The Article III Publication Power and the Foreign Intelligence Surveillance Court

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The Framers vested "the judicial Power of the United States" in independent courts so that they may protect individual liberty and serve as a check on the legislative and executive branches. The judicial power, however, is narrow and not self-executing. As Chief Justice Marshall put it, it is merely the power "to say what the law is." Federal courts cannot raise armies or pay money to enforce their decrees. Having neither force nor will, courts must instead rely on cultivating public support to secure the authoritative legitimacy necessary to effectuate their judgments.

But what happens when the executive branch asserts that a court's opinions are classified, or when Congress directs a court to keep its orders sealed? Can Congress or the executive branch override Article III courts' power to issue public decisions? That question looms large for the Foreign Intelligence Surveillance Court (FISC), which oversees a narrow and highly classified docket.

This Article answers that question. Starting from the Supreme Court's recognition that federal courts have inherent supervisory power over judicial records, this Article offers the first account of the nature of Article III courts' power to make their records public, or what I call the "publication power." It surveys caselaw and scholarship on courts' inherent powers to identify four points of consensus that provide a framework for explicating the nature of particular powers. Applying that framework to courts' publication power, it demonstrates that the power to issue public decisions in the form of orders, judgments, and opinions is a core inherent power that cannot be abridged. In contrast, courts' publication power over most, if not all, other judicial records can be regulated and perhaps abrogated

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consistent with Article III. For the FISC, that means that neither Congress nor the executive branch can prevent the court from issuing public decisions.

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INTRODUCTION

The Framers vested "[t]he judicial Power of the United States" in independent courts so that they may protect individual liberty and serve as a check on the legislative and executive branches.[1] As Alexander Hamilton explained, "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[2] It was to be the duty of the courts "to declare all acts contrary to the manifest tenor of the Constitution void."[3]

The judicial power, however, is narrow and not self-executing. The judicial power is merely the power "to say what the law is."[4] "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[5] Instead, it can only "declare the sense of the law" and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[6] Whether the executive ultimately enforces judicial decisions, in turn, depends on popular support for those decisions.[7] In other words, the root of judicial

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1 U.S. CONST. art. III, § 1; *see, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–58 (1982); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

2 THE FEDERALIST NO. 78 (Alexander Hamilton).

3 *Id.*

4 Marbury v. Madison, 5 U.S. 137, 177 (1803).

5 THE FEDERALIST NO. 78 (Alexander Hamilton).

6 *Id.*

7 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–66 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381 (2009); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–95, 1839–42 (2005).

power is the public support courts cultivate through public decisions and reason-giving.

But what happens when the executive branch asserts that a court's opinions are classified, or when Congress directs a court to keep its orders sealed? Those questions loom large in the Foreign Intelligence Surveillance Court (FISC), which oversees a highly classified docket. As Part I describes, the Foreign Intelligence Surveillance Court of Review (FISCR) has held that the FISC does not have power to entertain claims of access to its opinions, and members of the FISC have suggested that the FISC lacks authority to grant access to those portions of its opinions the executive branch determines are classified.

To assess those questions, this Article offers this first account of the nature of courts' inherent power to make their records public. In 1978 in *Nixon v. Warner Communications, Inc.*, the Supreme Court stated, without citation, that "[e]very court has supervisory power over its own records and files."[8] Lower courts have since construed *Nixon* as holding that one of federal courts' "inherent powers" is the power over access to judicial records.[9] I call that inherent power the "publication power."

The Supreme Court has never addressed whether Congress can override courts' inherent publication power to control access to their records. Nor has it provided a rubric for determining, in general, which of the courts' inherent powers may be limited or abrogated, and which are immune from interference.[10]

Thankfully, a rich body of scholarship has developed to fill the jurisprudential void. Since Felix Frankfurter and James Landis published their seminal work on courts' inherent contempt powers,[11] scholars have proposed various derivations of courts' inherent powers and offered competing theories of the extent to which Congress may regulate those powers,[12] as well as assessed the extent to which superior

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8 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

9 *See, e.g.*, Carlson v. United States, 837 F.3d 753, 759 (7th Cir. 2016); Gambale v. Deutsche Bank AG, 377 F.3d 133, 140–41 (2d Cir. 2004); Hagestad v. Tragesser, 49 F.3d 1430, 1433–34 (9th Cir. 1995); United States v. Noonan, 906 F.2d 952, 956 (3d Cir. 1990).

10 *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43–47 (1991). *See generally* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 2 n.2, 43–56 (2011).

11 *See* Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1021–22 (1924) (quoting Craig v. Hecht, 263 U.S. 255, 280, 281 (1923)).

12 *See, e.g.*, Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 44–49 (2008) (collecting cases); Amy Coney Barrett, *Procedural*

courts can supervise lower courts' exercise of their inherent powers.[13] Part II of this Article catalogues that scholarship and identifies four points of consensus that provide a framework for explicating the nature of particular inherent powers. The most significant points of consensus are that certain "core" inherent powers are entirely immune from interference by coordinate branches, while others may be regulated or even abrogated altogether.

Applying that framework to courts' publication power, Part III of this Article identifies the existence of a narrow and previously unrecognized core power: Article III courts' power to publish their decisions publicly. As I explain, courts' power to make their decisions public cannot be limited by Congress or the executive branch. In contrast, courts' publication power over most, if not all, other judicial records is subject to congressional and executive branch override.

Part IV turns back to the FISC and lays out two significant consequences that flow from the nature of courts' publication power. First, the FISC must have the power to publish its decisions in full, even if those decisions contain classified information. Second, the publication power explains why the FISC has jurisdiction to entertain motions seeking access to its opinions, despite the courts' narrow grant of statutory jurisdiction.

I. ACCESS TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

To animate and ground the analysis of Article III courts' inherent publication power that follows, this Section briefly describes the origins of the secretive FISC and traces the course of access litigation seeking FISC decisions and other records.

Common Law, 94 VA. L. REV. 813, 864–68 (2008) (cataloguing cases invoking courts' inherent power to govern local procedure); Barton, *supra* note 10, at 2–3; Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1468–73 (1984); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1152 (2006); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 760–82 (2001); *see also* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705–73 (1998).

[13] *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 328–33 (2006) (tracing the Supreme Court's invocation of its own supervisory power over lower courts).

A. *Origins and Nature of the FISC*

The origins of the FISC lie in two Supreme Court decisions and a scandal.[14] In 1967, the Supreme Court held that the government must obtain a warrant before intercepting telephone conversations.[15] In 1972, it rejected the government's argument that there should be an exception to the warrant requirement for domestic security electronic surveillance—i.e., electronic surveillance conducted for national security, as opposed to law enforcement, purposes.[16] Nevertheless, in 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee) revealed that every President since 1946 had engaged in warrantless electronic surveillance, including domestic surveillance, and that there had been serious abuses of Americans' constitutional rights in the process.[17] The Church Committee recommended that Congress take action to limit federal domestic security activities, including by requiring judicial warrants for all non-consensual domestic electronic surveillance.[18]

In response, Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA).[19] FISA authorizes the President, acting through the Attorney General, to conduct domestic electronic surveillance of individuals believed to be agents of foreign powers or otherwise acting on behalf of foreign powers.[20] In general, the government must apply for and obtain a specialized "FISA warrant" before conducting such surveillance.[21]

To oversee FISA warrant applications, Congress created the FISC, a specialized Article III court.[22] Today, FISA specifies that the FISC is to be made up of eleven Article III judges "publicly designate[d]" by the Chief Justice of the United States.[23] To review decisions of the FISC,

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14 *See generally* STEPHEN I. VLADECK, CONST. PROJECT, THE CASE FOR A FISA "SPECIAL ADVOCATE" 2–11 (2014); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1164–69 (2015).

15 Katz v. United States, 389 U.S. 347, 359 (1967).

16 United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div., 407 U.S. 297, 303 (1972).

17 *See* S. REP. NO. 94-755, Book II (1976).

18 *Id.* at 327.

19 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1885c (2018)).

20 50 U.S.C. § 1802(a)(1)(A)(i).

21 *Id.* § 1804.

22 *Id.* § 1803.

23 *Id.* § 1803(a)(1).

Congress created the Foreign Intelligence Surveillance Court of Review (FISCR), to be made up of three Article III judges, who must also be publicly designated by the Chief Justice.[24]

As Professor Vladeck has explained, when Congress enacted FISA in 1978, "FISA contemplated that the FISC would resolve individualized warrant applications [for electronic surveillance] on a case-by-case basis."[25] However, Congress has subsequently amended FISA to permit the FISC to authorize broader surveillance programs.

Most notably, Section 215 of the USA PATRIOT Act of 2001 authorized the government to apply to the FISC for orders directed to third parties "requiring the production of any tangible things" relevant to an ongoing foreign intelligence or terrorism investigation, including business records.[26] And, in the FISA Amendments Act of 2008, Congress authorized the government to obtain non-individualized orders from the FISC permitting programmatic surveillance of individuals reasonably believed to be located outside the United States for up to one year, as well as individualized orders for surveillance of United States persons who are abroad.[27]

Notwithstanding the esoteric nature of its caseload, the FISC itself has clarified that "the FISC is an inferior federal court established by Congress under Article III."[28] But it is a unique lower federal court in at least two respects. First, FISA vests the FISC with an exceptionally narrow grant of jurisdiction. Second, access to records of FISC's proceedings, including FISC's own orders and opinions, is heavily regulated by Congress through FISA and security procedures established thereunder.

