoked to protect presidential communications or the deliberative process within the executive branch, executive privilege is designed to protect the public interest in the President receiving candid, informed, and objective advice necessary for the effective operation of government. The three new reporting requirements either are unlikely to implicate these executive privileges or specifically provide that the Executive may assert them.

The Supreme Court has recognized that the President can withhold from a civil plaintiff documents that would reveal military or state secrets. In United States v. Reynolds, the Court said that the privilege is appropriate when the government can satisfy a court that the compulsion of evidence will reveal military secrets. The Court held that the Secretary of the Air Force could withhold a report on an accident because it would reveal the nature of sensitive electronic equipment on U.S. warplanes and because other alternatives for acquiring the relevant information were available.

This executive privilege does not apply. Reynolds involved civil litigation over the release of a report including sensitive military technology. By contrast, the new reporting requirements would not require sharing legal opinions and classified information with the public, but rather with the members of the legislative branch charged with writing laws delimiting those powers. Such information is necessary for Congress to fulfill its constitutional responsibilities—to consider and enact legislation, appropriate funds, and investigate the execution of the laws. As the Supreme Court has said, “the power of inquiry— with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” Thus, the new reporting requirements do not implicate the military or state secrets privileges.

The executive branch has also invoked executive privilege to protect the confidentiality of communications involving decision making and deliberations. In United States v. Nixon (Nixon I), the Supreme Court unanimously recognized a qualified privilege to presidential communications based on constitutional separation of powers principles. In that case, President Nixon invoked the privilege in response to a subpoena by a special prosecutor for tape recordings documents of his conversations with aides and advisors in a pending criminal trial. The Court held that there is a

116 United States v. Reynolds, 345 U.S. 1, 6–8 (1953).
117 Id. at 10.
118 See id. at 10–11.
constitutionally based privilege in presidential communications but rejected the President’s claim in the case. When asked to produce documents relating to presidential deliberations and decision making, the President may invoke the privilege to protect the confidentiality of communications, but the privilege is qualified and can be overcome by a public interest, as the need for evidence in a criminal proceeding did in that case.\(^{121}\)

_Nixon I_— which involved a conflict between the judiciary and the President—left many questions about the scope of the privilege unanswered, and only four cases by lower courts have involved disputes over information between Congress and the President.\(^{122}\) In the absence of a subsequent Supreme Court decision, the Executive has developed an expansive view of the scope of executive privilege in response to congressional requests for information.\(^{123}\) For instance, the Clinton Administration asserted that the privilege presumptively applies to all communications within the White House and from the White House to Departments and agencies.\(^{124}\)

Another explanation may be the Executive’s implicit acknowledgment of the privilege’s more limited scope. Although the _Nixon I_ Court expressly restricted its ruling to claims of executive privilege against a subpoena in a criminal trial, recent decisions by the lower courts suggest the President’s privilege against congressional inquiry is narrower than the Executive has asserted.

In _In re Sealed Case_ (Espy) and _Judicial Watch v. Department of Justice_, the U.S. Court of Appeals for the D.C. Circuit clarified that the executive privilege doctrine includes both the communications privilege and the deliberative process privilege.\(^{125}\) Both privileges are designed to protect the integrity of executive branch decision making. The deliberative process privilege applies to executive branch officials generally and is rooted in the common law, while the communications privilege applies to “direct decisionmaking by the President” and is constitutionally based.\(^{126}\) The deliberative process privilege applies to pre-decisional and deliberative materials, such as advisory

\(^{121}\) _Id._ at 712–13.

\(^{122}\) Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976); United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (declining to resolve claim of executive privilege because “judicial intervention should be delayed until all possibilities for settlement have been exhausted” by the political branches); House Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (discussing, but not resolving, claim of executive privilege in context of denial of motion to dismiss).


\(^{124}\) See Memorandum for All Executive Department and Agency General Counsels Re: Congressional Requests to Departments and Agencies Protected by Executive Privilege, at 2 (Sept. 28, 1994).

\(^{125}\) See _In re Sealed Case_ (Espy), 121 F.3d 729, 736–40 (D.C. Cir. 1997); _Judicial Watch v. Dep’t of Justice_, 365 F.3d 1108, 1109 (D.C. Cir. 2004). The attorney-client privilege, a common-law privilege, is “subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches.” Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 494 n.24 (1982).

\(^{126}\) In re Sealed Case (Espy), 121 F.3d 729, 752 (D.C. Cir. 1997)
opinions and recommendations,\textsuperscript{127} while the presidential communications privilege covers “documents in their entirety” and includes “final and post-decisional materials as well as pre-deliberative ones.”\textsuperscript{128} While the deliberative process privilege can be overcome by a lower showing of need, the presidential communications privilege can only be overcome by a substantial showing of need and unavailability.\textsuperscript{129}

Given that the deliberative process privilege is rooted in the common law and not constitutionally based, the enactment of reporting requirements would supersede the privilege. However, the presidential communications privilege—constitutionally based—remains relevant.

\textit{In re Sealed Case} and \textit{Judicial Watch} further clarified the scope of the presidential communications privilege. While the President need not have seen or known about the documents for them to be covered by the privilege, only documents “solicited and received” by immediate White House advisers—not heads of Departments and agencies—are covered.\textsuperscript{130}

The reporting requirements in FISA (50 U.S.C. § 1871) and the National Security Act (50 U.S.C. § 3109) are unlikely to implicate the presidential communications privilege. The vast majority of the decisions regarding interpretations of FISA, Executive Order 12333, and related surveillance and intelligence authorities will not reach the President’s desk and are unlikely to be “solicited or received” by his immediate aides and advisors in the White House. These interpretive issues are resolved primarily by attorneys in the offices of General Counsel of the Departments of Defense and Justice and the intelligence agencies.

