

NOTES

HISTORICAL GLOSS AND CONGRESSIONAL POWER: CONTROL OVER ACCESS TO NATIONAL SECURITY SECRETS

*Jared Cole**

THE executive branch frequently invokes the state secrets privilege to shield its actions from judicial scrutiny. Since 9/11, courts have dismissed suits challenging the extraordinary rendition and warrantless wiretapping programs on state secrets grounds, often based solely on the government's declaration that the privilege applies.¹ In an effort to curtail this practice, the State Secrets Protection Act ("SSPA"), introduced in the House of Representatives on June 18, 2012,² amends the Federal Rules of Evidence to regulate the privilege's invocation. Its provisions, however, have received criticism for intruding on the President's "inherent power"³ in Article II to control access to national security information.⁴ For example, in a 2008 letter to the Senate Judiciary Commit-

* J.D. 2013, University of Virginia School of Law; B.A. 2007, Wheaton College. I would like to thank John Harrison for his help in developing this Note. Thank you also to the editorial board of the *Virginia Law Review*. Finally, thanks to my family for their steadfast support.

¹ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087–89 (9th Cir. 2010) (affirming the dismissal at the pleadings stage of a claim challenging the extraordinary rendition program); *El-Masri v. United States*, 479 F.3d 296, 311, 313 (4th Cir. 2007) (same); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 919–20 (N.D. Ill. 2006) (dismissing at the pleadings stage a claim against AT&T's disclosure of telephone records to the government). See also William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 *Pol. Sci. Q.* 85, 101 (2005) ("In less than one-third of reported cases in which the privilege has been invoked have the courts required *in camera* inspection of documents."). But see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *Geo. Wash. L. Rev.* 1249, 1300 (2007) (arguing that empirical data on the state secrets privilege is prone to "the selection bias inherent in any assessment based exclusively on published opinions").

² State Secrets Protection Act, H.R. 5956, 112th Cong. (2012).

³ Memorandum from Alberto R. Gonzales, Attorney General, to Honorable William H. Frist, Majority Leader, United States Senate, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President 7* (Jan. 19, 2006), available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter *Gonzales Memo*].

⁴ See, e.g., *State Secret Protection Act of 2009: Hearing on H.R. 984 before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the House Committee on the Judiciary*, 111th Cong. 74, 76 (2009) [hereinafter *Hearing*] (statement of Andrew M. Grossman, Senior Legal Policy Analyst, Heritage Foundation) (arguing that since "the state secrets privilege is

tee, the Justice Department argued that: (1) the privilege is rooted in the Constitution—not the common law—so Congress may not regulate its use; and (2) assigning control over the disclosure of national security secrets to the judiciary, rather than the executive branch, violates the separation of powers.⁵ The Obama administration has taken a similar—though less confrontational—stance, arguing that the privilege “performs a function of constitutional significance,”⁶ reflecting the President’s duty “as head of the Executive Branch and as Commander in Chief”⁷ to protect state secrets.

These claims reflect a position often articulated by the executive branch—that the President enjoys broad constitutional authority as Commander in Chief to operate free from congressional regulation.⁸ Typically, the executive branch supports this notion of presidential power by pointing to historical practice, relying for support on Justice Frankfurter’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which emphasized that historical practice may serve as a “gloss” on the scope of presidential power.⁹ The Obama administration, for example, defended the constitutionality of its operation in Libya by pointing to consistent

grounded in the powers committed to the President in Article II of the Constitution,” the SSPA “run[s] roughshod over the separation of powers”); Lindsay Windsor, *Is the State Secrets Privilege in the Constitution? The Basis of the State Secrets Privilege in Inherent Executive Powers & Why Court-Implemented Safeguards Are Constitutional and Prudent*, 43 *Geo. J. Int’l L.* 897, 918 (2012) (“[R]ecently proposed legislation regulating the privilege would exceed the constitutional authorities of Congress if passed.”).

⁵ Letter from Michael Mukasey, Attorney General, to Honorable Patrick Leahy, Chairman, S. Comm. on the Judiciary 2–3 (Mar. 31, 2008), available at www.loufisher.org/docs/ssp/448.pdf [hereinafter Mukasey Letter].

⁶ Redacted, Unclassified Brief for United States on Rehearing En Banc at 16, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693) [hereinafter Unclassified Brief] (quoting *El-Masri*, 479 F.3d at 303).

⁷ Brief for the United States in Opposition at 11, *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011) (No. 10–778) [hereinafter Cert Petition] (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1998)).

⁸ See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *The Torture Papers: The Road to Abu Ghraib* 172, 207 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

congressional acquiescence to presidential uses of military authority.¹⁰ Thus far, however, while many scholars have examined the implications of congressional acquiescence to executive actions, the subject of executive branch deference to congressional regulations is comparatively underexplored. Inverting traditional historical gloss arguments, this Note argues that consistent executive branch compliance with congressional regulations demonstrates the inherent constitutionality of such legislation. In this case, the executive branch's claim that the SSPA unconstitutionally intrudes on the President's Article II power is undercut by extensive historical practice. Congress has routinely enacted substantially similar provisions to those in the SSPA, passing legislation such as the Classified Information Procedures Act ("CIPA"),¹¹ the Foreign Intelligence Surveillance Act ("FISA"),¹² and the Freedom of Information Act ("FOIA").¹³ The executive branch has consistently complied with these statutes, and the judiciary has regularly applied them.¹⁴ Consequently, insofar as the SSPA mirrors the provisions of previous legislation, it is likely constitutional. But, to the extent that it compels executive branch disclosure of state secrets beyond past practice, such requirements might restrict a preclusive presidential power.

Part I of this Note sketches the general contours of conflicts between Congress and the executive branch, and explains the "preclusive/peripheral" distinction used to analyze the scope of Congress's ability to cabin presidential authority. Part II describes the background of the state secrets privilege, explores its foundations, and briefly notes the

¹⁰ Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Attorney General, Authority to Use Military Force in Libya 7, 14 (Apr. 1, 2011) [hereinafter Krass Memo], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

¹¹ 18 U.S.C. app. 3 §§ 1–16 (2006).

¹² 50 U.S.C. §§ 1801–1811 (Supp. V 2012).

¹³ 5 U.S.C. § 552 (Supp. V 2012).

¹⁴ The executive branch has submitted classified information for in camera judicial review under both CIPA, for example, *United States v. Hanna*, 661 F.3d 271, 280 (6th Cir. 2011); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984), and under FISA, for example, *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982); *United States v. Falvey*, 540 F. Supp. 1306, 1316 (E.D.N.Y. 1982). The executive branch has also complied with FOIA, see, for example, *Cox v. Levi*, 592 F.2d 460, 463 (8th Cir. 1979); and the judiciary has ordered disclosure of materials that the executive branch has initially claimed were exempt for national security reasons, see, for example, *Silets v. Fed. Bureau of Investigation*, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (holding that the FBI must submit certain documents withheld under national security exemption for in camera review).

provisions of the SSPA. Part III argues, first, that regardless of its foundation, Congress has authority to regulate the privilege. Second, insofar as the executive branch has historically acquiesced to the legislature, the SSPA does not unconstitutionally intrude on any executive branch power. However, any novel provisions that depart from past practice could raise constitutional questions.

I. PRECLUSIVE PRESIDENTIAL POWER

Mapping the precise contours of presidential power has occupied substantial scholarly interest. Thus far, so-called *Youngstown* category two disputes—“[w]hen the President acts in absence of either a congressional grant or denial of authority”¹⁵—have received the most coverage.¹⁶ Since “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power,’”¹⁷ congressional deference to the executive branch can effectively expand the scope of presidential power. Where national security is concerned, scholars divide on whether such deference—seen a number of times in American politics—properly balances society’s security and liberty interests. Supporters of expansive presidential power highlight the executive branch’s information advantage in national security matters,¹⁸ while opponents urge increased congressional action to protect individual rights.¹⁹ Of course, this schol-

¹⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (describing the scope of presidential power within three analytical categories).

¹⁶ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689, 693 (2008). See also Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 262–97 (Randall W. Bland et al. eds., 5th ed. 1984) (discussing previous wars and the actions Presidents have taken without congressional grants of approval or denial); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 34–46 (1993) (exploring whether Congress authorized the 1973 bombing of Cambodia); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (1990) (using the Iran-Contra Affair to examine relationships between the branches).

¹⁷ *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

¹⁸ See, e.g., Eric Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, & the Courts* 4–6 (2007) (“[T]he executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security.”); Eric Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 *Va. L. Rev.* 1091, 1104 (2006) (contending that “judges’ information is especially poor” in national security emergencies).

¹⁹ See, e.g., Bruce Ackerman, *Essay, The Emergency Constitution*, 113 *Yale L.J.* 1029, 1047–49, 1060–61 (2004); Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *U. Pa. J. Const. L.* 1001, 1003 (2004); William

arship examines presidential activity when Congress is passive; it does not address situations where presidential actions conflict with congressional statutes.

The objections against the SSPA raise just this question, placing a potential conflict in *Youngstown*'s category three: when the President acts in violation of the will of Congress. According to Justice Jackson, the President acts here at the "lowest ebb" of his authority, and must "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."²⁰ Consequently, were the President to defy duly enacted statutes regulating the state secrets privilege, he would have to rely for support on some sphere of authority beyond congressional control. Recently, Professors David Barron and Martin Lederman offered a helpful framework to address this murky area of presidential power, distinguishing between peripheral and preclusive Article II powers.²¹ Particularly in national security matters, they envision substantial overlapping authority between all three branches of government, "reject[ing] the idea that there are clear lines of demarcation establishing the proper domain of each branch."²² Their approach recognizes, however, that some presidential powers might be immune from congressional regulation. While the President's *peripheral* powers are subject to statutory regulation, *preclusive* ones constitute the "core" of executive power, "establish[ing] not only a power to act in the absence of legislative authorization, but also an infeasible scope of discretion."²³

Accordingly, the preclusive/peripheral framework rejects as formalistic a number of "war powers" theories that attempt to explain away potential *Youngstown* category three conflicts as illusory. For instance, some argue that Congress must automatically prevail in any supposed category three dispute because the Commander in Chief clause merely conveys hierarchical, rather than substantive, authority.²⁴ The President,

Scheuerman, Survey Article: Emergency Powers and the Rule of Law after 9/11, 14 J. Pol. Phil. 61, 67 (2006).