1. The FISC's Jurisdiction

Regarding jurisdiction, the FISC originally only had authority to issue individualized orders approving electronic surveillance under

24 *Id.* § 1803(b).

25 VLADECK, "SPECIAL ADVOCATE," *supra* note 14, at 3.

26 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272 (2001) (codified as amended at 50 U.S.C. § 1861(a)(1) (2018)); *see* VLADECK, "SPECIAL ADVOCATE," *supra* note 14, at 3–4.

27 50 U.S.C. §§ 1881a–1881d.

28 *In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d 484, 486 (FISA Ct. 2007).

FISA.[29] But Congress has subsequently expanded the FISC's jurisdiction to keep pace with its expansion of the surveillance authorized by FISA.

Today, the FISC also has jurisdiction to entertain applications for orders authorizing physical searches;[30] the installation and use of pen registers and trap-and-trace devices;[31] the production of tangible things;[32] programmatic surveillance of individuals located outside of the United States;[33] and surveillance of United States citizens reasonably believed to be located outside the United States.[34] In addition, Congress has granted the FISC jurisdiction to entertain challenges to the legality of FISC orders requiring production of tangible things from recipients of those orders,[35] as well as challenges from electronic communication service providers that receive directives related to programmatic surveillance under FISA.[36]

But Congress has never granted the FISC general federal question jurisdiction.[37] In fact, with one exception,[38] FISA does not explicitly direct the FISC to review proposed surveillance activities for compliance with the Fourth Amendment. Congress instead sought to address Fourth Amendment considerations directly by laying out the specific requirements that must be met before a FISC judge can issue an order authorizing surveillance.[39] The only exception is for orders authorizing programmatic surveillance of non-United States persons.[40] Before a FISC judge may enter an order authorizing programmatic

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29 50 U.S.C. § 1803.

30 *Id.* § 1823(a).

31 *Id.* § 1842(a)(1).

32 *Id.* § 1861(a)(1).

33 *Id.* § 1881a.

34 *Id.* §§ 1881b(a)(1), 1881c(a)(1), 1881d(a).

35 *Id.* § 1861(f).

36 *Id.* § 1881a(i)(4)(A).

37 *See id.* §§ 1801–1885c; *see also* 28 U.S.C. § 1331.

38 *See* 50 U.S.C. § 1881a(b)(6) (requiring that surveillance of individuals outside of the United States must be "conducted in a manner consistent with the fourth amendment to the Constitution of the United States"); *id.* § 1881a(g)(1), (2)(C) (requiring the Attorney General to adopt guidelines for ensuring that surveillance of individuals located outside the United States, among other things, comports with the Fourth Amendment and submit those guidelines for review to the FISC); *id.* § 1881a(h)–(j) (requiring the Attorney General to obtain certification and issue directives to obtain surveillance information regarding individuals located outside the United States and the FISC to review those certifications and directives for compliance with the Fourth Amendment).

39 *See* S. REP. NO. 95-701 at 9, 13–16 (1978).

40 *See* sources cited *supra* note 38.

surveillance, the judge must determine that the surveillance is "consistent . . . with the . . . fourth amendment to the Constitution."[41]

Congress's only other reference to the Constitution in FISA is to the First Amendment. Several sections of FISA specify that the FISC may not conclude that there is probable cause to believe that a United States person is a foreign power or an agent of a foreign power "solely upon the basis of activities protected by the first amendment."[42] Otherwise, FISA is silent as to the FISC's power to consider constitutional issues.[43]

2. Restricted Access to FISC Orders, Opinions, and Records

Through FISA, Congress and the executive branch strictly regulate access to records of FISC proceedings. FISA specifies that orders authorizing surveillance be entered ex parte.[44] It further specifies that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence."[45] If the government appeals a FISC judge's denial of an application to FISCR, or an order from FISCR to the Supreme Court, the record must be "transmitted, under seal."[46]

On May 18, 1979, Chief Justice Burger issued security procedures pursuant to 50 U.S.C. § 1803(c) that addressed access to its proceedings.[47] Those procedures were amended as recently as February 21, 2013, and "adopted in consultation with the Attorney General and the Director of National Intelligence as required by [FISA]."[48] As amended, they require that "all court records (including notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch

41 50 U.S.C. § 1881a(j)(3)(B).

42 *Id.* §§ 1805, 1824, 1842, 1843, 1861, 1881b–1881c.

43 Several provisions of FISA direct federal district courts to consider whether due process requires disclosing FISC materials to targets upon a motion to suppress the use of those materials. *Id.* §§ 1806(g), 1825(h), 1845(g).

44 *Id.* §§ 1805(a), 1824(a), 1842(d)(1), 1861(c)(1), 1881b(c)(1), 1881c(c)(1).

45 *Id.* § 1803(c).

46 *Id.* § 1803(a)(1), (b).

47 *In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d 484, 489 (FISA Ct. 2007).

48 Ord. Appointing an Amicus Curiae at 4, Ex. A, *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things, No. BR 15-99 (FISA Ct. Sept. 17, 2015).

security standards for storing and handling classified national security information."[49] In addition, the procedures specify that "[r]ecords of the court shall not be removed from its premises except in accordance with [FISA], applicable court rule, and these procedures."[50]

In addition to the security procedures, the FISC has issued rules of procedure that address access to its records. FISC Rule of Procedure 3 provides that "national security information" in the court's possession must be maintained under the court's security procedures and in accordance with Executive Order 13526, "Classified National Security Information," or its successor.[51] More importantly, FISC Rule of Procedure 62 governs the publication of FISC opinions and other FISC records:

> Rule 62. Release of Court Records.
>
> (a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).
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> (b) Other Records. Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3.[52]

FISA does permit the disclosure of FISC records to federal district courts when the government seeks to use surveillance information in prosecutions or other government enforcement actions;[53] to Congress;[54] and, in limited circumstances, to the targets of surveillance.[55] In

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[49] *Id.* at Ex. A, ¶ 7.

[50] *Id.*

[51] FISC R.P. 3.

[52] FISC R.P. 62. FISC Rule of Procedure 62 also governs the release of records to Congress by the government or by the court. FISC R.P. 62(c).

[53] 50 U.S.C. §§ 1806(f)–(g), 1825(g), 1845(f), 1881e(b); *see also id.* § 1885a(d) (permitting transfer of FISC records to district courts when an individual seeks to use their assistance in surveillance efforts as a defense in a civil action).

[54] *Id.* § 1871(a), (c).

[55] *Id.* §§ 1806(f), 1825(g), 1845(f)(2), 1881e(b).

addition, FISC orders directing the production of tangible things are disclosed to the subject of those orders.[56] But FISA requires every recipient of FISC records, including Congress, to maintain FISC records "in a secure and nonpublic fashion."[57]

B. *Public Access to FISC Records*

Since 1978, the FISC has "issued literally thousands of classified orders."[58] Only a hundred or so are currently publicly available.[59] Between 1978 and 2013, only six FISC and FISCR opinions saw the light of day. It was only after Edward Snowden disclosed the existence of FISC-sanctioned mass surveillance programs that additional FISC opinions began to emerge.

The first public FISC opinion surfaced early on. On June 11, 1981, Presiding Judge George Hart issued a brief unclassified memorandum opinion affirming that the FISA court, at the time, had no jurisdiction to issue warrants for physical searches.[60] That opinion was republished in a 1981 Senate report titled, *Implementation of the Foreign Intelligence Surveillance Act of 1978*, which recommended amending FISA to authorize physical searches.[61]

The second FISC opinion to emerge was a May 17, 2002, opinion authored by then–FISC Presiding Judge Royce Lamberth.[62] After

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56 *See id.* § 1861(f).

57 *In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d 484, 490 (FISA Ct. 2007).

58 *Id.* at 492.

59 *See FISA Court Opinions Index*, BRENNAN CTR. FOR J., https://www.brennancenter.org/sites/default/files/FISC%20Opinions%20Index%208.5.16.pdf [https://perma.cc/TP6X-H6K7] (cataloguing FISC opinions through April 2016). At least a few additional opinions have been made public since the Brennan Center compiled its index. *See, e.g.*, *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc); *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2017 WL 427591 (FISA Ct. Jan. 25, 2017), *vacated on reconsideration en banc*, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017).

60 *In re* United States for an Ord. Authorizing the Physical Search of Nonresidential Premises and Pers. Prop., GID.C.00001 (FISA Ct. June 11, 1981), *reprinted in* S. REP. NO. 97-280, at 16–19 (1981).

61 S. REP. NO. 97-208, at 3–4 (1981). Judge Hart's opinion was republished in the third Senate report. *Id.* at 16–19. FISA required the Senate and House Permanent Select Committees on Intelligence to issue a report on the implementation of FISA once a year for four years following FISA's enactment. 50 U.S.C. § 1808(b).