The reporting requirements for OLC opinions would implicate the presidential communications privilege, however. OLC opinions are often “solicited and received” by top advisers in the White House, or the President himself. Yet the new reporting requirement in the statutory notes to 28 U.S.C. § 521 expressly allows the President to assert the privilege: “Nothing in this section shall require the official publication of any opinion of the Office of Legal Counsel, including . . . [w]hen publication would conflict with preserving internal Executive branch deliberative processes or protecting other information properly subject to privilege.”\textsuperscript{131}

The presidential communications privilege is designed to promote effective government by ensuring that the President receives full and frank advice. The courts have held that this public interest must sometimes yield in the face of a competing

\textsuperscript{127} Id. at 737.  
\textsuperscript{128} Id. at 745.  
\textsuperscript{129} See id. at 754.  
\textsuperscript{130} In re Sealed Case (\textit{Espy}), 121 F.3d 729, 757 (D.C. Cir. 1997); Judicial Watch, Inc. v. Dep’t of Justice, 365 F.3d 1108, 1123 (D.C. Cir. 2004).  
\textsuperscript{131} 28 U.S.C. § 521(d)(3).
interest in the integrity of the judicial system and the fair administration of justice. It is likewise possible that it might need to yield to Congress’ need for information to exercise its constitutionally assigned legislative function. However, with the three new reporting requirements, Congress chose to avoid this potential conflict.

Finally, to the extent executive privilege would apply, the Executive’s acquiescence to the new reporting requirements may reflect the President’s waiver of executive privilege. When the executive branch submits its legal reasoning to the courts, it waives any privilege it had to those documents. Thus, the Executive waives the privilege when submitting briefs to the FISC. As for the publication of OLC opinions and the disclosure of legal reasoning from agency general counsel supporting intelligence operations, the President can always maintain that he simply waives the privilege only with regard to those specific documents while retaining the general prerogative.

Whether the Executive’s acquiescence to the new reporting requirements reflects an understanding of the more limited nature of presidential control over access to classified information and the privilege or a waiver of those prerogatives, the concessions are nonetheless significant in that they require systematic disclosure.

III. Scalable Solution?

Should Congress expand disclosure requirements of executive branch legal reasoning any further? The best way to grasp the tradeoffs of reporting requirements of executive branch legal reasoning on intelligence activities is through a concrete example. I therefore consider a hypothetical reporting requirement for executive branch legal opinions related to foreign intelligence surveillance affecting U.S. persons.

While Congress has already provided for the disclosure of summaries of significant legal interpretations that agency general counsel give to the intelligence community, the reporting requirement in 50 U.S.C. § 3109 may not prompt the executive branch to disclose certain intelligence activities and their legal justifications about which Congress has the most interest. With 50 U.S.C. § 1871 Congress requires the disclosure of FISC orders, briefs submitted to the FISC, and associated legal memoranda. Congress has thus demonstrated a particular interest in overseeing the Executive’s use of surveillance authorities under FISA. But the U.S. government conducts foreign intelligence surveillance not only under FISA, but also pursuant to Executive Order 12333. If Congress can require disclosure under 50 U.S.C. § 1871 of legal interpretations of foreign intelligence surveillance conducted pursuant to FISA, then a seemingly logical next step would be to extend those reporting requirements to foreign intelligence surveillance conducted outside of FISA.

This Part begins with a brief description of Executive Order 12333 and an outline of possible legal issues arising from foreign intelligence surveillance conducted under
that authority. I then introduce possible new legislation as a way to scale the reporting requirements for foreign intelligence surveillance activities under Executive Order 12333. I consider the political feasibility of this proposal. I then describe the benefits that this requirement would provide. Finally, I consider the significant costs that it would entail—namely, infringing executive deliberation, encouraging executive evasion through informal legal advice, and overwhelming Congress with too much information. Ultimately, I conclude that we can never fully remove the tension between secrecy and accountability. Reporting requirements simply shift that tension.

Because most of the government’s activities in this space remain classified, the analysis is necessarily speculative. Yet outlining some of the questions and broad principles at stake can help clarify the tradeoffs in disclosure to congressional committees. While we can lay out the benefits and costs of requiring limited disclosure of legal opinions on foreign intelligence surveillance conducted outside of FISA, the magnitude of the benefits and costs is unknown. As a result, even though the types of benefits and costs of disclosure are clear, we do not know (and cannot know ex ante) if the benefits outweigh the costs. Part IV proceeds to consider how to minimize the costs of disclosure and outlines other ways to achieve the values served by disclosure of legal opinions to Congress described in Part I.

A. Executive Order 12333

Soon after Congress enacted FISA, in 1981 President Reagan issued Executive Order 12333, which governs the executive branch’s conduct of intelligence activities and remains in force today.¹³² The order carries the force of law within the executive branch. Technically speaking, it does not itself provide legal authority for intelligence activities but rather channels the President’s constitutional powers under Article II. The order specifies the missions and authorities of each element of the Intelligence Community, imposes restrictions on certain intelligence activities, and establishes principles to strike the balance between intelligence operations and privacy protection. Executive Order 12333 governs a host of intelligence activities, including electronic foreign intelligence surveillance conducted outside the United States.

While FISA generally governs surveillance within the United States and against U.S. persons, the government generally conducts surveillance against foreign targets

¹³² Exec. Order No. 12333, 3 C.F.R. 200 (1981). In 1976, President Ford issued Executive Order 11905—the first executive order on intelligence—in part to preempt efforts by Congress to create a statutory charter for intelligence activities that he feared would infringe on the President’s broad constitutional authority in the sphere of national security. Two years later, President Carter replaced that document with Executive Order 12036, reflecting his administration’s balance of priorities. In 1981, fulfilling a campaign promise to reinvigorate America’s intelligence capabilities vis-à-vis the Soviet Union, President Reagan issued Executive Order 12333. Stephen B. Slick, The 2008 Amendments to Executive Order 12333, United States Intelligence Activities, 58 STUD. INTELLIGENCE 2 (2014) (chronicling the history of Executive Order 12333 and its reforms). Subsequent presidents have chosen to update rather than replace the order.
outside the United States pursuant to Executive Order 12333. According to declassified
documents, the government conducts “the majority” of its surveillance solely pursuant
to Executive Order 12333. As such, this surveillance is not subject to FISA, including
review by the FISC and FISA reporting requirements.