²⁰ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²¹ Barron & Lederman, *supra* note 16, at 726–29.

²² *Id.* at 726.

²³ *Id.*

²⁴ See David Gray Adler, George Bush as Commander in Chief: Toward the Nether World of Constitutionalism, 36 Presidential Stud. Q. 525, 526–29 (2006) (arguing that the President has no military power [other than the ability to repel invasions] "that cannot be stripped by congress"—the Commander in Chief clause merely bestows the power of "first General" in situations where Congress has already authorized military action); see also Richard A. Ep-

on this view, enjoys no completely independent power over national security beyond the superintendence of the military. Others adopt precisely the opposite conclusion, claiming that since the legislative and executive powers are “strictly segregated and cannot overlap,”²⁵ Congress does not have authority under Article I to restrict the President’s conduct of war.²⁶ The President’s power under the Commander in Chief clause, the theory posits, is simply not subject to congressional restrictions. As Barron and Lederman point out, however, the first argument ignores a number of independent presidential powers that, at a minimum, may be exercised without congressional authorization.²⁷ The Supreme Court has long recognized, for example, that the President has independent authority to authorize spies to obtain intelligence about the enemy.²⁸ The second argument is similarly overdrawn, ignoring a number of Supreme Court cases affirming congressional regulations—pursuant to Article I—that overlap with Article II powers.²⁹ Most recently, the Court in *Hamdan v. Rumsfeld* invalidated the Bush administration’s use of military commissions because their procedures conflicted with congressional statute.³⁰ The preclusive/peripheral framework also rejects the notion that the President enjoys plenary authority over foreign affairs, such that all statutes regulating presidential discretion with the outside world are unconstitutional. This view ignores Congress’s constitutional power to declare war,³¹ regulate foreign commerce,³² and control immigration.³³

stein, Executive Power, the Commander in Chief, and the Militia Clause, 34 Hofstra L. Rev. 317, 321 (2005).

²⁵ Barron & Lederman, *supra* note 16, at 733.

²⁶ See, e.g., Michael Stokes Paulsen, The Emancipation Proclamation and the Commander in Chief Power, 40 Ga. L. Rev. 807, 825–29 (2006); John Yoo, Transferring Terrorists, 79 Notre Dame L. Rev. 1183, 1201–02 (2004). The Bush administration has argued that Congress lacks any affirmative Article I power to enact FISA. Letter from William E. Moschella, Assistant Attorney General, to Sen. Charles Schumer, Comm. on Judiciary 2 (July 10, 2006), available at <http://lawculture.blogs.com/lawculture/files/NSA.Hamdan.response.schumer.pdf>.

²⁷ Barron & Lederman, *supra* note 16, at 730–31.

²⁸ *Totten v. United States*, 92 U.S. 105, 106 (1875).

²⁹ Barron & Lederman, *supra* note 16, at 732–36. See, e.g., *Loving v. United States*, 517 U.S. 748, 767–68 (1996); *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

³⁰ 548 U.S. 557, 567 (2006).

³¹ U.S. Const. art. I, § 8, cl. 11. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (“Congress, to be sure, has a substantial and essential role in both foreign affairs and national security.”).

³² U.S. Const. art. I, § 8, cl. 3.

³³ Barron & Lederman, *supra* note 16, at 743–44; *Fong Yue Ting v. United States*, 149 U.S. 698, 713–14 (1893) (recognizing Congress’s plenary power over immigration policy).

Youngstown category three disputes, therefore, can be analyzed by investigating whether the congressional regulations at issue intrude on a preclusive presidential power. However, while the preclusive/peripheral framework is a helpful analytical tool for examining conflicts, it does not answer *which* presidential powers are immune from congressional regulation. What, exactly, differentiates preclusive powers from peripheral ones? While the Supreme Court is largely silent on this subject, its approach to statutes aiming to cabin the President's removal power sheds some light on the matter by recognizing a preclusive sphere of executive discretion that is immune from congressional regulation.

In short, the Constitution permits the appointment of officers to carry out the duties of the executive branch, and the Supreme Court has long recognized a concomitant presidential power to hold those officers accountable by removing them if necessary.³⁴ Congress may impose certain restrictions on the President's exercise of this power. For example, Congress may create independent agencies whose heads cannot be removed except for good cause³⁵ and may impose similar restrictions on the power of department heads to remove their own inferiors.³⁶ However, the President must retain a certain measure of control over executive officers, and restrictions that interfere with this preclusive aspect of presidential power are unconstitutional. Congress may not, for example, combine these two features—for instance, by imposing restrictions on the President's power to remove principal officers, who are themselves restricted in their power to remove inferiors.³⁷

The Supreme Court distinguished between the preclusive and peripheral aspects of the President's removal power in *Morrison v. Olson*.³⁸ In that case, the Court examined the constitutionality of the Ethics in Government Act, which permitted the appointment of an independent counsel to investigate executive branch officers.³⁹ The independent counsel was appointed by a special court and was removable by the Attorney General only for good cause—provisions that, the appellees argued, rendered the statute unconstitutional.⁴⁰ Relying on the Court's analysis in

³⁴ *Myers v. United States*, 272 U.S. 52, 176 (1926).

³⁵ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

³⁶ *United States v. Perkins*, 116 U.S. 483, 485 (1886).

³⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010).

³⁸ 487 U.S. 654 (1988).

³⁹ *Id.* at 659–60.

⁴⁰ *Id.* at 663, 666–68.

Humphrey's Executor v. United States, the appellees argued that the constitutionality of restrictions on the President's removal power turned on whether the officer in question performed a "purely executive" function—if so, the President enjoyed an unlimited power of removal.⁴¹ In contrast, appellees argued, restrictions were only permissible when applied to officials who performed "quasi-legislative" or "quasi-judicial" functions.⁴² The Court, however, explained that its removal power doctrine was not intended to "define rigid categories" of officials who are removable at will by the President.⁴³ Instead, its analysis aimed to prevent Congress from "interfer[ing] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."⁴⁴

Accordingly, the crucial question for examining the good cause removal restriction was not whether the official in question performed an executive function—which she did—but instead "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."⁴⁵ Although the independent counsel exercised significant authority in carrying out her own statutory responsibilities, the Court reasoned that the President's need to monitor the "exercise of that discretion" was not "so central to the functioning of the Executive Branch" that the independent counsel must be removable at the President's will.⁴⁶ Since the counsel could still be removed for good cause, the Attorney General retained sufficient power to ensure that the counsel "competently perform[ed] his or her statutory responsibilities."⁴⁷

In addition, the Act's overall structure did not violate the separation of powers by obstructing the exercise of a preclusive executive branch power. The Court did acknowledge that the legislation "reduced[ed] the amount of control" that the President—and the Attorney General—enjoyed over a traditional executive branch function, since the Attorney General could not appoint an independent counsel of his own choosing or remove the counsel except for cause.⁴⁸ However, these restrictions did not infringe on the preclusive aspect of the President's removal power.

⁴¹ Id. at 688–89.

⁴² Id.

⁴³ Id. at 689.

⁴⁴ Id. at 690 (quoting U.S. Const. art. II, § 3, cl. 5).

⁴⁵ Id. at 691.

⁴⁶ Id.

⁴⁷ Id. at 692.

⁴⁸ Id. at 695.

The Attorney General retained discretion to decide whether to request the appointment of an independent counsel in the first place, power to remove the counsel for cause, and some control over the counsel's jurisdiction, since its scope "must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation."⁴⁹ In light of these factors, the Court ruled that the executive branch retained "sufficient control over the independent counsel to ensure that the President [was] able to perform his constitutionally assigned duties."⁵⁰

In sum, the President enjoys some preclusive power to remove executive branch officers, though the scope of this authority is unclear. Objections to congressional restrictions on the President's removal power must—in order to succeed—prove that the limitations interfere with the President's preclusive responsibility to "take care that the laws [are] faithfully executed."⁵¹ Likewise, those who argue that the SSPA unconstitutionally intrudes on the President's Article II authority must prove that control over national security secrets is a preclusive—and not merely peripheral—presidential power. To do so, they must show that the SSPA's provisions "impede the President's ability to perform his constitutional duty,"⁵² a claim that, as we will see, is undercut by extensive historical practice.

II. THE STATE SECRETS DOCTRINE

The state secrets doctrine derives from two principal cases: *Totten v. United States*⁵³ and *United States v. Reynolds*.⁵⁴ Both cases allow the executive branch to protect privileged matters that implicate national security. *Totten* stands as a complete bar to litigation about espionage contracts with the government. When properly invoked, it results in dismissal of the case on the pleadings, preventing any further judicial inquiry into the matter. In contrast, *Reynolds* only bars privileged classified evidence from trial; the case may proceed as long as a plaintiff's claim can be established with alternative evidence. This Part first briefly describes these cases, then explores the foundations of the privilege, and concludes with a discussion of the SSPA's most important provisions.

⁴⁹ Id. at 679.

⁵⁰ Id. at 696.

⁵¹ U.S. Const. art. II, § 3, cl. 5.

⁵² *Morrison*, 487 U.S. at 691.

⁵³ *Totten v. United States*, 92 U.S. 105 (1875).

⁵⁴ *United States v. Reynolds*, 345 U.S. 1 (1953).