62 *See In re* All Matters Submitted to the Foreign Intel. Surveillance Ct., 218 F. Supp. 2d 611 (FISA Ct. 2002), *abrogated by In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

Congress amended FISA through the PATRIOT Act of 2001, the government applied to the FISC for authorization to modify the then-existing minimization procedures.[63] Among other modifications, the government sought to permit officials additional leeway to share FISA information across intelligence and criminal investigations.[64] Judge Lamberth rejected the revisions that would have permitted increased intelligence sharing.[65] He explained that those provisions were inconsistent with FISA's core purpose of authorizing surveillance for intelligence, not law enforcement, purposes.[66]

When members of the Senate Judiciary and Intelligence Committees learned of Judge Lamberth's opinion, they requested that the FISC produce an unclassified version of the opinion to the committees.[67] On August 20, 2002, Judge Kollar-Kotelly, then–Presiding Judge of the FISC, informed the legislators that the eleven FISC judges had conferred and unanimously agreed to produce the opinion to the committees and to publish the unclassified opinion.[68]

Three months later, the FISCR issued its first and first-published decision.[69] After the government appealed Judge Lamberth's decision—the first appeal after FISA's enactment in 1978—the FISCR reversed Judge Lamberth's decision in a published opinion.[70]

Between 2002 and 2007, no additional FISC or FISCR opinions were made public.

The next FISC opinion to see daylight resulted from a December 2005 radio address by President Bush. In that address, President Bush revealed that the National Security Agency (NSA) had engaged in warrantless electronic surveillance inside the United States since 2001,

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63 *Id.* at 613.

64 *Id.* at 621–22.

65 *Id.* at 615–25.

66 *Id.* at 623.

67 Letter from Sen. Patrick Leahy, Sen. Charles E. Grassley & Sen. Arlen Specter, Members of the U.S. Sen. Comm. on the Judiciary, to Hon. Colleen Kollar-Kotelly, Presiding Judge of the U.S. Foreign Intel. Surveillance Ct. (July 31, 2002), https://fas.org/irp/agency/doj/fisa/leahy073102.html [https://perma.cc/SFY9-FFLC].

68 Letter from Hon. Colleen Kollar-Kotelly, Presiding Judge of the U.S. Foreign Intel. Surveillance Ct., to Sen. Patrick J. Leahy, Sen. Arlen Specter & Sen. Charles E. Grassley, Members of the U.S. Sen. Comm. on the Judiciary (Aug. 20, 2002), https://fas.org/irp/agency/doj/fisa/fisc082002.html [https://perma.cc/AQ62-HVJU].

69 *In re* Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002).

70 *Id.* at 719–20.

and that the program was ongoing.[71] The government had conducted the program outside the framework of FISA and the supervision of FISC.[72] When the ACLU and other litigants challenged the lawfulness of the program in the Eastern District of Michigan, the government argued that the program was lawful under Congress's 2001 Authorization for the Use of Military Force and the President's Article II powers.[73] The district court disagreed and enjoined the government from continuing the program.[74] The government appealed and oral argument in the Sixth Circuit was scheduled for January 31, 2007. On January 17, 2007, the government revealed that on January 10, 2007, the FISC had issued "innovative" and "complex" orders permitting the program to continue under FISA and with the FISC's supervision.[75]

On August 8, 2007, the ACLU filed a motion in the FISC requesting release of the January 10, 2007, orders, any subsequent orders that modified or vacated the January 10, 2007, orders and any legal briefs submitted by the government.[76] The government opposed the motion, arguing that the FISC lacked jurisdiction to entertain the motion and that the records sought were properly classified in their entirety.[77]

On December 11, 2007, the FISC issued its decision and third public opinion.[78] Though the FISC rejected the ACLU's motion on the merits, it held that it had jurisdiction to entertain the motion.[79] Then–Presiding Judge Bates explained that, like all Article III courts, the FISC was "vested with certain inherent powers upon its creation," including

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71 President George W. Bush, *President's Radio Address*, WHITE HOUSE (Dec. 17, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html [https://perma.cc/TU22-LXG2].

72 ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007) ("The wiretapping program here in litigation has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.").

73 *See* Defendants' Motion to Dismiss or, in the Alt., for Summary Judgment, *ACLU*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204), 2006 WL 1646521.

74 *ACLU*, 438 F. Supp. 2d at 782.

75 Letter from Alberto R. Gonzales, Att'y Gen., to Sen. Patrick Leahy & Sen. Arlen Specter, Members of the U.S. Sen. Comm. on the Judiciary (Jan. 17, 2007), http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf [https://perma.cc/J8AT-XJUQ].

76 Motion of the ACLU for Release of Ct. Recs. at 2, *In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d 484 (FISA Ct. 2007) (No. Misc. 07-01).

77 *See In re* Motion for Release of Ct. Recs., 526 F. Supp. 2d at 486.

78 *Id.*

79 *Id.* at 486–87.

"supervisory power over its own records and files."[80] Accordingly, Judge Bates held "it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files."[81]

The fourth FISC opinion to emerge followed Congress's enactment of the FISA Amendments Act of 2008. Section 702(a) of the Act permits the Attorney General and Director of National Intelligence to jointly authorize, for a period of up to one year, the surveillance of individuals reasonably believed to be located outside of the United States in order to acquire foreign intelligence information.[82] To conduct such surveillance, Section 702 requires the government to obtain a mass acquisition order from the FISC.[83] On July 10, 2008, the same day the Act took effect, the ACLU filed a motion in the FISC requesting that it publish records related to requests for mass acquisition orders and that the ACLU be permitted to participate in any proceedings related to such requests.[84] On August 27, 2008, the FISC issued a public order denying the motion.[85]

The next opinion to surface was a FISCR opinion issued on August 22, 2008.[86] The opinion concerns the legality of directives issued to an unnamed communications service provider commanding it to assist the government in the warrantless surveillance of its customers.[87] The FISCR opinion reveals that the FISC originally upheld the directives as lawful, and the FISCR affirmed.[88] Most notably, it held that there exists a foreign intelligence exception to the Fourth Amendment's Warrant Clause, such that the government may conduct warrantless "surveillance . . . to obtain foreign intelligence for national security purposes and . . . directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[89]

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80 *Id.* at 486 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)).

81 *Id.* at 487.

82 FISA Amendments Act of 2008, Pub. L. No. 110-261, § 702(a), 122 Stat. 2438 (codified as amended at 50 U.S.C. § 1881a(a)).

83 § 702(a)–(b), 122 Stat. 2438.

84 Motion for Leave to Participate in Proc. Required by § 702(i) of the FISA Amends. Act of 2008 at 2, *In re* Proc. Required by § 702(i) of the FISA Amends. Act of 2008, No. Misc. 08-01, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008).

85 *In re Proc.*, 2008 WL 9487946, at *1.

86 *See In re* Directives Pursuant to Section 105B of the Foreign Intel. Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008).

87 *Id.* at 1007.

88 *Id.* at 1006.

89 *Id.* at 1012.

At the conclusion of the opinion, FISCR explained that because its opinion "addresse[d] and resolve[d] issues of statutory and constitutional significance" and "[i]t would serve the public interest and the orderly administration of justice to publish [its] opinion," it would publish a redacted version of the opinion.[90]

Between August 2008 and June 2013, no FISC or FISCR opinions were made public.

On June 5, 2013, reporter Glenn Greenwald shocked the world by publishing a classified April 25, 2013, FISC order (Verizon 215 Order),[91] which was disclosed to Greenwald and Laura Poitras by Edward Snowden.[92] Utilizing authority granted by Section 215 of the PATRIOT Act, the order directed Verizon to "*continue*" producing "on an ongoing *daily* basis" to the NSA electronic copies of "*all* call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."[93] It defined "telephony metadata" to include "session identifying information (e.g., originating and terminating telephone number[s], International Mobile Subscriber Identity (IMSI) number[s], [and] International Mobile station Equipment Identity (IMEI) number[s]), trunk identifier[s], telephone calling card numbers, and [the] time and duration of call[s]."[94] In short, the order revealed that the NSA was collecting, and had been collecting, call metadata from millions of Americans.

The following day, Greenwald and Ewen MacAskill revealed the existence of another NSA surveillance program, "PRISM."[95] Greenwald

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90 *Id.* at 1016.

91 *See Verizon Forced to Hand over Telephone Data—Full Court Ruling*, GUARDIAN (June 5, 2013, 11:40 PM), https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order [https://perma.cc/8WMV-C993]; *see also* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/43HL-L9GZ].

92 *See* Glenn Greenwald, *Glenn Greenwald: Here's What Happened on the Day We Revealed Snowden's Identity*, BUS. INSIDER (May 11, 2014, 9:52 AM), https://www.businessinsider.com/the-day-we-revealed-snowdens-identity-2014-5 [https://perma.cc/SKX5-9CLC].

93 *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Comm'n Servs., Inc. D/B/A Verizon Bus. Servs., No. BR 13-80, at 1–2 (FISA Ct. Apr. 25, 2013) (emphases added), https://snowdenarchive.cjfe.org/greenstone/collect/snowden1/index/assoc/HASH01fe/40155e86.dir/doc.pdf [https://perma.cc/FJ2X-HXKC].

94 *Id.* at 2.