Section 2.3 governs “Collection of Information” and section 2.5 governs
“Collection Techniques.” Neither was written with global electronic communications in
mind. Assessing the appropriate and lawful scope and nature of foreign intelligence
surveillance conducted pursuant to Executive Order 12333 raises a host of interpretive
legal questions. They include:

- Does FISA or Executive Order 12333 govern?
- What counts as “in the United States”?
- Who counts as a “U.S. person”?
- Who counts as a “terrorist” or a “foreign power”?
- When collecting information, has the government used the “least
  intrusive” collection techniques within the United States and against U.S.
  persons?
- Was the collection “as tailored as feasible”?
- Which intelligence agencies may review or retain information on U.S.
  persons?
- What counts as “publicly available” information or “information collected
  with the consent of the person concerned”?
- What counts as “information necessary for administrative purposes”?
- The order prohibits the Intelligence Community from “participat[ing] in

---

133 NATIONAL SECURITY AGENCY, LEGAL FACT SHEET: EXECUTIVE ORDER 12333 (2013),
https://www.aclu.org/files/assets/eo12333/NSA/Legal%20Fact%20Sheet%20Executive%20Order%2012333.pdf.

134 Instead, only the general intelligence reporting requirements of the National Security Act apply.

135 Section 2.5 is also relevant; through it the President delegates to the Attorney General power to approve foreign
intelligence techniques against U.S. persons and within the United States where a warrant would otherwise be
required for law enforcement purposes.

136 President Obama recently indicated a desire to have agencies besides the NSA analyze raw data collected from
NSA. See Charlie Savage, Obama Administration Set to Expand Sharing of Data that N.S.A. Intercepts, N.Y. TIMES
that-nsa-intercepts.html?_r=0.
or request[ing] any person to undertake activities forbidden by this Order.” What counts as “participation”? May the Intelligence Community accept—if they do not solicit—information from sources that undertake prohibited activities?

As may be readily apparent, these legal questions are complicated, will be fact-intensive, and have no easy answers. This is especially so given that the Executive Order dates to 1981 before the widespread use of the Internet, email, cell phones, smart phones, social media, cloud storage, and big data analytics. How do the answers to the above questions change given these technological developments and the increasing global nature of electronic communications?

The executive branch may have adapted old language to new circumstances. After all, national security threats have evolved significantly over the last 35 years. And Executive Order 12333’s mandate to provide “[a]ccurate and timely information about the capabilities, intentions and activities of foreign powers” has not changed. But has the executive branch struck the right balance? In “playing to the edge,” have agencies gone too far? As described above, agencies have an incentive and track record to interpret intelligence authorities broadly.

As with the Executive’s activities under FISA, Congress has a legitimate interest in understanding what the executive branch does pursuant to Executive Order 12333 and how it interprets those provisions. In particular, activities conducted under FISA and Executive Order 12333 both implicate the rights and interests of U.S. persons.

B. Possible Legislation

If Congress wanted to increase oversight over these activities, it could enact the following amendment to the National Security Act reporting requirements:


(a) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of National Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall submit to the congressional intelligence and judiciary committees

(1) on a semiannual basis a summary of significant or new legal interpretations or applications of legal authorities, including executive orders and Departmental and agency regulations, relating to foreign intelligence surveillance that affects U.S. persons;

137 Exec. Order 12333, § 2.1.
(b) The first report under subsection (1) shall be submitted not later than 6 months after [the date of enactment]. Subsequent reports shall be submitted on a semiannual basis thereafter.

(c) This section is repealed effective [five years from enactment].

Several aspects of this proposed legislation are worth highlighting. Note first that the reporting requirement would be codified not within FISA but alongside the general reporting requirements of the National Security Act. It would appear immediately following the general reporting requirement on significant intelligence activities\(^\text{138}\) and before the reporting requirement on covert actions.\(^\text{139}\)

Second, consider the scope of the reporting requirement. The proposed reporting requirement broadly covers not just legal interpretations of OLC and the offices of general counsel, but also those of other offices. This means that the interpretations of NSA, DIA, and NGA general counsels’ offices, which report to the DoD general counsel but operate independently in substantial respects, would fall under the provision. Note also that while the scope of actors is broadly defined, the substantive issues pertain only to a specific category of sensitive activities implicating constitutional rights—foreign intelligence surveillance that \textit{affects U.S. persons}. The reporting requirement does not require disclosure to the committees of all legal interpretations of foreign intelligence surveillance, but rather only those implicating the rights and interests of U.S. persons. This tracks the scope of constitutional rights, since the Supreme Court has interpreted the Fourth Amendment to protect only U.S. persons and persons within the United States.\(^\text{140}\) It also tracks the statutory distinction between U.S. persons and non-U.S. persons, legal terms of art that are deeply embedded in intelligence community operational policy.\(^\text{141}\) Congress has a strong interest in protecting U.S. persons; after all, the government conducts intelligence activities to protect the people of the United States.

Third, in certain significant respects, the language of the reporting requirement tracks the USA FREEDOM Act provision codified at 50 U.S.C. § 1871. The new reporting requirement includes an opening caveat that the section operates only “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters . . . .” This language affords the Executive some flexibility in reporting legal interpretations that implicate the most highly sensitive

\(^{138}\) 50 U.S.C. § 3092.

\(^{139}\) 50 U.S.C. § 3093.

\(^{140}\) United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (Fourth Amendment protections apply to U.S. persons and to all persons within the United States; they do not apply to foreigners located abroad.).

information to the congressional committees. This language is not a catch all, but merely provides a safeguard for the Executive to exercise caution in safeguarding the nation’s most important secrets, such as intelligence on Osama bin Laden’s compound in Abbotabad, Pakistan.

Fourth, the reporting requirements are timed to make them both manageable and effective. The semiannual report does not kick in until six months after the enactment of the statute. In discussions with former national security lawyers, delayed implementation of the reporting requirements were important to their palatability to the executive branch; it gives the Executive time to process and review materials. A separate provision requires disclosure of executive branch legal opinions on matters of foreign intelligence surveillance affecting U.S. persons over the past five years. If review of “new” or “changed” interpretations are important, then retrospective review helps the committees understand what counts as “new.”

Fifth, and perhaps most important, the reporting requirement includes a sunset clause. Sunset clauses are typically used to limit powers granted. A sunset clause on a disclosure requirement recognizes that these measures could have significant costs, the magnitudes of which are difficult to ascertain before implementation. A sunset clause forces Congress to reevaluate the provision and allows the Executive an opportunity to renegotiate the terms based on the costs of implementation.