A. The Totten Bar and the Reynolds Privilege

Totten concerned a suit brought by a spy's (William A. Lloyd) estate against the United States to recover compensation for espionage activities conducted during the Civil War.⁵⁵ Lloyd allegedly entered into a contract with President Lincoln to spy on the Confederate army in exchange for \$200 per month.⁵⁶ Lloyd met his portion of the contract, but the government failed to pay his monthly salary.⁵⁷ The Supreme Court assumed, without deciding, that the President had authority to enter into such contracts, but dismissed the case because "the contract was a secret service."⁵⁸ The Court analogized the case to matters protected by confidential privileges: Just as suits may not reveal matters protected by the attorney-client or patient-doctor privilege, claims based on a spy's employment would violate the secret nature of the contract.⁵⁹ Litigation could reveal sensitive information and "compromise or embarrass our government in its public duties."⁶⁰ The Court noted that both parties "must have understood" that the nature of the agreement mandated confidentiality.⁶¹ If claims premised on espionage contracts were permitted, then any purported spy could endanger the entire national security infrastructure by threatening to bring suit against the government.⁶² The CIA would be forced to settle, rather than reveal confidential information that would compromise national security. Consequently, "public policy forbid[s]" suits premised on the existence of espionage contracts.⁶³

Reynolds, involving a tort claim against the government, was brought by the widows of three civilians killed in a B-29 aircraft crash.⁶⁴ The plaintiffs moved for production of the Air Force's official accident report, but the government opposed the motion, arguing that Air Force regulations rendered the materials privileged.⁶⁵ Before the Supreme Court, the government argued that the executive branch possessed unilateral authority to withhold documents from judicial review, and the

⁵⁵ *Totten*, 92 U.S. at 105–06.

⁵⁶ *Id.*

⁵⁷ *Id.* at 106.

⁵⁸ *Id.* at 106–07.

⁵⁹ *Id.* at 107.

⁶⁰ *Id.* at 106.

⁶¹ *Id.*

⁶² *Id.* at 106–07.

⁶³ *Id.* at 107.

⁶⁴ *Reynolds*, 345 U.S. at 2–3.

⁶⁵ *Id.* at 3–4.

plaintiffs responded by arguing that the Tort Claims Act waived any such discretion.⁶⁶ However, the Court rejected both “broad propositions,”⁶⁷ and relied instead on the “privilege against revealing military secrets . . . which is well established in the law of evidence.”⁶⁸

Deciding whether the privilege actually applied to particular evidence was a murkier matter. Without much precedent to guide its analysis, the Court turned to the “sound formula of compromise,”⁶⁹ developed by the “analogous privilege . . . against self-incrimination.”⁷⁰ That doctrine guides courts to probe the evidence without disclosing “the very thing the privilege is designed to protect.”⁷¹ Accordingly, while courts should not “automatically require a complete disclosure” whenever the privilege is raised, “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁷² Of course, sometimes “all the circumstances of the case” would reveal “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”⁷³ In that situation, “the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone.”⁷⁴ Therefore:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.⁷⁵

⁶⁶ Id. at 6.

⁶⁷ Id.

⁶⁸ Id. at 6–7.

⁶⁹ Id. at 9.

⁷⁰ Id. at 8.

⁷¹ Id.

⁷² Id. at 9–10.

⁷³ Id. at 10.

⁷⁴ Id.

⁷⁵ Id. at 11.

In the case at hand, the plaintiffs' claim of necessity was "dubious" because they failed to investigate an alternative non-privileged source of evidence—the crewmembers that survived.⁷⁶ In light of the government's formal claim of privilege, the Court reversed the disclosure order, and remanded the case to proceed on the basis of non-privileged evidence.⁷⁷

B. Foundation of the State Secrets Privilege

Originally, these cases were distinct, operating separately to shield privileged matters from disclosure. However, some courts have gradually merged the *Reynolds* privilege with the *Totten* bar, dismissing non-espionage contract claims that implicate national security at the pleading stage.⁷⁸ Initially, a *Reynolds* analysis consisted of (1) whether the privilege was correctly invoked procedurally, and (2) whether the privilege applied to particular evidence.⁷⁹ With increasing frequency in the last fifteen years, however, the government has argued—and some courts have agreed—that if the "very subject matter" of a plaintiff's claim is a state secret, whether or not the claim concerns an espionage contract, then the case should be dismissed at the pleadings.⁸⁰ Consequently, the state secrets privilege now often includes a third factor: how cases should proceed (if at all) when the privilege applies.⁸¹

⁷⁶ *Id.*

⁷⁷ *Id.* at 12.

⁷⁸ Christina E. Wells, *State Secrets and Executive Accountability*, 26 *Const. Comment.* 625, 637–38 (2010); cf. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *Fordham L. Rev.* 1931, 1939–40 (2007) ("[G]overnment officials increasingly rely on a footnote in *Reynolds* to weave *Totten*-like justiciability arguments into state secrets privilege assertions."). For examples of courts dismissing non-espionage cases at the pleading stage under the state secrets privilege, see, for example, *Trulock v. Lee*, 66 F. App'x 472, 473 (4th Cir. 2003); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992); *Bowles v. United States*, 950 F.2d 154, 155 (4th Cir. 1991); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004). The D.C. Circuit, however, has resisted merging the two doctrines. See, e.g., *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (reversing the district court's dismissal of the case on state secrets grounds, and allowing it to continue on the basis on non-privileged evidence).

⁷⁹ *Reynolds*, 345 U.S. at 7–8 (procedure); *id.* at 9–11 (application).

⁸⁰ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1078–79 (9th Cir. 2010) (quoting *Reynolds*, 345 U.S. at 11 n.26).

⁸¹ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 296, 306 (4th Cir. 2007) (dismissing a claim based on the government's "extraordinary rendition program" because the secrets at issue were "so central to the subject matter of the litigation that any attempt to proceed . . .

In part, this evolution reflects a disagreement over the nature of the privilege. Some assert a constitutional basis for it,⁸² while others describe it as a rule of evidence.⁸³ At the moment, there is a circuit split on the privilege's foundation. The Fourth Circuit, for its part, places weight on the "constitutional significance"⁸⁴ of the privilege, understanding the Supreme Court's opinion in *Department of the Navy v. Egan*⁸⁵ to explicitly locate constitutional power over the protection of national security information in the executive branch.⁸⁶ As such, the state secrets privilege protects against the potential constitutional conflict were the judiciary to force the executive to reveal military secrets.⁸⁷ Not surprisingly, the executive branch relies heavily on both cases to support its notion that the privilege reflects the President's constitutional authority as Commander in Chief.⁸⁸

In contrast, the Ninth and D.C. Circuits' application of the privilege lacks any constitutional overtones.⁸⁹ In *In re Sealed Case*, for example, the D.C. Circuit reversed the district court's dismissal of the case on state secrets grounds.⁹⁰ The district court had reasoned that since application of the privilege barred materials the government needed to make

threaten[ed] disclosure of the privileged matters"); *Fazaga v. FBI*, 884 F.2d 1022, 1035 (C.D. Cal. 2012) (explaining that the *Reynolds* privilege and *Totten* bar "converge in situations where the government invokes the [state secrets] privilege—as it may properly do—before waiting for an evidentiary dispute to arise during discovery or trial"); *Kasza v. Browner*, 133 F.3d 1159, 1166–67 (9th Cir. 1998).

⁸² Hearing, supra note 4, at 74; *Windsor*, supra note 4, at 914; *Mukasey Letter*, supra note 5, at 2–3.

⁸³ See, e.g., Am. Bar Ass'n, Report to the House of Delegates 1 (Revised Report 116A) (2007) ("The state secrets privilege is a common law evidentiary privilege that shields sensitive national security information from disclosure in litigation.").

⁸⁴ *El-Masri*, 479 F.3d at 303.

⁸⁵ 484 U.S. 518, 527 (1988).

⁸⁶ *El-Masri*, 479 F.3d at 303.

⁸⁷ *Id.* (citing *Reynolds*, 345 U.S. at 6).

⁸⁸ See, e.g., *Mukasey Letter*, supra note 5, at 3 (pointing to *El-Masri*, 479 F.3d at 303–04, for its holding that the state secrets privilege has a "firm foundation in the Constitution"); *Gonzales Memo*, supra note 3, at 6–7 ("Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces In this way, the Constitution grants the President inherent power . . . to protect national security information, see, e.g., *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).").

⁸⁹ See, e.g., *Mohamed*, 614 F.3d at 1079, 1092 (describing the privilege as a "judge-made doctrine" derived from the law of evidence); *Kasza*, 133 F.3d at 1165 (describing the privilege as a "common law evidentiary privilege").

⁹⁰ *Sealed Case*, 494 F.3d at 151–54.

a particular defense, the case could not proceed.⁹¹ However, the D.C. Circuit rejected this argument, explaining that the state secrets privilege should be applied no differently than traditional common law privileges.⁹² To allow it “to thwart a citizen’s efforts to vindicate his or her constitutional rights”⁹³ would violate “the Supreme Court’s caution against precluding review of constitutional claims . . . and against broadly interpreting evidentiary privileges.”⁹⁴

Supreme Court doctrine arguably does not recognize a constitutional foundation for the privilege, describing it instead as a product of the common law.⁹⁵ For example, the Court clarified the nature of the privilege in *General Dynamics Corp. v. United States*,⁹⁶ and possibly expanded the scope of *Totten*, albeit in rather narrow circumstances. In that case, after a federal contracting officer held government contractors in default and ordered the repayment of a substantial sum to the government, the contractors appealed in court.⁹⁷ The petitioners argued that their default was excused because the government failed to share its “superior knowledge” about how to build stealth aircraft.⁹⁸ The Court of Federal Claims found that any litigation of that affirmative defense was barred by the *Reynolds* privilege, but found petitioners to be in default nonetheless.⁹⁹

The Supreme Court vacated the decision and ruled that *Reynolds* was inapplicable.¹⁰⁰ The Court explained that the applicable standard was not “the procedural rules of evidence,” but the judiciary’s “common-law authority to fashion contractual remedies in Government-contracting disputes.”¹⁰¹ The authority for that was not *Reynolds*, but *Totten*.¹⁰² *Totten* rested on the “[p]ublic policy” against litigating the details of an espionage contract, because disclosure of the underlying relationship would

⁹¹ Id. at 148.