95 Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013, 3:23 PM), https://www.theguardian.com/world/

and MacAskill reported that, under PRISM, NSA had obtained direct access to Google, Facebook, Apple, and other internet intermediaries to collect material, including users' search history, and the content of emails, file transfers and live chats.[96]

The public backlash was immediate and overwhelming.[97] The Electronic Frontier Foundation (EFF) called for a new Church Committee to investigate domestic surveillance practices and propose reforms.[98] ACLU attorneys called on Congress to update privacy protections.[99] Senators Ron Wyden and Mark Udall published an op-ed expressing their long-standing disagreement with senior Obama Administration officials that the NSA programs had produced valuable intelligence and called for the Obama Administration to declassify information about the programs so Americans could judge for themselves.[100]

On June 6, 2013, the Director of National Intelligence, James Clapper, issued a statement confirming the authenticity of the Verizon 215 Order and revealing additional information about the underlying surveillance program.[101] At a June 7, 2013, press conference, President

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2013/jun/06/us-tech-giants-nsa-data [https://perma.cc/SRC9-NU2S]. Note that the date of the article appears to be the date the article was last edited.

96 *Id.*

97 *See, e.g.*, Wells C. Bennett & Benjamin Wittes, Opinion, *Reaction to NSA Surveillance of U.S. Citizens' Phone Records*, BROOKINGS INST. (June 6, 2013), https://www.brookings.edu/opinions/reaction-to-nsa-surveillance-of-u-s-citizens-phone-records [https://perma.cc/5KYB-9BHR]; David Cole, *It's Worse than You Thought: NSA Spying and the Patriot Act*, NATION (June 6, 2013), https://www.thenation.com/article/its-worse-you-thought-nsa-spying-and-patriot-act [https://perma.cc/2A7K-WRX9]; Siobhan Gorman, Evan Perez & Janet Hook, *U.S. Collects Vast Data Trove*, WALL ST. J. (June 7, 2013, 9:25 AM), https://www.wsj.com/articles/SB10001424127887324299104578529112289298922 [https://perma.cc/R3EF-4CBU]; Amy Davidson Sorkin, *The N.S.A.-Verizon Scandal*, NEW YORKER (June 6, 2013), https://www.newyorker.com/news/amy-davidson/the-n-s-a-verizon-scandal [https://perma.cc/B5M6-382K].

98 Cindy Cohn & Trevor Timm, *In Response to the NSA, We Need a New Church Committee and We Need It Now*, ELEC. FRONTIER FOUND. (June 7, 2013), https://www.eff.org/deeplinks/2013/06/response-nsa-we-need-new-church-commission-and-we-need-it-now [https://perma.cc/66JS-N9R6].

99 Jay Stanley & Ben Wizner, Column, *Why the Government Wants Your Metadata*, REUTERS (June 7, 2013, 10:26 AM), https://www.reuters.com/article/usa-security-column/column-why-the-government-wants-your-metadata-idUSL1N0EJ0VK20130607 [https://perma.cc/7BP4-623Q].

100 Ron Wyden & Mark Udall, Opinion, *The Patriot Act Must Not Be Used to Violate the Rights of Law-Abiding Citizens*, GUARDIAN (June 7, 2013, 6:04 PM), https://www.theguardian.com/commentisfree/2013/jun/07/patriot-act-violate-privacy [https://perma.cc/V7XX-2C6M].

101 Press Release, James R. Clapper, Dir. of Nat'l Intel., DNI Statement on Recent Unauthorized Disclosures of Classified Information (June 6, 2013), https://www.dni.gov/

Obama fielded a question about the Snowden disclosures and provided additional details on the Verizon 215 Order and PRISM program.[102] President Obama disclosed that both programs were overseen by the FISC.[103] That same month, President Obama directed the Director of National Intelligence to declassify and make public as much information as possible about collection programs under Section 702 of the PATRIOT Act.[104]

The Snowden leak led to a flurry of filings in the FISC seeking disclosure of additional information about government surveillance of Americans. On June 12, 2013, the ACLU and Yale Media Freedom and Information Access Clinic (Yale MFIA Clinic) filed a motion asserting a First Amendment right of access to FISC opinions interpreting Section 215.[105] Between June 18 and September 17, 2013, Google, Microsoft, Yahoo!, Facebook, and LinkedIn each filed a motion for declaratory judgment asserting their First Amendment right to publish limited, aggregate statistics about their receipt of orders issued by the FISC, if any.[106]

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index.php/newsroom/press-releases/press-releases-2013/item/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information [https://perma.cc/KQS9-37SX].

102 President Barack Obama, Statement by the President (June 7, 2013, 9:01 AM), https://obamawhitehouse.archives.gov/the-press-office/2013/06/07/statement-president [https://perma.cc/EWR9-QG7K].

103 *Id.*

104 *See* Press Release, James R. Clapper, Dir. of Nat'l Intel., DNI Clapper Directs Annual Release of Information Related to Orders Issued Under National Security Authorities (Aug. 29, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/922-dni-clapper-directs-annual-release-of-information-related-to-orders-issued-under-national-security-authorities [https://perma.cc/TML3-ES2J].

105 Motion of the ACLU, the ACLU of the Nation's Cap. & the Media Freedom & Info. Access Clinic for the Release of Ct. Recs. at 1, *In re* Ords. Issued by This Ct. Interpreting Section 215 of the PATRIOT Act, No. Misc. 13-02 (FISA Ct. June 12, 2013).

106 *See* Motion for Declaratory Judgment that LinkedIn Corp. May Report Aggregate Data Regarding FISA Ords., *In re* Motion for Declaratory Judgment that LinkedIn Corp. May Report Aggregate Data Regarding FISA Ords., No. Misc. 13-07 (FISA Ct. Sept. 17, 2013); Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Ords. & Directives, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Ords. & Directives, No. Misc. 13-06 (FISA Ct. Sept. 9, 2013); Yahoo!'s Motion for Declaratory Judgement to Disclose Aggregate Data Regarding FISA Ords. & Directives, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Ords. & Directives, No. Misc. 13-05 (FISA Ct. Sept. 9, 2013); Microsoft Corp.'s First Amended Motion for Declaratory Judgment or Other Appropriate Relief Authorizing Disclosure of Aggregate Data Regarding Any FISA Ords. It Has Received, *In re* Motion to Disclose Aggregate Data Regarding FISA Ords., No. Misc. 13-04 (FISA Ct. Sept. 9, 2013); Amended Motion for Declaratory Judgment of Google Inc.'s First Amend. Right to Publish Aggregate Info. About FISA Ords., *In re* Amended Motion for Declaratory

Meanwhile, the government began to voluntarily declassify certain FISC orders and provide additional information about the court's work. On August 9, 2013, the Obama Administration published a white paper detailing the government's legal basis for the bulk collection of telephony metadata.[107] On August 21, 2013, Director Clapper authorized the declassification and publication of two FISC opinions in their entirety, as well as a third with redactions, addressing whether NSA's implementation of Section 702 was inconsistent with FISA and the Fourth Amendment.[108] On August 29, 2013, Director Clapper announced that the government would release, on an annual basis, aggregate information concerning compulsory legal process under certain national security authorities.[109] On September 10, 2013, Director Clapper authorized the declassification and publication of eight additional FISC opinions concerning various compliance incidents in the NSA's execution of authorized surveillance.[110] On September 17, 2013, FISC Judge Walton sua sponte ordered publication of four FISC orders concerning the constitutionality of the bulk collection of telephony metadata.[111] On October 18, 2013, Judge Walton sua sponte

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Judgment of Google Inc.'s First Amend. Right to Publish Info. About FISA Ords., No. Misc. 13-03 (FISA Ct. Sept. 9, 2013).

107 *See* OBAMA ADMIN., ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT (Aug. 9, 2013), https://www.eff.org/document/administration-white-paper-section-215-patriot-act [https://perma.cc/3EQF-3PNP].

108 *See* Shawn Turner, *DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)*, IC ON THE REC. (Aug. 21, 2013), http://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents [https://perma.cc/5MER-RUPV]; JAMES R. CLAPPER, 'DNI CLAPPER SECTION 702 DECLASSIFICATION LETTER (Aug. 21, 2013), https://www.dni.gov/files/documents/DNI%20Clapper%20Section%20702%20Declassification%20Cover%20Letter.pdf [https://perma.cc/S4GR-FCKB].

109 Press Release, James R. Clapper, Dir. of Nat'l Intel., DNI Clapper Directs Annual Release of Information Related to Orders Issued Under National Security Authorities '(Aug. 29, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/922-dni-clapper-directs-annual-release-of-information-related-to-orders-issued-under-national-security-authorities [https://perma.cc/XV97-7UQ5].

110 Press Release, James R. Clapper, Dir. of Nat'l Intel., DNI Clapper Declassifies Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (FISA) (Sept. 10, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifies-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-fisa [https://perma.cc/3KTY-4X89]; *FISA Court Opinions Index*, *supra* note 59.