C. Feasibility

Does Congress have the incentive to pass this kind of reform? Amy Zegart argues that because organized interest groups in the area of national security and foreign affairs are “much newer, fewer, far less interested in agency design and less able to get what they want,” we can expect Congress’ interest and role in creating and overseeing national security agencies to be low. Certainly, foreign affairs and national security tend to provide fewer election benefits on average. But there is reason to think that Congress could enact a reporting requirement as proposed here. First, the requirement is a relatively small procedural fix, not a large substantive overhaul. We might expect the Executive to readily concede a relatively minor procedural reform in exchange for substantive powers.

Second, and related, there may be opportune moments for reform in the near future. The Privacy and Civil Liberties Oversight Board (“PCLOB”) is currently reviewing the privacy and civil liberty implications of select counterterrorism activities, including surveillance, conducted pursuant to Executive Order 12333. In response to the PCLOB’s findings, Congress may choose to investigate other activities under

---


Executive Order 12333 and legislate in this space, and the reporting requirement proposed here offers one option for Congress. Congress will also need to reconsider Title VII of FISA, which expires on December 31, 2017. With the FISA Amendments Act of 2008, Title VII of FISA now includes section 702, an important surveillance authority for targeting U.S. persons and non-U.S. persons abroad. A new reporting requirement like the one presented here on foreign intelligence surveillance conducted outside of FISA could form part of a compromise between Congress and the President in reauthorizing these key surveillance authorities.

D. Benefits of Disclosure

As described in Part I.C, disclosure of legal opinions underlying intelligence activities serves three functions. Disclosure (1) helps Congress exercise its legislative and oversight duties; (2) promotes the political accountability of Congress; and (3) forces more ex ante deliberation in the executive branch. Disclosure of legal opinions serves these goals in a way that disclosure of intelligence activities alone cannot. The following section highlights these benefits in considering the proposed reporting requirement.

First, disclosure informs Congress so that it can better exercise its legislative and oversight functions. Disclosure is a powerful check envisioned by the Framers. As Madison famously wrote, “[a]mbition must be made to counteract ambition.” As the people’s representative, Congress is the federal institution closest to the people. It should therefore play the primary role in determining what activities the government may conduct in the people’s name.

A serious legal opinion must understand and grapple with the full set of facts of a given intelligence activity. While FISA regulates surveillance within the United States and against U.S. persons, foreign intelligence surveillance generally remains outside of statutory restrictions. With access to detailed analysis and facts, Congress can better understand the programs conducted pursuant to Executive Order 12333, their benefits, their flaws, and how the affect U.S. persons. Congress can then decide whether to exercise any potential power it has to regulate those programs. Understanding how the executive branch interprets its own authorities allows Congress to legislate with more specificity to effect its legislative intent. Because rapidly changing technology can make surveillance authorities quickly obsolete, the proposed reporting requirement could prove particularly important in enabling Congress to write laws with regard to foreign intelligence surveillance that are not underspecified or incomplete.

145 THE FEDERALIST NO. 51 (James Madison).
Disclosure to Congress of executive branch legal opinions concerning foreign intelligence surveillance affecting U.S. persons opens several pathways to help Congress exercise its legislative and oversight functions. In addition to proposing new laws that either prohibit certain activities or put programs on statutory footing, the congressional intelligence and judiciary committees can push back against the Executive via informal channels; disclose the information to the public; and threaten to delay or discontinue appropriations.

Second, disclosure of legal opinions promotes the political accountability of Congress for intelligence activities. Some scholars argue that Congress’s ability and willingness to check the President is necessarily limited. For instance, Zegart notes that Congress lacks incentives to conduct oversight of intelligence activities on a consistent basis.146 Because national security and foreign policy is an area with few and weak interest groups, Congress has a diminished interest in creating and supervising national security agencies.147 When overseeing national security activities, Members of Congress gain few political points or votes and have few perks to dole out. They also may not exercise their oversight powers with sufficient vigor because they do not want to risk the charge that their oversight compromised U.S. national security.148

With respect to 50 U.S.C. § 1871 specifically, Orin Kerr argues that “although well-intentioned, . . . limited disclosures fail to generate the necessary feedback about what the law authorizes.”149 In his view, this arises because elected representatives do not necessarily understand the technicalities and can’t anticipate what actions the public will approve, and because disclosure to committees is insufficient; committee members may be “captured” by the agencies and won’t be able to convince the entire Congress to pass new legislation.

These scholars too readily dismiss the benefits of disclosing national security legal opinions to Congress. If the congressional committees have mandated access to legal interpretations, then in the event a surveillance program conducted pursuant to Executive Order 12333 leaks the committee members will have a harder time running for political cover. They will be less likely to be able to distance themselves from controversial programs or deny adequate briefing. Thus, the public can more readily hold their elected representatives accountable.

Third, disclosure of legal opinions underlying intelligence activities disciplines the Executive by forcing more ex ante deliberation. By anticipating disclosure, an executive branch lawyer is more likely to consider counterarguments and tradeoffs, as well as to adopt more conservative reasoning and a more judicious approach. In

147 Id. at 26.
148 Id. at 35.
analyzing the incentive structure of the Office of Legal Counsel, scholars have identified the competing tensions that OLC attorney advisers face to say both “yes” and “no.” For instance, John McGinnis emphasizes that it is in the Executive’s long-term interest to develop a rigorous, compelling, yet justifiable, set of legal opinions as an independent authority in interpreting the Constitution and laws of the United States.\textsuperscript{150} And OLC attorneys have an interest in cultivating an appearance and professional reputation for fidelity to the law.\textsuperscript{151} But an attorney also faces pressure to adopt interpretations that serve a particular president’s interests, rather than just the Office of the President.\textsuperscript{152}

Disclosure, or its prospect, forces the executive branch attorney to internalize the costs to reputation of too readily saying yes to presidential policy requests. When an attorney knows her opinion will see the light of day, she is far less likely to adopt incautious and unduly expansive reasoning, or even innovative interpretations that push the envelope. With foreseeable disclosure, the executive branch attorney will think not only about the efficacy of such arrangements but also whether Congress or the public would approve of them.