⁹² Id. at 149–50.

⁹³ Id. at 151.

⁹⁴ Id. (citations omitted). See *Webster v. Doe*, 486 U.S. 592, 603–04 (1988); *United States v. Nixon*, 418 U.S. 683, 710 (1974).

⁹⁵ See, e.g., *Reynolds*, 345 U.S. at 6–7.

⁹⁶ 131 S. Ct. 1900, 1906–10 (2011).

⁹⁷ Id. at 1905.

⁹⁸ Id. at 1904.

⁹⁹ Id. at 1905.

¹⁰⁰ Id. at 1910.

¹⁰¹ Id.

¹⁰² Id. at 1906–07.

compromise national security.¹⁰³ Rather than take such a risk, the Court left the parties “where we found them the day they filed suit.”¹⁰⁴ Likewise, in the case at hand, “[w]here liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense ‘would inevitably lead to the disclosure of’ state secrets, neither party can obtain judicial relief.”¹⁰⁵ However, while the Court’s opinion seems to expand the scope of the *Totten* bar to include all government contracts, the Court took great pains to explain the extremely narrow application of its holding:

In *Reynolds*, we warned that the state-secrets evidentiary privilege “is not to be lightly invoked.” Courts should be even more hesitant to declare a Government contract unenforceable because of state secrets. It is the option of last resort, available in a very narrow set of circumstances. Our decision today clarifies the consequences of its use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment.¹⁰⁶

Those that, like the Fourth Circuit, consider the state secrets privilege to reflect the constitutional power of the executive branch to protect national security secrets are likely to find congressional regulation of the privilege problematic.¹⁰⁷ In contrast, those that locate the privilege within the judiciary’s discretion to grant evidentiary privileges see such regulation as a straightforward application of congressional power.¹⁰⁸ However, this focus on the privilege’s foundation seems to be misplaced. The ultimate question is not where the privilege is located per se, but whether congressional regulation of the privilege intrudes on a preclusive presidential power. Even if the privilege is rooted in the Constitution, this Note argues that Congress may still regulate it, subject of course to any preclusive presidential power.

¹⁰³ Id. at 1906.

¹⁰⁴ Id.

¹⁰⁵ Id. at 1907 (quoting *Totten*, 92 U.S. at 107).

¹⁰⁶ Id. at 1910 (citations omitted) (quoting *Reynolds*, 345 U.S. at 7).

¹⁰⁷ Hearing, supra note 4, at 74, 76; Windsor, supra note 4, at 918.

¹⁰⁸ See, e.g., Am. Bar Ass’n, Report to the House of Delegates, supra note 83, at 1, 3–6.

C. The State Secrets Protection Act—Provisions

Courts' application of the state secrets privilege has met sustained scholarly and media criticism,¹⁰⁹ and the SSPA attempts to regulate its invocation. The legislation forbids granting the privilege based simply on government affidavits, mandating instead that courts examine the underlying evidence in camera "before determin[ing] whether the claim of privilege is valid."¹¹⁰ In order to properly assess the claim, courts may "order disclosure [of] . . . all information the Government asserts is protected by the privilege and other material related to the Government's claim."¹¹¹ The legislation also raises the standard required for the privilege to apply, rejecting the lower "reasonable danger"¹¹² test of *Reynolds*, and requiring that "public disclosure of the information that the Government seeks to protect . . . be reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States."¹¹³ In addition, it bars courts from granting summary judgment or resolving any claim until discovery is completed,¹¹⁴ essentially eliminating the judicial discretion to dismiss cases at the pleadings simply because the subject matter of a suit is a state secret.

The SSPA also contains a number of procedural provisions that largely mirror those in the Classified Intelligence Procedures Act.¹¹⁵ It permits courts to flexibly utilize a number of procedures to protect classified evidence, including: in camera proceedings, ex parte review of evidence and pleadings, issuance of protective orders, placing evidence under seal, and limitations on the participation of counsel.¹¹⁶ If a court "determines that the privilege is not validly asserted," then the court shall order disclosure of the information, subject to interlocutory appeal.¹¹⁷ Alternatively, if a "court finds that the privilege is validly assert-

¹⁰⁹ See, e.g., Louis Fisher, In the Name of National Security: Unchecked Presidential Power in the *Reynolds* Case 165–69 (2006); Robert M. Pallito & William G. Weaver, Presidential Secrecy and the Law 93–94 (2007); Editorial, Shady Secrets, N.Y. Times, Sept. 30, 2010, at A38; Editorial, Torture Is a Crime, Not a Secret, N.Y. Times, Sept. 9, 2010, at A30.

¹¹⁰ State Secrets Protection Act, H.R. 5956, 112th Cong. § 2(d)(4)(B) (2012) (referring to sections in the proposed Federal Rule of Evidence 503).

¹¹¹ Id. § 2(d)(4)(C).

¹¹² *Reynolds*, 345 U.S. at 10.

¹¹³ H.R. 5956, 112th Cong. § 2(a).

¹¹⁴ Id. § 2(f)(3).

¹¹⁵ Id. § 2(b), (c), (d), (e). See *infra* notes 173–82 and accompanying text.

¹¹⁶ Id. § 2(b)(1)–(3).

¹¹⁷ Id. § 2(f)(1).

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ed and it is possible to craft a nonprivileged substitute . . . that would provide the parties a substantially equivalent opportunity to litigate the case,” courts shall order the government to produce one.¹¹⁸ In cases where the government is the defendant, if “the Government fails to comply, . . . the court shall find against the Government” on that issue.¹¹⁹ However, the legislation makes no provision for suits based on espionage contracts, so its provisions presumably apply to all cases where the state secrets privilege is raised.

III. IS THE SSPA CONSTITUTIONAL?

Critics allege that the SSPA is unconstitutional on two primary grounds. First, they argue, Congress may not regulate the state secrets privilege because it is constitutionally rooted in the President’s Article II powers, not the common law.¹²⁰ This Part begins by noting that, even if the privilege is grounded in the Constitution, this does not prevent Congress from regulating its use. To the contrary, the Supreme Court has upheld numerous statutes that affect Article II powers, including legislation that cabins the President’s discretion in national security matters. Instead, the crucial inquiry is whether the legislation intrudes on a preclusive presidential power. Critics’ second argument is thus on firmer ground, claiming that the SSPA infringes on the President’s exclusive Article II power to control access to national security information.¹²¹ This Part continues by explaining, however, that this notion is undercut by extensive historical practice. Consistent with a number of statutes regulating access to national security information, courts have long exercised authority to examine classified evidence in camera, to review the executive branch’s privilege claims, and to order the release of records under FOIA. The executive branch’s longstanding compliance with these statutes demonstrates the inherent constitutionality of such legislation. However, to the extent that the SSPA’s provisions depart from historical practice, the President may retain some preclusive authority.

¹¹⁸ Id. § 2(f)(2)(A).

¹¹⁹ Id. § 2(f)(2)(B).

¹²⁰ See, e.g., Mukasey Letter, *supra* note 5, at 2–3.

¹²¹ See, e.g., *id.* at 3–4.

A. May Congress Regulate the Privilege at All?

Congress often enacts—and the Supreme Court upholds—statutes that affect Article II powers. Nevertheless, critics argue that because the state secrets privilege is grounded in the Constitution, and Congress may not alter the President’s constitutional responsibilities by statute, Congress may not legislate in this area.¹²² This assertion echoes a common claim advanced by supporters of expansive Presidential power: If the President has an independent or inherent Article II power, then it must be immune from congressional regulation; accordingly, powers conferred under the Commander in Chief clause cannot be restricted.¹²³ This proposition, however, ignores Justice Jackson’s declaration that “the question whether a power is ‘within [the President’s] domain’ is distinct from the question whether the exercise of that power is ‘beyond control by Congress.’”¹²⁴ The President’s mere possession of a power, by itself, does not imply “that statutes cannot temper his exercise of that power.”¹²⁵

For example, a number of Supreme Court cases recognize Congress’s authority to direct or modify Article II powers. Each case acknowledges some inherent executive power over the matter at issue, but nonetheless enforces congressional regulations that cabin the scope of the President’s discretion to act. In *Loving v. United States*, for example, the Supreme Court noted that “the President’s duties as Commander in

¹²² See, e.g., *id.* at 3. See also Hearing, *supra* note 4, at 74 (“Congress’s undisputed power to codify or even abrogate common-law privileges by statute cannot extend to altering to the Constitution’s assignments of authority and responsibility. Because it would radically restrict the authority of the President to safeguard military and diplomatic secrets and intelligence, the Act is likely unconstitutional.”).

¹²³ See Gonzales Memo, *supra* note 3, at 28–35 (arguing that since the President enjoys both inherent power and power under the Commander in Chief clause to engage in foreign intelligence surveillance, and statutes may not impede core constitutional obligations, FISA may not be read to restrict the President’s power to engage in foreign intelligence surveillance); Memorandum from John Yoo, Deputy Assistant Attorney General, Dep’t of Justice, Office of Legal Counsel, for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs 1 (June 27, 2002), available at <http://www.justice.gov/opa/documents/memo-detentionuscitizens06272002.pdf> (“[T]he President’s authority to detain enemy combatants, including U.S. citizens, is based on his constitutional authority as Commander in Chief. We conclude that section 4001(a) does not, *and constitutionally could not*, interfere with that authority.” (emphasis added)); Paulsen, *supra* note 26, at 824–29; Yoo, *supra* note 26, at 1201–02.

¹²⁴ Barron & Lederman, *supra* note 16, at 742 (quoting *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring)).

¹²⁵ *Id.* at 742.

Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial,” but, the Court ruled, the President must comply with subsequent legislation by Congress.¹²⁶ Congressional restrictions on the President’s removal power are also permissible, even though that discretion is a part of the executive power.¹²⁷ Likewise, the Court has “recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities,”¹²⁸ but has upheld congressional regulations that required limited disclosure.¹²⁹

The Constitution also clearly provides a role for Congress where national security and foreign relations are concerned.¹³⁰ In *Little v. Barreme*, Justice Marshall, for a unanimous Court, held that while the President might otherwise have discretion as Commander in Chief to seize foreign ships, doing so in contravention of statute was without legal authority.¹³¹ Likewise, in *Youngstown*, the majority denied that the President enjoyed power as Commander in Chief to defy congressional will and seize domestic steel mills in the interest of national security.¹³² Finally, in *Hamdan v. Rumsfeld*, the Court assumed (but did not decide) that the President might possess inherent authority to convene military commissions,¹³³ but held that the military commissions established by the President violated congressional statute.¹³⁴ The Court made clear that “[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”¹³⁵

¹²⁶ 517 U.S. 748, 772–73, 767 (1996). See also Barron & Lederman, *supra* note 16, at 742.

¹²⁷ *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988).

¹²⁸ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 447 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974)).

¹²⁹ *Nixon*, 433 U.S. at 455; see also *Nixon*, 418 U.S. at 706–13.

¹³⁰ See, e.g., U.S. Const. art. I, § 8, cl. 10 (power to define and punish offenses against law of nations); id. art. I, § 8, cl. 11 (power to declare war); id. art. I, § 8, cls. 12–13 (power to raise and support military); id. art. I, § 8, cl. 14 (power to make rules for government of military).

¹³¹ 6 U.S. (2 Cranch) 170, 176–78 (1804).

¹³² 343 U.S. at 587.

¹³³ 548 U.S. 557, 592, 594 (2006).

¹³⁴ *Id.* at 613.

¹³⁵ *Id.* at 593 n.23.

Similarly, when individual rights are implicated, as is often the case when the state secrets privilege is raised, the President's discretion may be even more restricted. For example, the Court in *Hamdi v. Rumsfeld* rejected the executive branch's argument that the separation of powers required a limited role for courts in assessing the legality of citizens' detention, emphasizing that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."¹³⁶

Unfortunately, while these cases clearly recognize Congress's concurrent power over national security matters, they offer little guidance on the precise scope of its ability to cabin the President's Commander in Chief power. Indeed, the Supreme Court has indicated that at least some aspect of the Commander in Chief power is beyond congressional control. In *Hamdan*, for example, the Court favorably cited dictum in *Ex Parte Milligan*, which recognized that Congress may not "intrude . . . upon the proper authority of the President . . . [by] direct[ing] the conduct of campaigns."¹³⁷ Therefore, while Congress may restrict the President's discretion as Commander in Chief in some matters, there remains a preclusive sphere that seems to be immune from congressional regulation. Consequently, while the executive branch's argument that Congress may not regulate the state secrets privilege simply because it has "a firm foundation in the Constitution"¹³⁸ is overdrawn, it nevertheless may be true that some aspect of the legislation intrudes on a preclusive presidential power.

B. Does the SSPA Intrude on a Preclusive Article II Power?

In addition to the concerns discussed above, critics of the SSPA argue that the Act intrudes on the President's Article II authority as Commander in Chief.¹³⁹ For example, the Justice Department's letter argues that requiring the executive branch to submit classified information to courts for in camera review "would infringe upon the Executive's constitutional authority under Article II to control access to national security

¹³⁶ 542 U.S. 507, 535–36 (2004).

¹³⁷ *Hamdan*, 548 U.S. at 592 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866)).

¹³⁸ Mukasey Letter, *supra* note 5, at 2.

¹³⁹ See, e.g., Hearing, *supra* note 4, at 58; Windsor, *supra* note 4, at 901, 918–19.

information.”¹⁴⁰ Also, by granting courts discretion to determine whether invocations of the privilege are valid, and allowing courts to order the executive branch to segregate classified information or substitute non-classified information, the SSPA violates the separation of powers by preventing the executive branch from making its own “independent and controlling determinations” on what information is subject to disclosure.¹⁴¹ As this Section explains, however, these objections are painted much too broadly.

This Section begins by explaining how historical practice can be a source of legislative power. It continues by analyzing executive branch compliance with past legislation substantially similar to the SSPA. Next, this Section examines the Supreme Court cases typically invoked to support a supposed preclusive presidential power over national security information, concluding that this reliance is misplaced. If anything, Supreme Court doctrine envisions a role for all three branches of government where national security secrets are concerned.

To the extent that the executive branch has historically complied with congressional regulation over the matter, it does not possess preclusive power over national security secrets. However, to the extent that Supreme Court doctrine has historically shielded particular information from disclosure, the executive branch could not be fairly described as acquiescing to congressional regulation of the field with respect to that specific information. Consequently, insofar as the SSPA alters the protections historically enjoyed by the executive branch, it might intrude on a preclusive presidential power.

1. Historical Practice as Source of Legislative Power

Historical practice is typically invoked to justify executive action in the face of congressional acquiescence. As Justice Frankfurter stated in his *Youngstown* concurrence, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President.”¹⁴² Accordingly, the executive branch has often pointed to

¹⁴⁰ Mukasey Letter, *supra* note 5, at 4.

¹⁴¹ *Id.* at 3.

¹⁴² *Youngstown*, 343 U.S. at 610–11 (1952) (Frankfurter, J., concurring).

such deference to defend its activities in the war on terror.¹⁴³ It argues that this consistent deference demonstrates the inherent constitutionality of the action in question.¹⁴⁴

The Supreme Court has indicated, however, that historical practice can also serve as a source of legislative power.¹⁴⁵ This was made clear in *Myers v. United States*, where the Court looked to historical practice to determine whether Congress could restrict the President's removal power.¹⁴⁶ The Court stated that executive branch deference to congressional restrictions could sometimes support the recognition of legislative power.¹⁴⁷ But, in order for historical practice to justify such a finding, it was not enough for the President to simply sign bills; instead, he had to comply with congressional restrictions in practice.¹⁴⁸ Since the executive branch had not historically done so, the Court reasoned that Congress did not enjoy the constitutional power to impose such restrictions.¹⁴⁹

Similarly, in *McGrain v. Daugherty*, the Court upheld the use of Congress's contempt power, even though it is not rooted in any constitutional provision, because of past legislative practice.¹⁵⁰ In that case, a Senate committee issued a report stating that Mally S. Daugherty, the brother of the Attorney General, refused to respond to congressional subpoenas, and the president pro tempore issued a warrant to his sergeant at arms to take Daugherty into custody.¹⁵¹ Daugherty was taken into custody and then filed a habeas petition, arguing that the deputy of the sergeant at arms lacked the power to execute the warrant.¹⁵² Upon review, the Supreme Court conceded that the Constitution lacked any textual provision authorizing Congress's contempt power, but ruled that his detention was

¹⁴³ See, e.g., Gonzales Memo, supra note 3, at 7 (arguing that "a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes").

¹⁴⁴ For example, the Obama administration relied heavily on historical practice to justify its intervention in Libya without congressional authorization. See Krass Memo, supra note 10.

¹⁴⁵ See Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 419–21 (2012).

¹⁴⁶ 272 U.S. 52, 161 (1926).

¹⁴⁷ Id. at 170–71.

¹⁴⁸ Id. at 172.

¹⁴⁹ Id. at 176.

¹⁵⁰ 273 U.S. 135, 174 (1927). See also Todd Garvey & Alissa M. Dolan, Cong. Research Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 2–4 (2012).

¹⁵¹ *McGrain*, 273 U.S. at 152–53.

¹⁵² Id. at 154–55.

nevertheless lawful.¹⁵³ The Court reasoned that a congressional contempt power was exercised in the “British Parliament and in the Colonial Legislatures” and “has prevailed and been carried into effect in both houses of Congress.”¹⁵⁴ On the basis of this past “legislative practice,” Congress had assumed such constitutional authority.¹⁵⁵

In addition, in *Hamdan v. Rumsfeld*, the Court appeared to rely on legislative practice to validate Congress’s constitutional prerogative to enact rules governing military commissions.¹⁵⁶ In that case, the Court held that the rules established by President Bush to govern such commissions violated statutory requirements and were therefore illegal.¹⁵⁷ The Court never explained why Congress was constitutionally permitted to require these procedures, but “appeared to place significant weight on the historical pedigree of the statutory provisions at issue.”¹⁵⁸ Justice Kennedy, in concurrence, was more explicit, asserting that since “the President has acted in a field with a history of congressional participation and regulation,”¹⁵⁹ the executive was required to respect “the bounds Congress has placed on [his] authority.”¹⁶⁰

Finally, as described by Professors Curtis Bradley and Trevor Morrison, the Supreme Court has relied on historical practice to uphold the modern administrative state.¹⁶¹ In a series of cases addressing congressional regulation of the President’s power of removal over executive branch officers, the Court has consistently upheld restrictions that would appear to be unconstitutional under *Myers v. United States*.¹⁶² *Myers* had held that any restrictions on the President’s removal authority were unconstitutional;¹⁶³ but, in *Humphrey’s Executor v. United States*, the Court upheld a for-cause restriction on an independent agency officer, distinguishing *Myers* by focusing on the “character of the office” at issue.¹⁶⁴ Restrictions on traditional executive offices were still unconstitutional, the Court explained, but those on “quasi-legislative” and “quasi-

¹⁵³ Id. at 174.

¹⁵⁴ Id. at 161.

¹⁵⁵ Id.

¹⁵⁶ 548 U.S. at 592.

¹⁵⁷ Id. at 613.

¹⁵⁸ Bradley & Morrison, *supra* note 145, at 422 (citing *Hamdan*, 548 U.S. at 592 n.22).

¹⁵⁹ *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring in part).

¹⁶⁰ Id. at 653.

¹⁶¹ Bradley & Morrison, *supra* note 145, at 481–83.

¹⁶² 272 U.S. at 161.

¹⁶³ Id.