111 Ord., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things, No. BR 13-109 (FISA Ct. Sept. 17, 2013). The four orders Judge Walton ordered released are Amended Memorandum Op., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573 (FISA Ct. Aug. 29, 2013);

ordered publication of an October 11, 2013, opinion authorizing the bulk collection of telephony metadata.[112]

On November 6, 2013, the ACLU and the Yale MFIA Clinic filed a second motion seeking access to FISC opinions addressing the legal basis for the bulk collection of data.[113] On November 12, 2013, ProPublica, Inc. filed its own motion asserting a First Amendment right of access to opinions cited in one of the opinions disclosed by the FISC on September 17, 2013.[114]

On December 6, 2013, in response to the ACLU and the Yale MFIA Clinic's second motion, the government identified two redacted opinions concerning bulk collection of metadata and released two additional redacted opinions concerning the bulk collection of electronic communications metadata and certain compliance issues regarding the bulk collection of electronic communications metadata.[115] The ACLU and the Yale MFIA Clinic filed a supplemental brief challenging the government's redactions on First Amendment grounds.[116]

On January 27, 2014, the government settled with Microsoft, Google, and the other intermediaries, permitting them to publish aggregate statistics about the number of surveillance orders they receive.[117] And on August 27, 2014, in response to the ACLU and the

Primary Ord., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109, 2013 WL 5741573 (FISA Ct. July 19, 2013); Ord., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109 (FISA Ct. Aug. 23, 2013); and Ord., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-109 (FISA Ct. Aug. 29, 2013).

112 Ord., *In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things, No. BR 13-158 (FISA Ct. Oct. 18, 2013).

113 Motion of the ACLU, the ACLU of the Nation's Cap. & the Media Freedom & Info. Access Clinic for the Release of Ct. Recs., *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08 (FISA Ct. Nov. 6, 2013).

114 Motion of ProPublica, Inc. for the Release of Ct. Recs., *In re* Motion of ProPublica, Inc. for the Release of Ct. Recs., No. Misc. 13-09 (FISA Ct. Nov. 12, 2013).

115 *See* United States' Opposition to the Motion of the ACLU, *et al.*, for the Release of Ct. Recs. at 1–2, *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08 (FISA Ct. Dec. 6, 2013).

116 *See* Movants' Reply in Support of Their Motion for the Release of Ct. Recs., *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data, No. Misc. 13-08 (FISA Ct. Dec. 20, 2013).

117 *See* Stipulation for Voluntary Dismissal of Action, Nos. Misc. 13-03, 13-04, 13-05, 13-06, 13-07 (FISA Ct. Jan. 27, 2014); Craig Timberg & Adam Goldman, *U.S. to Allow Companies to Disclose More Details on Government Requests for Data*, WASH. POST (Jan. 27, 2014), https://www.washingtonpost.com/business/technology/us-to-allow-companies-to-disclose-more-details-on-government-requests-for-data/2014/01/27/3cc96226-8796-11e3-a5bd-844629433ba3_story.html?utm_term=.f2db80666896 [https://perma.cc/45LE-VXEP].

Yale MFIA Clinic's first right of access motion, the government released a redacted version of a February 19, 2013, FISC opinion concerning the legality of the government's bulk collection of telephony metadata.[118]

While access litigation progressed in the FISC, several FOIA lawsuits resulted in the disclosure of additional FISC opinions and records. From September to December 2013, the government released a host of FISC materials in response to FOIA litigation brought by the ACLU and EFF.[119] On January 17, 2014, the ACLU obtained another twenty-seven FISC opinions in FOIA litigation against the FBI.[120] On March 28, 2014, EFF obtained an additional FISC opinion in FOIA litigation against the Director of National Intelligence.[121] And on December 12, 2014, *The New York Times* obtained an additional six FISC opinions in FOIA litigation against the Department of Justice.[122]

On June 2, 2015, Congress enacted the USA FREEDOM Act, amending FISA to incorporate several important transparency guarantees.[123] Congress codified the annual Director of National Intelligence transparency reports that were initiated by Director Clapper.[124] Congress enacted a new requirement that the Director of National Intelligence, in consultation with the Attorney General, declassify FISC and FISCR opinions that include a "significant" or "novel" "construction or interpretation of any provision of law," or, if declassification is not possible, to produce a public summary of the significant or novel opinion.[125] Congress also provided for the appointment of amici curiae to participate in FISC proceedings concerning applications that present a significant or novel issue of law.[126]

Following the USA FREEDOM Act's passage, the government took the position that the provision requiring declassification of FISC and

118 *See In re* Fed. Bureau of Investigation for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. BR 13-25, 2013 WL 9838183 (FISA Ct. Feb. 19, 2013).

119 *See NSA Documents Released to the Public Since June 2013*, ACLU, https://www.aclu.org/nsa-documents-released-public-june-2013 [https://perma.cc/UF5U-P2DT].

120 *See FISA Court Opinions Index*, *supra* note 59.

121 *Id.*

122 *Id.*

123 *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 267 (2015). The USA FREEDOM Act also narrowed Section 215 of the PATRIOT Act, requiring the government to narrow bulk collection by "specific selection term[s]." *Id.* § 101, 129 Stat. at 269–70 (codified at 50 U.S.C. § 1861(b)(2)).

124 *Id.* § 602, 129 Stat. at 292 (codified at 50 U.S.C. § 1873).

125 *Id.* § 402, 129 Stat. at 281 (codified at 50 U.S.C. § 1872).

126 *Id.* § 401, 129 Stat. at 279 (codified at 50 U.S.C. § 1803(i)).

FISCR opinions containing significant or novel interpretations of law does not apply retroactively to decisions that predate the USA FREEDOM Act's enactment on June 2, 2015.[127] As a result, on October 19, 2016, the ACLU and the Yale MFIA Clinic filed another access motion in the FISC seeking disclosure of FISC opinions and orders containing novel or significant interpretations of law between September 11, 2001, and June 2, 2015.[128] That motion is outstanding. To date, the government has declassified no FISC or FISCR opinions under the USA FREEDOM Act's declassification provision or issued a public summary of any decisions.

On January 25, 2017, the FISC issued an order denying the ACLU and the Yale MFIA Clinic's November 2013 access motion seeking disclosure of the redacted portions of four FISC opinions addressing bulk collection of Americans' metadata on jurisdictional grounds.[129] The FISC held that there is no First Amendment right of access to FISC opinions and that, as a result, the movants lacked standing to assert a First Amendment injury.[130] On March 22, 2017, the FISC sua sponte decided to rehear the motion in its first ever en banc sitting, and on November 9, 2017, a six-to-five majority of the en banc FISC reversed the initial decision, holding that the movants did have standing.[131]

Notably, the five dissenting judges would have held that the FISC lacks power to order the classified portions of its opinions disclosed for one or both of two reasons. The dissenters would have held that the FISC lacks discretion to conduct its proceedings publicly because Congress has required it to conduct its proceedings secretly and, through the USA FREEDOM Act, assigned declassification determinations to the executive branch—specifically to the Director of National Intelligence and the Attorney General.[132] In addition, the dissenters would have held that courts, including the FISC, lack

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127 *See* Defendant U.S. Dep't of Just.'s Memorandum of Points & Authorities in Opposition to Plaintiff's Motion for Reconsideration, Elec. Frontier Found. v. Dep't of Just., No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF No. 28.

128 Motion of the ACLU for the Release of Ct. Recs., *In re* Ops. & Ords. of This Ct. Containing Novel or Significant Interpretations of L., No. Misc. 16-01 (FISA Ct. Oct. 19, 2016).

129 *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2017 WL 427591 (FISA Ct. Jan. 25, 2017), *vacated on reconsideration en banc*, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017).

130 *Id.* at *3–21.

131 *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc).

132 *Id.* at *9, *13 (Collyer, J., dissenting).

authority to independently review the executive branch's classification decisions.[133]

On January 5, 2018, the en banc FISC sua sponte certified the issue of standing to the FISCR,[134] and on March 16, 2018, the FISCR affirmed the en banc FISC's decision.[135]

On remand, the FISC entered an order directing the parties to address whether the FISC has subject-matter jurisdiction over access claims asserting a First Amendment right of access to classified information contained in FISC opinions.[136] After briefing was completed, the FISC entered an order holding that the FISC has subject-matter jurisdiction over right of access claims pursuant to the Supreme Court's ancillary jurisdiction jurisprudence, but that the First Amendment does not convey a right of access to FISC opinions.[137] The ACLU, Knight First Amendment Institute, and Yale MFIA Clinic appealed that decision.

On appeal, the FISCR reversed the FISC's decision on subject-matter jurisdiction.[138] The FISCR first held that the FISC lacks statutory jurisdiction over access claims under FISA.[139] The court then turned to the issue of ancillary jurisdiction. The FISCR observed that the Supreme Court has cautioned that courts must generally exercise restraint and discretion in invoking their ancillary jurisdiction.[140] The FISCR explained that it was "especially reluctant" to exercise any ancillary jurisdiction, given its "significantly limited powers carefully delineated by Congress."[141] With respect to the specific access claim at hand, the FISCR noted that it was not a case in which the movants had been haled into court against their will, or one where an exercise of ancillary jurisdiction was necessary to enforce its own mandates or to protect the

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133 *Id.* at *14 (Collyer, J., dissenting).

134 *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2018 WL 396244, at *1–2 (FISA Ct. Jan. 5, 2018).

135 *See In re* Certification of Questions of L. to Foreign Intel. Surveillance Ct. of Rev., No. FISCR 18-01, 2018 WL 2709456 (FISA Ct. Rev. Mar. 16, 2018).

136 Appointment of Amicus Curiae & Briefing Ord., *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08 (FISA Ct. May 1, 2018).

137 *In re* Ops. & Ords. of This Ct. Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, No. Misc. 13-08, 2020 WL 897659, at *3, *6–7 (FISA Ct. Feb. 11, 2020).