Forcing more ex ante deliberation may be especially important for intelligence activities contemplated under Executive Order 12333. While most statutes and statutory terms receive interpretations by courts through litigation, executive authorities governing intelligence activities often do not. Executive branch attorneys thus have more interpretive space when construing their own authorities. The proposed reporting requirement would thus force ex ante deliberation over the legal interpretations of those authorities.

It would also force ex ante deliberation about whether to undertake the activities themselves. Jack Goldsmith describes how the covert action finding requirement has spurred an extensive and cumbersome internal vetting process for covert actions.\textsuperscript{153} The “duties to comply with the law and report activities to Congress, combined with political and legal and personal penalties for not doing so, spark valuable deliberation and care within the executive branch.”\textsuperscript{154} Reporting requirements on other intelligence

\textsuperscript{150} John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 CARDOZO L. REV. 375, 400 (1993) (“The body of the Attorney General’s opinions will have greater influence in constructing a plausible alternative jurisprudence insofar as they are principled and consistent. Given that one of the central purposes of permitting the President independent authority to interpret the Constitution is to make available a method of correction to the constitutional interpretation of the Court, these opinions overall should partake of the coherence necessary to influence the judiciary and the public.”).

\textsuperscript{151} See id. at 403.

\textsuperscript{152} See id. at 402–03 (describing a situational lawyer model where OLC attorneys serve the political interest of a sitting president); see also Jack Goldsmith, The Third Annual Solo-Warren Lecture in International and Operational Law: Reflections on Government Lawyering, 205 MIL. L. REV. 192 (2010) (describing the competing pressures for government lawyers to say yes and no).

\textsuperscript{153} J ACK G OLDSMITH, POWER AND CONSTRAINT 89 (2012).

\textsuperscript{154} Id. at 92.
activities could similarly force more ex ante deliberation. The proposed reporting requirement would force more deliberation before proceeding with foreign intelligence surveillance, a type of intelligence collection with perceived significant economic and diplomatic costs that commentators have argued the executive branch fails to internalize.\textsuperscript{155}

The benefits of this proposed reporting requirement for accountability are significant. Disclosure helps Congress exercise its legislative and oversight function, improves the political accountability of Congress, and forces more ex ante deliberation within the executive branch. However, the disclosure requirement also presents significant potential costs that should not be discounted.

\textit{E. Costs of Disclosure}

Further disclosure requirements raise potentially serious policy problems that should not be discounted. The first risk is that disclosure will lead to worse policy outcomes by discouraging executive branch officials from seeking—and executive branch attorneys from providing—full and candid legal advice. The public has an interest in ensuring that executive branch officials receive forthright and confidential legal advice so that the government operates lawfully and effectively. As one group of scholars has noted, “[f]or 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 formulation.”\textsuperscript{156}

The proposed reporting requirement does not require disclosure of deliberative or pre-decisional materials. For this reason, it does not require the disclosure of full legal opinions rendered by Departments or agencies, as well as OLC. Still, the requirement could negatively affect the deliberative process. If government lawyers fear repercussions from sanctioning activities that are later scrutinized, government lawyers may refrain from giving legal advice, qualify it, or only provide risk-averse opinions. This can hamper the government’s ability to take aggressive action in the interest of national security. Thus, more disclosure could actually have the perverse effect of decreasing the legitimacy and effectiveness of government action by unduly hampering aggressive action to thwart national security threats.

A second risk is that the President’s subordinates might evade the disclosure requirements. This could take several forms. The executive branch could stop keeping records of legal advice. For instance, during the Whitewater investigation, the Clinton White House reportedly stopped writing everything down. The executive branch might also start providing legal advice through informal channels. Reports indicate this trend


\textsuperscript{156} \textit{Principles to Guide the Office of Legal Counsel}, 81 \textit{Ind. L.J.} 1345, 1350 (2006).
has already started. Agencies are asking for fewer OLC opinions as a result of FOIA and the purported decline of OLC’s reputation and influence following the Torture Memos. Requests for OLC written opinions have dropped. The risk is that a “two-track” system of legal advice could emerge—formal written opinions for public consumption and informal oral advice for the real decisions.

A third risk is that disclosure of legal opinions increases the prospect of leaks and consequent damage to national security. The executive branch compartmentalizes national secrets. Government officials gain access to classified information only on a need to know basis. This allows the government both to limit the extent to which any one person can damage the national interest and to better trace leaks. As more information is concentrated in any one location, the harm of disclosure increases. And as more people have access, the risk of disclosure increases. Thus, disclosure to a handful of Members of Congress or committees is less risky than to all 535 members.

A fourth risk is that increased disclosure requirements could overwhelm Congress’ capacity to oversee. If the congressional committees are inundated with documents, then there could come a point it actually results in less oversight. The intelligence committees have more cleared staff and secure space to review materials that do the judiciary committees, but the risk remains that these committees could be overwhelmed with information and simply not review it.

IV. RECONSIDERING DISCLOSURE OF SECRET LEGAL OPINIONS

Disclosure of full executive branch legal opinions to congressional committees provides benefits for accountability but also entails significant costs, particularly in infringing on the executive branch deliberative process and incentivizing executive evasion. In the end, reporting requirements do not solve the tension between secrecy and accountability; they merely shift the tension.

How can a democracy best manage this tension? This Part explores two potential ways to manage the tension more carefully. First, we can try to decrease the costs of reporting legal opinions. Part of the problem in trying to manage this tension is unknowns. While I have identified the types of costs and benefits of reporting requirements, their magnitudes remain unknowable up front. Decreasing the costs of disclosing legal opinions can thus bolster their appeal as a tool for calibrating secrecy and accountability.

Second, other tools besides disclosure to Congress might help manage this tension. Part I identified three basic functions that disclosure of executive branch legal reasoning serve: (1) helping Congress exercise its legislative and oversight function; (2) improving political accountability for Congress; and (3) forcing more ex ante deliberation in the executive branch. Disclosure of legal opinions may not best serve these goals. I therefore consider other ways to achieve these goals.