¹⁶⁴ 295 U.S. 602, 620, 631–32 (1935).

judicial” offices were permissible.¹⁶⁵ Subsequently, in *Morrison v. Olson*, the Court upheld restrictions on the removal of an independent counsel.¹⁶⁶ The “real question,” the Court explained, was not the character of the office, but “whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”¹⁶⁷ Most recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, even though the Court held the restrictions at issue to be unconstitutional, the Court actually assumed a for-cause limitation on the removal of the heads of an independent agency, even though no such provision was required by statute.¹⁶⁸ By doing so, the Court essentially granted independent agencies a “quasi-constitutional status.”¹⁶⁹ The Court’s approach to analyzing removal restrictions strongly suggests reliance on historical practice, recognizing that the administrative state is now “an ingrained feature of modern government.”¹⁷⁰

2. Statutory Practice

Critics of the SSPA claim that requiring the executive branch to submit classified information for in camera review, granting courts discretion to determine whether invocations of the privilege are valid, and allowing courts to order the executive branch to segregate classified information or substitute non-classified information intrude on the President’s preclusive power over control of national security secrets.¹⁷¹ However, the executive branch has consistently complied with numerous statutes regulating the control of national security information. Congress has regularly passed legislation that grants courts access to classified information in camera, the ability to make determinations of whether information is privileged, and the discretion to order disclosure of national security information. Courts have consistently applied these procedures without objection from the executive branch.

¹⁶⁵ *Id.* at 627–28.

¹⁶⁶ 487 U.S. at 696–97.

¹⁶⁷ *Id.* at 691.

¹⁶⁸ 130 S. Ct. 3138, 3147–48 (2010). The independent agency at issue was the Securities and Exchange Commission.

¹⁶⁹ Morrison & Bradley, *supra* note 145, at 483 (quoting Jack M. Beerman, An Inductive Understanding of Separation of Powers, 63 *Admin. L. Rev.* 467, 491 (2011)).

¹⁷⁰ Morrison & Bradley, *supra* note 145, at 483.

¹⁷¹ See *supra* notes 3–5 and accompanying text.

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a. Judicial Access to Classified Information

The executive branch has consistently complied with CIPA, submitting classified information for in camera review in numerous cases.¹⁷² Passed in 1980, CIPA allows the government to determine before trial whether a “disclose or dismiss” problem exists in a case, or if a trial may proceed that both protects national security secrets and ensures a fair trial to the defendant.¹⁷³ It outlines procedures for courts to follow when deciding whether classified information will be discoverable by the defendant and admissible at trial.

First, it permits the government to seek a limitation on the disclosure of classified information during discovery through an ex parte showing to the court.¹⁷⁴ Second, if the government produces classified information during discovery and the defense aims to use it at trial, the government may then request a hearing to judge the “use, relevance, or admissibility” of the evidence.¹⁷⁵ If the court decides that the evidence is admissible, the government can move to admit the relevant facts or provide a summary of the information as a substitute.¹⁷⁶ Finally, if a court orders disclosure and the government refuses to comply, the court is statutorily required to dismiss the case unless it “determines that the interests of justice would not be served by dismissal of the indictment or information.”¹⁷⁷ In such circumstances, a court can dismiss specific counts against the defendant or find against the government on a particular issue.¹⁷⁸

Courts have consistently exercised authority over CIPA’s application, recognizing that the privilege against revealing classified information

¹⁷² See, e.g., *United States v. Hanna*, 661 F.3d 271, 280 (6th Cir. 2011); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984); *Bostan v. Obama*, 674 F. Supp. 2d 9, 26 (D.D.C. 2009).

¹⁷³ Larry M. Eig, Cong. Research Serv., RL89-172A, *Classified Information Procedures Act (CIPA): An Overview* CRS-1 (1989). See also Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 *Am. Crim. L. Rev.* 191, 195 (1994).

¹⁷⁴ 18 U.S.C. app. 3 § 4 (2006). Initially, CIPA requires any criminal defendant who “reasonably expects to disclose or to cause the disclosure of classified information” to notify the court and the prosecution prior to trial. *Id.* § 5. Any party (including the court) may file a motion to hold “a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution.” *Id.* § 2.

¹⁷⁵ *Id.* § 6(a).

¹⁷⁶ *Id.* § 6(c).

¹⁷⁷ *Id.* § 6(e)(2).

¹⁷⁸ *Id.* § 6(e)(2)(A)–(B).

“must give way under some circumstances to a criminal defendant’s right to present a meaningful defense.”¹⁷⁹ CIPA’s procedures are largely mirrored in the SSPA, which explicitly provides for court application of “security procedures established under the Classified Information Procedures Act for classified information to protect the sensitive information.”¹⁸⁰ For example, the SSPA allows for in camera proceedings, preliminary ex parte showings to obtain a protective order, and the use of nonprivileged substitutes if they will provide the same opportunity to litigate the case.¹⁸¹ In fact, courts have already interpreted the procedural protections laid out in CIPA to largely mirror the traditional application of the state secrets privilege.¹⁸²

Courts also regularly conduct in camera review of classified information under FISA. FISA was a legislative reaction to the Church Committee’s¹⁸³ discovery of a wide range of electronic surveillance abuses by the executive branch.¹⁸⁴ The Church Committee’s investigation revealed that, beginning with Franklin D. Roosevelt, every President had authorized warrantless electronic surveillance on American citizens.¹⁸⁵ In response, the Senate Judiciary Committee developed legislation designed expressly to limit any assumed unilateral presidential power.¹⁸⁶ Most importantly, FISA requires government officials to seek authorization to engage in electronic surveillance for foreign intelligence reasons with the Foreign Intelligence Surveillance Court

¹⁷⁹ *United States v. Hanjuan Jin*, 791 F. Supp. 2d 612, 618 (N.D. Ill. 2011) (quoting *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008)). See also *United States v. Stewart*, 590 F.3d 93, 131 (2d Cir. 2009). For discussion of the standard by which courts will review a defendant’s claim to classified information, see *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989); *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (en banc); *Pringle*, 751 F.2d at 427–28.

¹⁸⁰ H.R. 5956, 112th Cong. § 2(b)(1) (2012).

¹⁸¹ *Id.* §§ 2(b)(1)–(3), 2(f)(2)(A).

¹⁸² *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008) (“It would appear that classified information at issue in CIPA cases fits comfortably within the state-secrets privilege.”).

¹⁸³ Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (“Church Committee”), <http://www.intelligence.senate.gov/churchcommittee.html>.

¹⁸⁴ Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, Cong. Research Serv. 12 (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (addressing presidential authority to conduct warrantless electronic surveillance to gather foreign intelligence information).

¹⁸⁵ *Id.* See also S. Rep. No. 95-604, at 7 (1977), reprinted in 1978 U.S.C.C.A.N. 13904, 13908.

¹⁸⁶ See S. Rep. No. 95-604, supra note 185, at 8–9.

(“FISC”).¹⁸⁷ Apart from three exceptions,¹⁸⁸ in order to obtain authorization, the government must file an application that includes a wide variety of classified material.¹⁸⁹

Aside from the Bush administration’s objections,¹⁹⁰ the executive branch has consistently respected the constitutionality of these provisions. For example, President Ford’s Attorney General, Edward Levi, remarked in a congressional hearing on the proposed legislation that while the President possessed authority to conduct surveillance, his activity could “be directed by the Congress,”¹⁹¹ and future administrations would be constrained by the procedures contained in the legislation. President Carter’s Office of Legal Counsel also considered the legislation appropriate, admitting that it did not intrude on any preclusive executive powers.¹⁹² His Attorney General, Griffin Bell, indicated agree-

¹⁸⁷ *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 122–23 (2d Cir. 2011), cert. granted, 81 U.S.L.W. 4121 (U.S. Feb. 26, 2013) (No. 11-1025). See 50 U.S.C. §§ 1803(a), 1804(a) (2006).

¹⁸⁸ 50 U.S.C. § 1802(a)(1)(A)(i) (2006) (authorizing electronic surveillance of three categories of foreign powers for up to one year without a court order upon Attorney General certification); id. § 1805(f) (sanctioning emergency electronic surveillance upon Attorney General certification for up to seventy-two hours while a FISC order is being sought); id. § 1811 (permitting electronic surveillance for fifteen calendar days after a congressional declaration of war).

¹⁸⁹ Including the identity of the officer seeking an application; “the identity, if known, or a description of the specific target of the electronic surveillance”; a description “of the facts and circumstances relied upon” for believing the target “is a foreign power or an agent of a foreign power” and the places targeted are used by a foreign power; “the nature of the information sought and the type of communications or activities to be subject to the surveillance”; “a certification . . . that the official deems the information sought to be foreign intelligence information” and “a significant purpose of the surveillance is to obtain foreign intelligence information,” which could not “reasonably be obtained by normal investigative techniques”; a description of any previous surveillance applications; and a description of the time period surveillance will occur. Id. § 1804(a).

¹⁹⁰ See Gonzales Memo, *supra* note 3, at 35.

¹⁹¹ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *Harv. L. Rev.* 941, 1075 (2008) [hereinafter Barron & Lederman, *A Constitutional History*] (quoting Foreign Intelligence Surveillance Act of 1976: Hearings on S. 743, S. 1888, and S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 94th Cong. 16 (1976) (statement of Edward H. Levi, Attorney General of the United States)).