138 *In re* Ops. & Ords. by the FISC Addressing Bulk Collection of Data Under the Foreign Intel. Surveillance Act, 957 F.3d 1344, 1349 (FISA Ct. Rev. Apr. 24, 2020).

139 *See id.* at 1349–55.

140 *Id.* at 1356.

141 *Id.*

integrity of its proceedings.[142] Coupled with the fact that resolving the movants' claim could disrupt the executive branch's "clear authority to determine what material should remain classified," the FISCR concluded that the FISC lacked ancillary jurisdiction to entertain access motions "[i]n the absence of a clear grant of reviewing authority in the FISA or a need to protect the integrity of [its] own judicial processes."[143]

On April 19, 2021, the ACLU, Yale MFIA Clinic, and Knight First Amendment Institute filed a petition for writ of certiorari in the Supreme Court.[144] The Court had not yet ruled on that petition at the time of publication.[145]

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As things stand, there are two threshold issues precluding a final resolution on the merits of whether there exists a First Amendment right of access to FISC opinions.

The first is whether the FISC has authority to disclose those portions of its opinions, which the executive branch deems classified. If courts must defer to the executive branch's classification determinations with respect to their own decisions, the FISC cannot

142 *Id.*

143 *Id.* at 1357.

144 *See* Petition for a Writ of Certiorari, ACLU v. United States, No. 20-1499, 2021 WL 1670279 (Apr. 19, 2021).

145 In July 2018, the FBI also released some of the FISC's Carter Page surveillance records in response to several FOIA lawsuits. Charlie Savage, *Carter Page FISA Documents Are Released by Justice Department*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/us/politics/carter-page-fisa.html [https://perma.cc/YL8C-8NJF]. The FISC itself has issued one public opinion denying an amicus leave to file a brief and six opinions concerning the surveillance of Carter Page. On April 11, 2019, the FISC issued an order denying Thomas Goldstein leave to file an amicus brief challenging the lawfulness of Matthew Whitaker's tenure as Acting Attorney General. Ord., *In re* Motion for Appointment of Thomas C. Goldstein as Amicus Curiae Pursuant to 50 U.S.C. § 1803(i)(2)(B), No. Misc. 18-04 (FISA Ct. Apr. 11, 2019). And, in the aftermath of the Office of the Inspector General report concluding that the FBI made material misstatements and omissions in its representations to the FISC, the court has issued six public orders on the matter, directing the government to take steps to punish the attorney responsible; sequester, minimize, and dispose the information collected as a result; and to take steps to prevent such misstatements and omissions in the future. *See* Ord. Regarding Handling & Disposition of Info., *In re* Carter W. Page, a U.S. Person, Nos. 16-1182, 17-52, 17-375, 17-679 (FISA Ct. Jan. 7, 2020); Ord., *In re* All Matters Submitted to the Foreign Intel. Surveillance Court, No. [Redacted] (FISA Ct. Dec. 5, 2019), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Dec%205%20Redacted%20Order%20191220.pdf [https://perma.cc/S9HV-99CN].

require its orders, opinions, and judgments to be disclosed over the executive branch's objection.

The second is whether the FISC has jurisdiction over claims of access to its records. If courts must have federal-question jurisdiction to entertain constitutional access claims for court records, then the FISC very likely does not have subject-matter jurisdiction to entertain claims of access to its records.

II. Article III Courts' Inherent Powers

Whether the FISC has the power to publish its opinions and jurisdiction over constitutional access claims turns on the nature of its inherent power over access to its records, or what I call its "publication power." In order to analyze the nature of that power and whether it may be overridden, this Part surveys the doctrine and scholarship on courts' inherent powers in order to construct a framework that can be applied to courts' publication power.

Since the early days of the Republic, the Supreme Court has acknowledged that Article III courts possess certain inherent powers.[146] Inherent powers do not derive from statutes or rules. Instead, they are "vested" in Article III courts "by their very creation."[147]

In 1821, for instance, Justice Johnson recognized that Article III courts have inherent power to hold individuals in contempt, irrespective of any legislative grant of contempt power:

> Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.
>
> It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision

146 *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution" and "cannot be dispensed with in a Court, because they are necessary to the exercise of all others."); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991). *See generally* Frankfurter & Landis, *supra* note 11.

147 *Chambers*, 501 U.S. at 43 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

> may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.[148]

While the inherent contempt power is only one of many inherent powers vested in Article III courts, the Supreme Court has never offered a definitive list of those powers. In *Chambers v. NASCO, Inc.*, the Court catalogued an Article III court's inherent powers as including the "power to control admission to its bar and to discipline attorneys who appear before it"; "the power to punish for contempts," including for "both conduct before the court and that beyond the court's confines," such as "disobedience to the orders of the Judiciary"; "[the power] to vacate its own judgment upon proof that a fraud has been perpetrated upon the court" and, as a corollary, "the power to conduct an independent investigation in order to determine whether it has been the victim of fraud"; the power "to "bar from the courtroom a criminal defendant who disrupts a trial"; the power to "dismiss an action on grounds of *forum non conveniens*"; the power to "act *sua sponte* to dismiss a suit for failure to prosecute"; and "[the] power to assess attorney's fees against counsel."[149] But that list is not even exhaustive of the Supreme Court's own inherent powers' jurisprudence.[150] And lower courts have identified an even wider array of inherent powers.[151]

Nor has the Supreme Court ever offered a general rubric for the derivation of inherent powers. Early on, the Court indicated that federal courts possess those inherent powers "necessary to the exercise of all others."[152] Later, the Court offered that courts possess those inherent powers necessary "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[153] More recently, the Court described inherent powers as those necessary "to enable a court to function successfully, that is, to manage its proceedings, vindicate its

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148 *Anderson*, 19 U.S. (6 Wheat.) at 227–28.

149 *Chambers*, 501 U.S. at 43–45.

150 *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978); Barrett, *supra* note 12, at 864–68 (cataloguing cases invoking courts' inherent power to govern local procedure); Barrett, *supra* note 13, at 328–33 (tracing the Supreme Court's invocation of its own supervisory power over lower courts).

151 Anclien, *supra* note 12, at 44–49 (collecting cases).

152 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

153 Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

authority, and effectuate its decrees."[154] But beyond these vague guideposts, the Court has eschewed any general theory of inherent powers in favor of a piecemeal approach, analyzing specific assertions of "inherent power" on a case-by-case basis.[155]

The Court has also never provided a straightforward analysis of whether and to what extent Congress can regulate or displace courts' inherent powers. On the one hand, the Court has recognized that "the exercise of the inherent power of lower federal courts can be limited by statute and rule."[156] On the other hand, the Court has explained that lower courts' inherent powers "can neither be abrogated nor rendered practically inoperative,"[157] and adopted a presumption that Congress does not intend to limit a court's inherent power absent a clear intent to do so.[158]

In the absence of more definitive guidance from the Court, scholars and lower federal courts have explicated the nature of lower courts' inherent powers and offered varying accounts about the extent to which Congress can regulate those powers. Surveying that literature and caselaw, there are at least four points of consensus relevant to this discussion.

A. *Courts' Inherent Powers Are Rooted in Article III*

Professor (and later Justice) Frankfurter and Professor Landis laid out the seminal derivation of lower courts' inherent powers in 1924.[159] In a law review article, they argued that Article III grants Congress discretion in determining whether to create lower federal courts at all, but that when Congress chooses to create lower courts, Article III specifies that "the 'Tribunals inferior to the Supreme Court' which Congress is authorized to 'constitute' must be 'Courts'" endowed with the "judicial power" of the United States.[160] To be "courts" exercising the "judicial power" of the United States, lower federal courts therefore

154 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994).

155 *See* Pushaw, *supra* note 12, at 760–82; Anclien, *supra* note 12, at 49–51; Barton, *supra* note 10, at 2–3.

156 Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991).

157 Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 66 (1924).

158 *See Chambers*, 501 U.S. at 47.

159 *See* Frankfurter & Landis, *supra* note 11.

160 *Id.* at 1018–23.

must, at a minimum, decide, not advise; be independent; not be tasked with core legislative or executive powers; and, "[a]s an incident to their being, . . . have the authority 'necessary in a strict sense' to enable them to go on with their work."[161] It is the last attribute that Frankfurter and Landis argue gives rise to lower courts' so-called "inherent" powers.

Today, there is broad consensus around Frankfurter and Landis's conclusion that lower federal courts' inherent powers stem directly from Article III's references to "judicial power" and "courts."[162]

Importantly, Article III inherent powers are vested in each court, such that one court cannot exercise another courts' inherent power. Now-Justice Amy Coney Barrett has persuasively argued that because Article III's Vesting Clause vests the judicial power in each federal court individually, federal courts' inherent powers—which derive from "the judicial power" vested—are entirely local and inhere to each individual Article III judge.[163] "The principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power," including against interference by fellow judges with their exercise of inherent powers.[164] The Second Circuit has held that courts' inherent power to discipline attorneys, for instance, is "an inherent, self-contained power of any court" such that an appellate court may only review a lower court's use of that power for an abuse of discretion.[165] For the same reasons, the Fourth Circuit has held that appellate courts may only review a lower court's use of its contempt power for abuse of discretion.[166]

The takeaway is that there is a broad consensus among courts and scholars that Article III courts' inherent powers stem from Article III itself and a persuasive argument that those powers inhere to each Article III judge.