A. Decreasing Costs of Disclosure

1. Timing of Disclosure

Adjusting the timing of disclosure can decrease the costs of disclosure. First, a delay in disclosure can protect deliberative process. The longer the delay, the less chance that disclosure would affect the candor of an executive branch lawyer’s legal advice. But longer delay also decreases accountability— that is, timely scrutiny and effective feedback. For instance, a medium-term reporting delay (say, 45 days) ensures that the legal decision has been made before the legal interpretation is disclosed. A longer delay may be appropriate depending on the desired balance between secrecy and accountability.

Second, a sunset clause can also decrease the long-term costs of disclosure of national security legal opinions. Congress normally attaches sunset clauses to new powers it grants in order to prevent their abuse or to restrict their operation to exigent circumstances. Once enacted, statutes are difficult to repeal. A sunset clause on a disclosure requirement would force Congress and the President to reevaluate the merits of disclosure. If the costs outweigh the benefits, the President can lobby Congress to repeal the requirement.

2. Scope of Disclosure

How much disclosure is optimal? Adjusting the scope of disclosure of legal opinions also affects the balance of secrecy and accountability. As Jack Goldsmith has outlined, two factors that affect the relative balance are the target of the disclosure and the detail of the analysis.\(^{158}\) We can think of the target on a continuum from the public to the congressional committees (or even a few members of those committees, as is the case with some covert actions). A broader target of disclosure promotes transparency but risks compromising national security. Similarly, we can think of the level of detail on a continuum from full legal opinions to vague, redacted, or summarized opinions. Disclosing a more detailed legal opinion increases transparency but risks compromising national security.

Disclosing fully detailed legal opinions to the public best serves transparency and accountability but risks the most harm to national security. Absent a strong need to explain an intelligence program to the public, the government will not ordinarily choose this option.

Disclosing vague, redacted, or summarized legal opinions to the public can generate confusion and perceptions of illegitimate secrecy. Indeed, the Administrative Office of the U.S. Courts made precisely this argument to the House Permanent Select Committee on Intelligence in opposing a draft provision of the USA FREEDOM Act that would have required the release of public “summaries” of unpublished full court opinions:

Summaries of court opinions can be inadvertently incorrect or misleading, and may omit key considerations that can prove critical for those seeking to understand the import of the court’s full opinion. This is particularly likely to be a problem in the fact-focused area of FISA practice, under circumstances where the government has already decided that it cannot release the underlying opinion even in redacted form, presumably because the opinion’s legal analysis is inextricably intertwined with classified facts.¹⁵⁹

Indeed, the fact-intensive nature of legal opinions on national security issues means that it may prove difficult to separate the facts from the legal reasoning. The identities of targets, whether suspected spies or terrorists, as well as the sources and methods of surveillance can be important in a legal analysis that draws fine distinctions.

Selective disclosure of legal opinions to the public also has specific problems. One might argue that something is better than nothing; releasing a sanitized white paper would provide the public with at least the basic legal justification for a national security activity. But doing so has negative consequences. A vague, incomplete, or heavily redacted legal rationale raises more questions than it answers and risks confusing the issues.¹⁶⁰ To be sure, some information may narrow the field of relevant issues and allow critics to counter the government’s rationales on its own terms.¹⁶¹ But vague or selective disclosure likely emboldens critics who wonder whether high-level discussions of abstract legal terms (say, proportionality, due process, imminence, or self-defense) are being used to support other, broader controversial actions. In short, vague or selective disclosure of legal rationales for national security decisions risks

¹⁵⁹ 161 Cong. Rec. S3421-03, 161 Cong. Rec. S3421-03 (noting that “a formal practice of creating summaries of court opinions without the underlying opinion being available is unprecedented in American legal administration”).


distorting the public’s understanding in ways counterproductive for transparency and accountability.

If disclosure to the public ordinarily does not strike the appropriate balance between secrecy and accountability, what about disclosure to a subset of Congress? Members of Congress are the people’s representatives in the federal government, and they can provide accountability on behalf of the people. Disclosure to all 535 Members of Congress would increase the risk of disclosure to the public.\textsuperscript{162} To minimize this cost, disclosure could be limited to a set of relevant congressional committees or committee members.\textsuperscript{163}

In disclosing to congressional committees, adjusting the level of detail of legal opinions can affect costs of disclosure. Disclosing full legal opinions would promote the most opportunity for accountability because detailed legal opinions would allow Congress to see the facts of the programs, how the law applies to them, and how the Executive interprets authorities. This would give Congress the best opportunity to adjust programs and legislate with specificity. However, it would also entail more costs than disclosing vague, redacted, or summarized legal opinions.

If the executive branch must only disclose the generic legal basis for an intelligence activity or an opinion with limited details, then the reporting requirement is less likely to discourage attorneys from providing full and frank legal advice or informal instead of written legal advice (that is, “two-track” legal advice). In short, disclosing fewer details would infringe less on the Executive’s pre-decisional deliberative space.

Perhaps for these reasons the current reporting requirement under 50 U.S.C. § 3109 only requires summaries of significant legal interpretations to be disclosed. The proposed legislation outlined above would similarly call for disclosure to the relevant congressional committees of summaries of legal opinions on a specific category of intelligence activities. Disclosure of full legal opinions would necessarily implicate executive privilege (particularly presidential communications privilege) and would have a higher likelihood of imposing costs to the Executive’s deliberative space, though such an option could be warranted for a narrow category of sensitive activities and if the Executive waived the privilege.

Adjusting the timing and scope of disclosure can both help mitigate the costs of disclosing the executive branch’s legal reasoning to Congress. Given it is impossible to know the magnitude of the costs and benefits up front, such adjustments could help make disclosure more palatable. Yet we might also consider other ways to achieve the functions that disclosure of legal opinions to Congress serves.


\textsuperscript{163} Those committees are typically the Senate Select Committee on Intelligence, the Senate Committee on the Judiciary, the House Permanent Select Committee on Intelligence, and the House Judiciary Committee.
B. Functions Served by Disclosure

1. Helping Congress Exercise Its Legislative and Oversight Functions

If the goal is to aid Congress in exercising its legislative and oversight functions, then disclosure directly to Congress is the best choice. However, there may be second-best alternatives to provide information to Congress without incurring some of the costs that result from disclosure of legal reasoning on national security issues outside of the executive branch. One possibility is the Privacy and Civil Liberties Oversight Board.