¹⁹² Id. at 1077–78; see Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Honorable Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978), in *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence, 95th Cong. 26, 31 (1978)* [hereinafter *Subcomm. Hearings*].

ment that executive power in this area was in need of restraint by Congress.¹⁹³ Upon signing the legislation, President Carter remarked that it “clarifies the Executive’s authority to gather foreign intelligence” and refrained from raising any constitutional objections.¹⁹⁴

Since then, each administration has largely deferred to congressional regulation of foreign intelligence surveillance. The executive branch routinely discloses sensitive national security information to the FISC, which conducts a review of the surveillance application. The government also routinely offers these classified materials to district courts for *in camera*, *ex parte* review when using information gained through surveillance in a criminal context.¹⁹⁵

b. Judicial Discretion to Decide If Material May Be Disclosed

While CIPA and FISA require judicial review of classified information, this access is limited to situations where the executive branch chooses to initiate a prosecution or seek authorization for intelligence surveillance. In contrast, FOIA¹⁹⁶ grants courts discretion to require executive branch disclosure of national security information outside of the prosecutorial context. Passed in 1966, FOIA creates a “statutory right of access for ‘any person’”¹⁹⁷ to agency records of the executive branch. All agency records (subject to nine exemptions)¹⁹⁸ not otherwise pub-

¹⁹³ Barron & Lederman, *A Constitutional History*, supra note 191, at 1077–78; see Subcomm. Hearings, supra note 192, at 38; see also Foreign Intelligence Surveillance Act of 1978: Hearings on S. 1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence, 95th Cong. 48 (1978) (statement of Admiral Stansfield Turner, Director of Central Intelligence).

¹⁹⁴ Barron & Lederman, *A Constitutional History*, supra note 191, at 1078 (citing Presidential Statement on Signing S. 1566 into Law, 2 Pub. Papers 1853 (Oct. 25, 1978)).

¹⁹⁵ *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982); *United States v. Megahey*, 553 F. Supp. 1180, 1193 (E.D.N.Y. 1982); *United States v. Falvey*, 540 F. Supp. 1306, 1316 (E.D.N.Y. 1982).

¹⁹⁶ 5 U.S.C. § 552 (2006).

¹⁹⁷ Gina Stevens, Cong. Research Serv., RL41406, *The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws 1* (2010) (quoting 5 U.S.C. § 552(a)(3)(A) (2006)).

¹⁹⁸ The exemptions include: information that is “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy,” internal rules and practices of an agency, information exempted from disclosure by statute, trade secrets, inter-agency or intra-agency memos, personnel files, law enforcement records, information about the operation of financial institutions, and geological information about wells. 5 U.S.C. § 552(b) (2006).

lished are subject to disclosure.¹⁹⁹ In cases where the agency objects to releasing information, the burden is on the agency to prove in court that particular information should not be revealed.²⁰⁰ Federal district courts are given jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.”²⁰¹ Courts must also ensure that agencies provide all “reasonably segregable” information that is not subject to one of the exemptions.²⁰² Courts review these issues de novo, and are permitted to “examine the contents of such agency records in camera” to determine if an exemption applies.²⁰³ If a court finds that information was improperly withheld from disclosure, and executive agents acted “arbitrarily or capriciously” in doing so, it can appoint a Special Counsel “to determine whether disciplinary action is warranted,” and the agency is required to comply with the Special Counsel’s recommendation.²⁰⁴ If an agency refuses to comply with a FOIA order, courts may “punish for contempt the responsible employee.”²⁰⁵

Section 552(b)(1)(a) of FOIA provides an exemption from disclosure of information that has been specifically authorized under criteria established by an executive order to be kept secret in the interest of national security.²⁰⁶ Before 1973, courts were “unsettled” on the proper scope of review for the government’s exemption claims on Section 552(b)(1) grounds.²⁰⁷ Consequently, the Supreme Court aimed to clarify the proper standard in *Environmental Protection Agency v. Mink*.²⁰⁸ In that case, members of Congress brought a FOIA action to obtain documents concerning an underground atomic explosion, and the executive branch

¹⁹⁹ Id. § 552(a)(2)(D).

²⁰⁰ Id. § 552(a)(4)(B).

²⁰¹ Id.

²⁰² Id. § 552(b); see also *Ctr. for Int’l Env’tl. Law v. Office of U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (stating that even when documents are classified, and thus exempt under FOIA, the government must disclose all reasonably segregable non-classified information within those documents).

²⁰³ 5 U.S.C. § 552(a)(4)(B) (2006).

²⁰⁴ Id. § 552(a)(4)(F).

²⁰⁵ Id. § 552(a)(4)(G).

²⁰⁶ Id. § 552(b)(1)(A).

²⁰⁷ John A. Bourdeau, What Matters Are Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. § 552(b)(1)) as “Specifically Authorized Under Criteria Established by an Executive Order to Be Kept Secret in the Interest of National Defense or Foreign Policy”, 169 A.L.R. Fed. 495, 512 (2001).

²⁰⁸ 410 U.S. 73 (1973).

claimed the documents were exempt under Section 552(b)(1).²⁰⁹ The plaintiffs argued that courts should critically examine classification orders, but the Supreme Court held that the judiciary was not authorized to conduct in camera inspection of properly classified materials.²¹⁰ Once the executive branch classifies documents pursuant to an executive order, the Court ruled, courts may not go behind the affidavit and attempt “sift out” secret from non-secret materials.²¹¹ Instead, the judiciary’s job is limited to ensuring that the withheld documents are actually classified.

The next year, Congress amended FOIA, overruling *Mink* by authorizing judicial access to classified information.²¹² Congress provided for de novo review of agencies’ exemption claims and explicitly authorized courts to determine if materials qualified under an exemption by reviewing agency records in camera.²¹³ Shortly thereafter, the D.C. Circuit explained the analysis when examining Section 552(b)(1) exemptions: (1) the government bears the burden of establishing the exemption; (2) the proper standard of review is de novo; (3) courts must “accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record”; and (4) in camera examination of the materials is within the court’s discretion in order to assess the claim.²¹⁴ The court added that this analysis necessarily included ensuring that proper procedures were followed and that any materials in question properly fell into the exemption category claimed.²¹⁵

²⁰⁹ Id. at 73.

²¹⁰ Id. at 84.

²¹¹ Id. at 81.

²¹² See S. Rep. No. 93-1200, at 9 (1974) (Conf. Rep.). Congress has passed numerous FOIA exemptions, aptly considering agency confidentiality concerns. Likewise, in reaction to concerns that exemptions were granted too easily, Congress enacted the OPEN FOIA Act of 2009, requiring that any future statutory exemptions to FOIA must be stated with particularity and must specifically invoke the OPEN FOIA Act of 2009. OPEN FOIA Act of 2009, 5 U.S.C. § 552(b) (Supp. V 2012). Congress has also legislated with national security concerns in mind, enacting the Protected National Security Documents Act of 2009 in response to FOIA requests for photographs of allegedly mistreated detainees in Iraq and Afghanistan. It permits the Secretary of Defense to withhold any photograph taken between September 11, 2011 and January 22, 2009 that “relates to the treatment of individuals engaged, captured, or detained after September 11, 2011.” Protected National Security Documents Act of 2009, Pub. L. 111-83, § 565, 123 Stat. 2184 (2009).

²¹³ 5 U.S.C. § 552(a)(4)(B) (2006).

²¹⁴ *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (quoting S. Rep. No. 93-1200, at 12 (1974) (Conf. Rep.)).

²¹⁵ Id. at 1195 (citing *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977)).

The executive branch has consistently complied with this statutory regime. Since the amendment's passage, courts frequently conduct in camera review of documents to determine if agencies properly applied the national security exemption.²¹⁶ Courts do, however, usually accept agency invocations of national security exemptions, ordering the public release of information only in rare circumstances.²¹⁷ In *Rosenfeld v. U.S. Department of Justice*, for example, the plaintiff sought disclosure from the FBI of documents relating to its investigation of the Free Speech Movement, which organized demonstrations at the University of California, Berkeley, in the 1950s and 1960s.²¹⁸ After the government claimed the materials were privileged under Exemption 1, the district court ordered the FBI to release some of the documents entirely and segregate others.²¹⁹ On appeal, the Ninth Circuit affirmed.²²⁰ The court ruled that, with respect to the documents ordered to be released in their entirety, the government had failed to meet its burden to sustain an Exemption 1 claim.²²¹ "General assertions" that disclosure of the materials would compromise national security were insufficient to merit the exemption.²²² Instead, the government needed to "identify the kind of information . . . that would expose the confidential sources, or describe the injury to national security that would follow from the disclosure of the confidential source of the particular document."²²³ Since the government failed to "demonstrate with any particularity why portions" of the rele-

²¹⁶ See, e.g., *Tenenbaum v. Simonini*, 372 F.3d 776, 776 (6th Cir. 2004) (sustaining the state secrets privilege after in camera examination); *Kronisch v. United States*, 150 F.3d 112, 120 n.3 (2d Cir. 1998) (affirming application of state secrets privilege after examining underlying documents in camera and finding them irrelevant to plaintiff's claim); *Cox v. Levi*, 592 F.2d 460, 463 (8th Cir. 1979) (affirming the trial court's in camera inspection of materials); *Halperin v. Dep't of State*, 565 F.2d 699, 707 (D.C. Cir. 1977) (remanding for in camera inspection); *Phillippi v. CIA*, 546 F.2d 1009, 1012–13 (D.C. Cir. 1976) (noting that FOIA contemplates in camera inspection of documents or affidavits); *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012) (holding that the national security exemption applied after conducting in camera review); *Silets v. FBI*, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (holding that the FBI must submit certain documents withheld under national security exemption for in camera review).

²¹⁷ *Bourdeau*, supra note 207, at 514–15.

²¹⁸ 57 F.3d 803, 806 (9th Cir. 1995). After the FBI withheld a number of relevant documents from the plaintiff's FOIA request, the plaintiff filed suit in the District Court for the Northern District of California. *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 807–08.

²²¹ *Id.* at 807.

²²² *Id.* (quoting *Wiener v. FBI*, 943 F.2d 972, 981 (9th Cir. 1991)).