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161 *Id.* at 1020–22 (quoting Craig v. Hecht, 263 U.S. 255, 280–81 (1923)).

162 *See, e.g.*, Anclien, *supra* note 12, at 44–54; Barrett, *supra* note 12, at 816, 844–83; Beale, *supra* note 12, at 1468–73; Lear, *supra* note 12, at 1152; Levin & Amsterdam, *supra* note 12, at 30; Pushaw, *supra* note 12, at 847–48; *cf.* Barton, *supra* note 10, at 31–40 (arguing that courts' inherent power stems primarily from Article I's Necessary and Proper Clause but acknowledging that there exists some "core judicial power of deciding cases" with which Congress may "not interfere").

163 *See* Barrett, *supra* note 13, at 357–89.

164 *Id.* at 358 (quoting McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of the Jud. Conf., 264 F.3d 52, 77 (D.C. Cir. 2001) (Tatel, J., concurring)).

165 *In re* Jacobs, 44 F.3d 84, 87–88 (2d Cir. 1994).

166 *In re* Morrissey, 305 F.3d 211, 217 (4th Cir. 2002).

B. *All Federal Courts Possess Some Inherent "Judicial Power" that Is Entirely Immune from Congressional Regulation*

The second point of consensus in the literature is that all federal courts possess some "core" or "pure" "judicial power" that is beyond Congress's reach. For example, Professors Leo Levin and Anthony Amsterdam contend that "[t]here are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*."[167] Then-Professor Barrett concluded that federal courts have "some small core of inherent procedural authority that Congress cannot reach."[168] Professors Pushaw and Barton reach similar conclusions.[169]

There is less clarity, however, on the breadth of courts' "pure" judicial power. Some have argued for an expansive conception of core judicial power, including Professors David Engdahl and Gary Lawson. Professor Engdahl contends that courts may disregard any congressional regulation of the judiciary that is "detrimental to judicial potency."[170] Professor Lawson argues that Congress may not limit the traditional range of remedies available to courts.[171]

Others have adopted a narrower and more defined view of the scope of courts' inherent powers, relying on Professors James Liebman and William Ryan's thorough explication of the meaning of "the judicial power," as used in Article III of the Constitution.[172] In *"Some Effectual Power*,*"* Professors Liebman and Ryan meticulously trace the drafting of Article III at the Constitutional Convention.[173] They explain that over the course of the Convention, James Madison and the nationalists agreed to curtail the *quantity* of federal jurisdiction mandated by Article

167 Levin & Amsterdam, *supra* note 12, at 30 (emphasis added).

168 Barrett, *supra* note 12, at 816.

169 *See, e.g.*, Pushaw, *supra* note 12, at 844 (defining "pure judicial power" as "applying pre-existing law to the facts in a particular case, then rendering a final, binding judgment"); Barton, *supra* note 10, at 7.

170 David. E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 168 (1999).

171 Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 219–26 (2001).

172 *See, e.g.*, Pushaw, *supra* note 12, at 844; Barton, *supra* note 10, at 7; *see also* Anclien, *supra* note 12, at 76.

173 *See* Liebman & Ryan, *supra* note 12, at 705–73.

III in exchange for mandatory *qualitative* attributes of Article III's "judicial power."[174]

Specifically, the Framers: (1) replaced the word "jurisdiction" in early drafts of the first sentence of Article III with the phrase "Judicial Power";[175] (2) removed a sentence from Article III that would have allowed Congress "to "assign *any part* of the jurisdiction above mentioned . . . *in the manner, and under the limitations* which it shall think proper, to . . . Inferior Courts" to ensure that lower Article III courts would be endowed with the full "Judicial Power" upon creation;[176] (3) guaranteed all Article III judges life tenure and forbade the diminution of their salaries;[177] (4) limited Article III jurisdiction to "Cases" and "Controversies" of a judicial nature and abandoned provisions that would have permitted Article III judges to operate in an advisory capacity to the President and Congress or to resolve abstract legal issues;[178] (5) expanded federal-question jurisdiction to ensure it reached all matters of federal law and not just those "involving the national peace and harmony";[179] (6) guaranteed that the "Judicial Power" extends to "law *and equity*" and that the Supreme Court has appellate jurisdiction over issues of both "law *and fact*";[180] and (7) abandoned a plan that would have allowed Congress to appoint state courts as federal courts.[181]

From the drafting of Article III and subsequent caselaw, Liebman and Ryan conclude that there are:

> five crucial qualities constituting "[t]he judicial Power": (1) independent decision of (2) every—and the entire—question affecting the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court's judgment in the case and in precedentially controlled cases.[182]

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174 *Id.*; *see also id.* at 775 ("The Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts.").

175 *Id.* at 750.

176 *Id.* (emphases added).

177 *Id.* at 741.

178 *Id.* at 744, 748.

179 *See id.* at 735–36, 746.

180 *Id.* at 746, 748–49, 755 (emphases added).

181 *Id.* at 758–59.

182 *Id.* at 884; *see* Pushaw, *supra* note 12, at 844 (defining "pure judicial power" as "applying pre-existing law to the facts in a particular case, then rendering a final, binding judgment").

Applying Liebman and Ryan's definition of "judicial power," several inherent-powers scholars posit that Congress may not interfere in any way with courts' power to "apply[] pre-existing law to the facts in a particular case, [and] then render[] a final, binding judgment."[183] At a minimum then, there is consensus that Article III's invocation of "the Judicial Power," coupled with the Supreme Court's decisions in *Hayburn's Case*[184] and *Klein*[185] indicate that "pure" judicial power must, at a minimum, include the power to issue binding decisions in particular cases free from congressionally dictated outcomes.[186]

C. *Outside Federal Courts' Core Judicial Power, Congress May Generally Regulate and, in Some Cases, Abrogate Courts' Inherent Powers*

The third point of consensus is that Congress may regulate and, in some cases, abrogate lower courts' non-core inherent powers. For example, Frankfurter and Landis defend the constitutionality of legislation limiting and regulating lower courts' contempt power.[187] Professor Sara Beale and then-Professor Amy Coney Barrett argue that, in general, Congress may regulate and displace the vast majority of courts' inherent power to establish procedural rules.[188]

Scholars have offered various formulations for determining whether and to what extent Congress may regulate non-core inherent powers. Professor Barton argues that, besides the "core judicial power of deciding cases" with which Congress may "not interfere," Congress has near plenary authority to displace lower courts' inherent powers, subject only to that restraint imposed by Article I's Necessary and Proper Clause.[189] Joseph Anclien contends that Congress may regulate courts' inherent powers except to the extent it impairs the "basic function[s]" or "central prerogatives" of the courts.[190]

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183 Pushaw, *supra* note 12, at 844; *see* Barton, *supra* note 10, at 7 (defining "pure judicial power," as "the power to render a final decision after applying the law to the facts"); *see also* Anclien, *supra* note 12, at 76.

184 Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

185 United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

186 *See, e.g.*, Frankfurter & Landis, *supra* note 11, at 1020 nn.55–56; Barton, *supra* note 10, at 7; Pushaw, *supra* note 12, at 844–46.

187 Frankfurter & Landis, *supra* note 11, at 1023–58.

188 Barrett, *supra* note 12, at 816; Beale, *supra* note 12, at 1473.

189 Barton, *supra* note 10, at 31.

190 Anclien, *supra* note 12, at 74–77.

Professor Pushaw suggests a hierarchical approach. He contends that the set of powers that have loosely been categorized as "inherent" can be divided into three distinct categories of judicial power: pure judicial power, implied indispensable powers, and beneficial powers.[191] Pushaw cites Liebman and Ryan in explaining that "pure judicial power" is the power to apply pre-existing law to the facts of a particular case and render a final binding judgment.[192] "Implied indispensable powers" consist of those that are absolutely essential for courts to be able to "perform their express constitutional functions competently."[193] "Beneficial powers," in turn, are those powers that are "helpful, useful, or convenient in implementing Article III."[194] According to Pushaw, pure judicial powers are entirely immune from congressional power, and implied indispensable powers may only be regulated to the extent that any regulation facilitates and does not destroy or impair the exercise of those powers.[195] In contrast, Pushaw contends that courts do not have, and should not exercise, beneficial powers absent congressional authorization, and that Congress has plenary power to deny courts' beneficial powers altogether.[196]

The Third Circuit adopted a similar approach in *Eash v. Riggins Trucking Inc.*, with one significant difference.[197] Like Pushaw, the Third Circuit categorized courts' inherent powers as falling into three categories: (1) "irreducible inherent authority" that "encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power'"; (2) "inherent powers," such as courts' contempt power, which arise from "strict functional necessity" and may be regulated, but not abrogated; and (3) "useful" powers—including the powers to certify questions to state courts, grant bail when not prohibited by statute, and dismiss a suit pursuant to the doctrine of forum non conveniens—which may be abrogated entirely.[198] Unlike Pushaw, the Third Circuit presumes that

191 Pushaw, *supra* note 12, at 843–53.

192 *Id.* at 844–46.

193 *Id.* at 847–48.

194 *Id.* at 848.

195 *Id.* at 844–48.

196 *Id.* at 848–49.