PCLOB (or the “Board”) is an independent executive agency charged with ensuring that counterterrorism actions are “balanced with the need to protect privacy and civil liberties” and that “liberty concerns are appropriately considered” in developing and implementing counterterrorism law and policy.164 Congress created PCLOB in 2004 based on recommendations from the 9/11 Commission. In 2007, Congress made the Board an independent agency within the executive branch.165

In practice, this means that the Board can serve as an oversight proxy and filter information to Congress.166 Because PCLOB sits within the executive branch, it has access to pre-decisional and other materials that would otherwise be subject to executive privilege. Because it evaluates programs across various agencies, it has access to some of the nation’s top secrets. PCLOB successfully negotiated with the White House for the right to report to Congress without White House clearance. PCLOB can thus collect and evaluate information on intelligence activities and their legal justifications from within the executive branch and then report to Congress.

PCLOB has so far issued reports on two counterterrorism programs: the NSA’s bulk collection of Americans’ telephone records under section 215 of the USA PATRIOT Act and the collection of communications targeting foreigners abroad under section 702 of FISA.167 In issuing these reports to Congress and the public, PCLOB obtained broad access to various actors across the intelligence community, from top officials to

166 One could argue that Congress should not have to get its information from an independent agency within the executive branch. While the PCLOB may provide a useful role in offering opinions on the law and policy of surveillance programs, Congress should not have its information filtered through this quasi-judicial executive branch agency.
attorney-advisers and computer scientists. The PCLOB reports analyzed overlapping authorities and synthesized highly technical information to provide comprehensive analysis on the operations of these surveillance programs. The reports helped the public understand the intelligence programs conducted in their name and helped Congress evaluate—and, in the case of section 215, abolish—certain surveillance authorities.

PCLOB thus offers a possible model for helping Congress exercise its legislative and oversight functions over intelligence activities. Acting as a “think tank” within the executive branch that reports to Congress, PCLOB can help Congress understand what programs the executive branch conducts and how it interprets its authorities so that Congress can amend or cancel such authorities with necessary specificity. If PCLOB exercises care in writing reports, this process can reduce the possible cost to the Executive’s deliberative space.

PCLOB is not free from tradeoffs, however. First, PCLOB’s ability to gather information is more limited than Congress’s powers. Several limitations hinder its effectiveness. The Board’s jurisdiction is limited to counter-terrorism. Despite growth over the past several years, the Board has relatively few resources: as of 2016, only one full-time member (the chair), 37 full-time staff, and a $10.1 million budget.\textsuperscript{168} The Board must pass through the Office of Management and Budget when submitting budget requests to Congress.\textsuperscript{169} In conducting reviews, the Board cannot issue subpoenas directly but must request the Attorney General to do so on its behalf.\textsuperscript{170}

One could envision reforms that would increase PCLOB’s independence. Congress could expand PCLOB’s jurisdiction beyond counter-terrorism actions to foreign intelligence, make all members full-time, and increase the Board’s budget and staff. Budgets could also be submitted directly to Congress, and the Board could be granted direct subpoena authority. The President’s Review Group recommended adopting some of these changes and creating a new and strengthened Civil Liberties and Privacy Protection Board (“CLPP Board”).

Expanding the PCLOB’s jurisdiction, resources, and authority would require significant legislation, which Congress may not be able to enact. Congress created PCLOB following the 9/11 Commission Report as part of a legislative compromise in expanding executive power over national security. Now that the dust has settled since Edward Snowden’s unauthorized disclosures, it remains unclear whether Congress has the motivation to undertake large institutional reforms of this nature. Congress passed


\textsuperscript{170} 42 U.S.C. § 2000ee(g)(2).
the USA FREEDOM Act and President Obama issued Presidential Policy Directive 28, but neither of these initiatives involved institutional reform. Absent another security crisis, Congress may be unlikely to act on the scale required. By contrast, tucking additional reporting requirements into intelligence authorization acts may be more politically feasible.

Second, the PCLOB model could amplify the risk of leaks. Because PCLOB reviews programs across multiple agencies, the process concentrates classified information in one small agency. Any leak or breach of security at PCLOB could thus damage national security at least as much as a leak from the intelligence or judiciary committees in Congress.

Third, the PCLOB model may decrease the political accountability of Congress. If PCLOB comes to take primary responsibility for reviewing intelligence activities and their legal justifications within the executive branch, then Members of Congress have more leeway to shirk their oversight responsibilities by claiming inadequate briefing or PCLOB’s errors in factfinding or analysis. This problem may be amplified because PCLOB has issued decisions that divide on party lines.

2. Improving Political Accountability of Congress

Are there ways to improve the political accountability of Congress besides disclosing executive branch legal opinions? One solution might be to reform the composition of the intelligence committees. Currently, the committees include members from the armed services and foreign affairs committees. Requiring membership from Senators and Representatives who oversee other interest groups—for instance, 


172 The report on section 215 was not unanimous; the two Republican members dissented from the report’s most significant conclusions. In separate opinions, Rachel Brand and Elisebeth Collins Cook disagreed with the Board’s conclusion that the telephone metadata program was not legally authorized and that it should be shut down. PCLOB 215, supra note 167, at 208–13 (separate statement of Rachel Brand); id. at 214–18 (separate statement of Elisebeth Collins Cook). With regard to section 702, the Board concluded unanimously that the program was statutorily authorized, subject to judicial and internal oversight, and “valuable and effective in protecting the nation’s security and producing useful foreign intelligence.” PCLOB 702, supra note 167, at 2. However, the Board appears to have narrowly construed or avoided certain issues in order to achieve unanimity. See Shirin Sinnar, Institutionalizing Rights in the National Security Executive, 50 Harv. C.R.-C.L. L. Rev. 289, 321 (2015) (making this argument). The report’s constitutional analysis concluded that the “core” of the surveillance program was reasonable under the Fourth Amendment but that certain aspects “push the entire program close to the line of constitutional reasonableness.” PCLOB 702, supra note 167, at 97. But these aspects—“the scope of the incidental collection of U.S. persons’ communications” and the search for U.S. persons within data collected—are arguably central to any understanding of the program’s constitutionality. Id. at 96. The report also avoided the question of privacy protections for non-U.S. persons, deferring the issue for future review. Id. at 98–100. That the Board issued separate opinions on crucial issues and avoided others in order to reach unanimity may give the impression that the legality of government action is up for grabs.
telecommunications firms—could enable organized interest groups to exert more pressure on committee members to exercise their oversight powers.