²²³ *Id.* (quoting *Wiener*, 943 F.2d at 981).

vant materials should be exempted from disclosure, the “government did not carry its burden.”²²⁴ Consequently, although government classification decisions do merit substantial weight, here, “the government failed to make an initial showing which would justify deference.”²²⁵ Turning to the segregated documents at issue, the Ninth Circuit agreed that the government had met its burden to withhold some of the information.²²⁶ It affirmed, however, the district court’s segregation order, ruling that the lower court did not clearly err in ordering segregation of the relevant materials.²²⁷

3. *Judicial Doctrine on Presidential Power over National Security Secrets*

a. *Supreme Court*

Critics of the SSPA primarily rely on two Supreme Court cases for the proposition that the executive branch maintains exclusive control over national security secrets.²²⁸ Supreme Court doctrine, however, recognizes that all three branches of government have a role in the protection of national security information, contradicting claims of preclusive presidential power over its disclosure. First, the Obama administration points to *Department of the Navy v. Egan*,²²⁹ which, it claims, recognizes that the “responsibility to protect national-security information” lies with the Commander in Chief.²³⁰ This interpretation of the case, however, is highly misleading, as the Court in that case actually acknowledged that power over national security secrets does not rest solely with the executive branch. The Supreme Court ruled that in the absence of congressional regulation on the matter, one executive agency could not review another’s security clearance determination.²³¹ The Federal Circuit Court of Appeals had ruled that the Merit Systems Protection Board (an administrative agency) had authority to review the merits of a security-

²²⁴ Id.

²²⁵ Id.

²²⁶ Id.

²²⁷ Id. at 807–08.

²²⁸ See Hearing, supra note 4, at 59–61; see also Mukasey Letter, supra note 5, at 1; Windsor, supra note 4, at 902–04.

²²⁹ 484 U.S. 518 (1988).

²³⁰ Cert Petition, supra note 7, at 11.

²³¹ *Egan*, 484 U.S. at 529–30.

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clearance determination issued by the Department of the Navy.²³² That court assumed that “[t]he absence of any statutory provision precluding appellate review . . . creates a strong presumption in favor” of review.²³³ The Supreme Court reversed, clarifying that in the absence of any constitutional violations, and the presence of national security concerns, when “the grant of [a] security clearance . . . is committed by law to the appropriate agency of the Executive Branch,” there should be no assumption of review by another agency.²³⁴ Far from denying congressional power over national security information, therefore, the Court applied the statutory framework in place. The Court explained that another agency’s ability to review such determinations would not be assumed “unless Congress specifically has provided otherwise,”²³⁵ recognizing that federal courts must apply the standards delineated by Congress.

Second, critics point to *Chicago & Southern Air Lines v. Waterman Steamship Corp.*²³⁶ for “noting [a] limited judicial role with respect to ‘information properly held in secret.’”²³⁷ This proposition is similarly misleading since the case does not concern Presidential power to withhold classified information. Instead, the Court merely declined to review—absent congressional direction to do so—a President’s decision to deny a foreign air travel permit. The plaintiff in that case, Waterman Steamship Corporation, was denied a certificate for a foreign air travel route by the Civil Aeronautics Board.²³⁸ The Civil Aeronautics Act required that in addition to approval by the Board, any application for foreign air travel was “unconditionally subject to the President’s approval.”²³⁹ Here, the President denied the application. The Court ruled that Congress did not intend to subject these presidential orders to judicial review.²⁴⁰ Pointing to the careful congressional measures taken to bestow direct presidential control over this discrete area, “completely invert[ing] the usual administrative process,”²⁴¹ the Court reasoned that reviewing such presidential determinations would contradict congress-

²³² Id. at 525.

²³³ Id. at 526.

²³⁴ Id. at 527.

²³⁵ Id. at 530.

²³⁶ 333 U.S. 103 (1948).

²³⁷ Mukasey Letter, *supra* note 5, at 3 (quoting *Chi. & S. Air Lines*, 333 U.S. at 111).

²³⁸ *Chi. & S. Air Lines*, 333 U.S. at 105.

²³⁹ Id. at 106.

²⁴⁰ Id. at 106–09.

²⁴¹ Id. at 109.

sional intent. The Court ruled that the decision involved foreign policy considerations and was, therefore, a political one.²⁴² It would be inappropriate for the judiciary to, “without the relevant information . . . review and perhaps nullify actions of the Executive taken on information properly held secret.”²⁴³

In fact, an examination of Supreme Court case law belies any notion of preclusive presidential authority over national security secrets, particularly when individual rights are implicated. To be sure, both the *Reynolds* privilege and the *Totten* bar recognize an executive branch privilege against disclosure in some matters. However, the judiciary, not the President, determines when the privilege actually applies. For example, in *Reynolds*, the government argued that the executive branch possessed inherent power—rooted in the constitutional separation of powers—to withhold any materials it considered important.²⁴⁴ The Court declined to adopt this position,²⁴⁵ stressing that the judicial branch should not cede control of evidence to “the caprice of executive officers,”²⁴⁶ and locating ultimate authority to determine whether evidence is suitable for disclosure with the judiciary. Similarly, *Totten* recognized the executive branch’s need to withhold information pertaining to espionage contracts, but employed a judicial common law authority to achieve this result.²⁴⁷ Rather than locate authority to withhold evidence in the executive branch, the Court employed its own discretion to refuse to enforce contracts that violate public policy.²⁴⁸

When constitutional rights are involved, the Court has also indicated Congress’s essential role in this area. In *New York Times Company v. United States*, for example, the Court rejected the government’s attempt to enjoin two newspaper companies from publishing a classified study—the “History of U.S. Decision-Making Process on Viet Nam Policy.”²⁴⁹ The executive branch, the government maintained, possessed authori-

²⁴² Id. at 111.

²⁴³ Id.

²⁴⁴ *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

²⁴⁵ Id. at 6–8.

²⁴⁶ Id. at 9–10.

²⁴⁷ *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1906 (2011) (“What we are called upon to exercise is not our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes.”).

²⁴⁸ Id.

²⁴⁹ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

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ty—rooted in the constitutional power over foreign affairs and as Commander in Chief—to “protect the nation against publication of information whose disclosure would endanger the national security.”²⁵⁰ In an opinion with six separate concurrences, the Court completely rejected this proposition, opining on the role of all three branches of government in balancing government secrecy with individual rights. Echoing Justice Jackson’s *Youngstown* framework, a majority of the Justices noted that Congress had refrained from criminalizing publication of the material in question.²⁵¹ Accordingly, the President had to rely on his own inherent powers to prevent publication of the classified information.²⁵² However, at least five Justices declined to find such a power in Article II in this situation.²⁵³ Accordingly, the Court denied the injunction.

b. The Executive Branch Has Not Acquiesced to Every SSPA Provision

While Supreme Court doctrine does not recognize a preclusive presidential power over national security information, it nevertheless has historically shielded some classified information from disclosure. These protections are modified by the SSPA, departing from historical practice in two crucial ways. First, the SSPA raises the standard required to invoke the privilege. *Reynolds* provided that information should be withheld if there is a reasonable danger that disclosure could harm national security.²⁵⁴ The SSPA, in contrast, requires courts to order disclosure unless it is “reasonably likely to cause significant harm.”²⁵⁵ Accordingly, the executive branch has historically acquiesced to court ordered (and congressionally regulated) disclosure of material in the former category, but has not done so with respect to the latter. To the extent that the disclosure of some classified information would cause a level of harm in

²⁵⁰ Id. at 718 (Black, J., concurring) (quoting Brief for the United States at 13, *N.Y. Times*, 403 U.S. 713); see 18 U.S.C. § 793(b) (2006).

²⁵¹ *N.Y. Times*, 403 U.S. at 718 (Black, J., concurring); id. at 721 (Douglas, J., concurring); id. at 730 (Stewart, J., concurring); id. at 732 (White, J., concurring); id. at 745–47 (Marshall, J., concurring).

²⁵² Id. at 730 (Stewart, J., concurring).

²⁵³ Id. at 719 (Black, J., concurring) (“To find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”); id. at 723–24 (Douglas, J., concurring); id. at 725 (Brennan, J., concurring); id. at 732 (White, J., concurring); id. at 741–42 (Marshall, J., concurring).

²⁵⁴ *Reynolds*, 345 U.S. at 10.

²⁵⁵ H.R. 5956, 112th Cong. § 2(a) (2012).

between the two standards, the executive branch may retain discretion to withhold such information.

Second, the SSPA's omission of any exception for suits premised on espionage contracts conflicts with Supreme Court precedent. The Court has consistently recognized an executive branch privilege against disclosure where such suits are concerned. In *Tenet*, the Court noted that the use of in camera proceedings in *Reynolds* cases "simply cannot provide the absolute protection" necessary for contracts based on espionage agreements, so the executive branch should not be compelled to disclose the information.²⁵⁶ In *General Dynamics*, the Court affirmed this principle and broadened its scope beyond espionage contracts to "contractual remedies in Government-contracting disputes."²⁵⁷ Under the Supreme Court's protection, the executive branch has never been forced to disclose these confidential matters. Since it has not acquiesced to congressional regulation in the past, it may retain preclusive power over their release.

CONCLUSION

Particularly after 9/11, the scope of presidential authority in national security matters has occupied sustained scholarly, media, and public attention. The executive branch has claimed expansive powers to fight terrorism, including the ability to defy legislation that restricts its power as Commander in Chief. Whether and when the President may contravene statutes seeking to limit his authority is crucially important to striking the proper balance between security and liberty. Some have argued for broad presidential discretion to ignore statutes in order to preserve the former, while others have criticized this notion for violating the latter.

Congress's attempt to regulate executive branch invocations of the state secrets privilege, if enacted, could ignite just such a conflict at the "lowest ebb" of presidential power. This Note has attempted to clarify whether the President possesses any preclusive powers in this area by examining historical practice. This analysis revealed that the executive branch has largely acquiesced to congressional regulation of the field, casting doubt on claims to a preclusive Presidential authority over the control of national security information. The SSPA, however, does depart from historical practice in two important respects: (1) raising the

²⁵⁶ *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

²⁵⁷ *Gen. Dynamics*, 131 S. Ct. at 1902.

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standard required for the privilege to apply and (2) omitting a provision for claims based on espionage contracts. These provisions, therefore, might intrude on a preclusive presidential power.