Congress has at times shown willingness to exert vigorous legislative constraints on executive power when political pressure prompts it to do so. With the Department of Defense appropriations acts, Congress effectively prevented the President from transferring Guantánamo detainees to the United States, and in response to reports of abuse of enemy combatant detainees, the McCain Amendment to the Detainee Treatment Act of 2005 prohibits cruel, inhumane, or degrading treatment of anyone in U.S. custody.173 Thus, while “in the modern era executive officials have arguably acted more in the Madisonian model than have legislative actors,”174 Congress has recently passed strong restrictions on executive power when political winds driven it to do so.175 Reforming the jurisdictional composition of congressional committees could encourage committee members to respond to political pressures to exercise more oversight over the executive branch.

3. Forcing Ex Ante Deliberation in the Executive Branch

Perhaps the most important value served by disclosing executive branch legal opinions underlying intelligence activities is forcing more ex ante deliberation. However, there may be other ways to promote this objective without incurring the costs of impinging on deliberative process and incentivizing executive evasion in the form of two-track legal advice.

Scholars have proposed various ways of increasing internal checks within the executive branch. An inter-agency consultation requirement would ensure that all interested equities be involved in a given decision. Debate among interested parties with different views encourages better decision making.176 An intra-agency consultation requirement would encourage more deliberation before brainstorming or approving policy decisions. For example, David Barron formalized in a memorandum a “two-deputies” rule to ensure that OLC finalizes opinions only after rigorous internal review.177 In the same vein, Dakota Rudesill has suggested raising and centralizing the standards for any document to carry the force of law on national security issues within the executive branch: signature by the President or Attorney General, review by the

174 See id.
175 See id.
176 See Neal Kumar Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2317 (2006) (“When the State and Defense Departments have to convince each other of why their view is right . . . better decision-making results.”).
National Security Council’s inter-agency lawyers’ working group, or sanctioned by OLC with a signature from two deputies. Such requirements can minimize the risk of both incautious and overbroad legal reasoning and unwise policy decisions. Neal Katyal has proposed other ways to encourage internal deliberation. The State Department’s “Dissent Channel” allows Foreign Service Officers to raise policy disagreements directly with the Policy Planning Staff (which reports directly to the Secretary of State) without fear of reprisal. The dissent channel model could be expanded to the intelligence community so as to encourage frank internal deliberation without the cost of external leaks.

Another possible mechanism for forcing more ex ante deliberation is the creation of additional offices within the executive branch to represent specific interests. Shirin Sinnar has analyzed the growth of institutions within the executive branch charged with monitoring individual rights and liberties. Integrated into the national security establishment, these offices are charged with advising on policy formulation. Based on an analysis of the Civil Rights and Civil Liberties Office of the Department of Homeland Security, she argues that internal privacy offices struggle to promote privacy rights within the national security establishment.

She catalogues several reasons why these offices have not managed to reform national security policy significantly. Considered second-tier legal offices, privacy offices do not have the stature to challenge effectively primary general counsel offices or OLC. If internal advisors on privacy rights are tasked with aiding the Executive “balance” national security and privacy, she notes that new or uncertain questions will tend to be resolved in favor of security. Classification restrictions mean such internal offices may have little ability to leverage support outside of the Executive. There is also the problem of mission drift—that is, when internal offices adopt security concerns as their primary focus. Ultimately, Sinnar concludes that “rights-oversight institutions . . . face considerable limitations in shaping executive legal interpretations on contested questions of powers and rights,” and that “internal advisors will often be relegated to suggesting changes around the edges of policies—perhaps minor procedural reforms to

181 See id. at 307.
182 Id. at 332–33.
183 Id. at 346–56.
184 Id. at 292.
improve documentation of how a power is used, rather than constriction of the power itself.”

Whether these institutions are effective depends on the desired outcome in forcing ex ante deliberation. Sinnar assumes that substantial reform is necessary and desirable to make the national security state more attentive to privacy concerns, and she therefore laments that these internal privacy offices have not managed to reform national security policy. However, if the goal in forcing ex ante deliberation is not bolstering privacy but rather promoting reason over caprice and law compliance, then these offices could be seen as successful. Thus, by providing an alternative voice within the executive branch at the policy formulation stage that forces some additional deliberation before proceeding with an intelligence activity, these offices may usefully complement direct congressional oversight without incurring some of the costs of disclosing legal opinions to congressional committees.

CONCLUSION

This Article examined a perennial problem facing democratic government: how to manage the tension between secrecy and accountability with regard to intelligence activities. The Article examined this tension through the lens of reporting requirements. Congress has increasingly turned to reporting requirements to improve accountability for intelligence activities. I described new reporting requirements enacted that require disclosure of classified information and legal reasoning related to national security. I assessed their significance in light of prior precedent, analyzed their costs and benefits, and considered alternatives.

Ultimately, reporting requirements do not resolve the tension between secrecy and accountability; they merely shift it. Requirements that the executive branch disclose classified information and legal reasoning to Congress have benefits and costs: these requirements increase accountability, but they also encroach on deliberative process and encourage executive evasion via informal legal advice.

In a democracy, the tension between secrecy and accountability never disappears. Indeed, this tension never should disappear, for it would signal either absolute harm to accountability and self-governance or total damage to national security. Reporting requirements are just one tool for managing the tension between secrecy and accountability. Managing this tension most effectively requires thinking about the specific values to be served, whether helping Congress exercise its legislative and oversight functions, improving the political accountability of Congress, or forcing more ex ante deliberation within the executive branch. While adjusting the timing and

185 Id. at 333.
scope of disclosure can make reporting requirements more palatable, other laws, policies, and agency designs offer potential to promote these desired values without incurring as many costs.