197 *See* Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985).

198 *Id.* at 561–64.

courts may exercise beneficial powers absent legislation denying courts' those powers.

The Supreme Court, for its part, declined to adopt or reject the Third Circuit's three-tiered, hierarchal approach in *Chambers*.[199] But since *Chambers*, the Fourth and Fifth Circuits adopted the *Eash* framework, indicating its continued viability.[200]

Lower courts and scholars thus largely agree that outside of courts' core inherent powers, Congress can regulate and, in some cases, abdicate courts' inherent powers.

D. *In the Absence of Congressional Regulation, Courts Are Free to Exercise Inherent Powers Absent Legitimate Regulation or Abrogation*

The final point of consensus is that, subject to a notable caveat, courts may exercise non-core inherent powers in the absence of specific congressional authorization. Supreme Court doctrine indicates, and scholars largely agree, that courts are free to exercise their inherent powers, so long as those powers have not been foreclosed by an existing act of Congress and are helpful to the deciding of cases.[201] For example, until Congress dictates otherwise, federal courts are free to formulate federal common law in federal enclaves,[202] create uniform procedural rules,[203] fashion remedies,[204] and appoint special masters.[205]

The only caveat is that some scholars argue there exists a necessity limitation on courts' exercise of inherent powers in the absence of congressional authorization. Professor Pushaw, for example, argues that courts cannot exercise "beneficial" powers—i.e., those that are helpful, useful, or convenient, but not *necessary*, to the exercise of the

199 Chambers v. NASCO, Inc., 501 U.S. 32, 47 n.12 (1991) (explaining that the "Court has never so classified the inherent powers" along the lines proposed in *Eash*, and that it had "no need to do so" in *Chambers*).

200 ACLU v. Holder, 673 F.3d 245, 255–56 (4th Cir. 2011); *In re* Stone, 986 F.2d 898, 901–02 (5th Cir. 1993).

201 *See, e.g.*, Barton, *supra* note 10, at 6; Anclien, *supra* note 12, at 83–84.

202 Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

203 Barrett, *supra* note 12, at 876–78, 888.

204 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402–10 (1971) (Harlan, J., concurring); *see* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 796–97 (1975).

205 *In re* Peterson, 253 U.S. 300, 306–07 (1920); Pushaw, *supra* note 12, at 853–54.

judicial power—absent congressional authorization.[206] Pushaw, however, defines "necessary" powers broadly. For example, Pushaw categorizes courts' authority over "[m]ost aspects of judicial administration and management" as indispensable, including the powers to calendar hearings, assign cases amongst judges, and grant continuances or recesses.[207]

Professor Van Alstyne similarly argues that the judiciary simply does not "possess any powers *not essential* (as distinct from those that may be merely helpful or appropriate) to the performance of [its] enumerated duties."[208] Van Alstyne appears to take a narrower view of the scope of courts' essential powers than Pushaw. He argues that absent legislation, courts should be skeptical of exercising supervisory authority, fashioning remedies, or creating evidentiary privileges.[209] He suggests that courts can only "exercise a wider scope of incidental power if, but only if, Congress itself has determined such powers to be necessary and proper."[210]

Most, however, reject the existence of a necessity limitation. Professor Beale argues that the broad vesting clauses of Articles II and III suggest that courts have and may exercise beneficial implied powers absent legislation to the contrary.[211] Joseph Anclien adds that policy considerations, including the inevitability of procedural gaps, further contradict the assertion of a necessity limitation.[212] Then-Professor Barrett points out that the Court has never adopted a generalized necessity limitation along the lines proposed by Pushaw and Van Alstyne.[213] And Professor Barton points to other authority suggesting the Court has explicitly signed off on the exercise of beneficial powers in the absence of legislative authorization.[214]

The Supreme Court's own jurisprudence suggests there is no generalized necessity limitation. In *Dickerson v. United States*, the Court held that it has the power to create uniform and binding rules of procedure and evidence in the absence of a relevant Act of Congress.[215]

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206 Pushaw, *supra* note 12, at 848–49.

207 *Id.* at 853–57.

208 Van Alstyne, *supra* note 204, at 797.

209 *Id.* at 794–809.

210 *Id.* at 797.

211 Beale, *supra* note 12, at 1471–72.

212 Anclien, *supra* note 12, at 66–70.

213 Barrett, *supra* note 12, at 881–82.

214 *See* Barton, *supra* note 10, at 49–53.

215 Dickerson v. United States, 530 U.S. 428, 437 (2000).

And, as then-Professor Barrett noted, the Court has often held that courts possess wide discretion to take docket-control measures absent congressional action.[216] To the extent the Court has imposed a necessity limitation to the exercise of inherent powers, it has only done so with respect to courts' power to punish contempt and issue sanctions out of a concern that courts not intrude on Congress's power to criminalize conduct.[217]

* * *

In sum, there are four points of consensus about the origins and nature of federal courts' inherent powers: inherent powers stem from Article III itself and inhere to individual Article III judges; courts possess certain "core" judicial power that is entirely immune from congressional or executive interference; courts possess other inherent powers that may be regulated and, in some cases, abrogated by Congress; and, in the absence of congressional regulation, courts are generally free to exercise any and all of their inherent powers, including their beneficial powers.

III. THE ARTICLE III PUBLICATION POWER

As noted above, the Supreme Court recognized in *Nixon v. Warner Communications, Inc.* that "[e]very court has supervisory power over its own records and files,"[218] and lower courts have construed that to mean that lower courts have inherent power over public access to court records.[219] But what is the nature of courts' publication power?

Against the first principles of inherent powers laid out above, two features of courts' publication power are immediately apparent.[220] *First*, the Supreme Court's recognition of the publication power means that

216 *See* Barrett, *supra* note 12, at 882 n.202.

217 *See, e.g.*, *id.* at 879–82; Degen v. United States, 517 U.S. 820, 829 (1996); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

218 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

219 *See, e.g.*, Carlson v. United States, 837 F.3d 753, 759 (7th Cir. 2016); Gambale v. Deutsche Bank AG, 377 F.3d 133, 141 (2d Cir. 2004); Hagestad v. Tragesser, 49 F.3d 1430, 1433 (9th Cir. 1995); United States v. Noonan, 906 F.2d 952, 956 (3d Cir. 1990).

220 In this Part, I do not address the nature of courts' supervisory power over their records writ large. Instead, I focus on courts' inherent power over the narrower issue of *access* to their records.

courts generally control access to their records. Regardless of whether the publication power is a core, necessary, or merely beneficial inherent power, courts are free to control access to their records in the absence of contrary legislation and executive action.[221]

Second, the binary nature of public access means that, in the absence of congressional regulation and executive actions, courts are constantly exercising their publication power. Records are either public or not. If a court record is publicly available, a court is exercising its power over access to that record (because the court could, at least in the first instance, have chosen to deny access to that record). If a court record is not publicly available, a court is exercising its publication power in the negative (because the court could choose to direct a record to be made available). Unlike other inherent powers, such as courts' contempt power, courts need not take any affirmative action to exercise their publication power. Instead, courts largely exercise that power by default.

The more difficult question is whether Congress or the executive branch may affirmatively regulate or displace courts' publication power. If the publication power is a core judicial power, then the answer is no. If it is an implied indispensable power, then Congress may regulate, but not abrogate, courts' publication power. And if the publication power is but a beneficial power, then Congress and the executive branch are free to displace it altogether.

The key precedent on this point is the Supreme Court's decision upholding the Presidential Recordings and Materials Preservation Act (Presidential Recordings Act) in *Nixon v. Administrator of General Services*.[222] Following Nixon's resignation, Nixon entered into an agreement with the Administrator of General Services regarding custody and access to the Watergate tapes.[223] The agreement provided that the tapes would be donated to the United States but that Nixon would retain authority over access to the tapes and that the tapes were to be destroyed either (1) as Nixon directed or (2) at the time of Nixon's death or on September 1, 1984, whichever event occurred first.[224]

Congress quickly passed the Presidential Recordings Act to abrogate the agreement.[225] The Act required any federal employee in possession of the Watergate tapes to deliver those tapes to the

[221] *See supra* Section II.D.

[222] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 484 (1977).

[223] *Id.* at 431–32.

[224] *Id.* at 432.

[225] *Id.*

Administrator of General Services, and it required the Administrator to preserve the tapes and issue regulations providing for public access to them.[226] Nixon sued to enforce his private agreement with the Administrator, arguing that the Act violated the principle of separation of powers.[227]

The Court rejected Nixon's separation of powers argument. It first reiterated Justice Jackson's conclusion in *Youngstown*,[228] that the Framers did not intend the separate branches of government to operate with absolute independence.[229] Accordingly, the fact that the Presidential Recordings Act regulated presidential records did not, in and of itself, violate separation of powers. Instead, the Court explained:

> [T]he proper inquiry "focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must [the Court] then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[230]

The Court held that the Presidential Recordings Act did not present the potential for disruption, highlighting four features of the Act it thought relevant to the inquiry.[231] First, the Act placed custody of presidential materials in the executive branch. Second, the Act protected the recordings from being used in judicial proceedings to the extent they were protected by any rights, defenses, or privileges, including a claim of executive privilege. Third, the Act protected the records from public disclosure to the extent they were subject to any legally or constitutionally based right or privilege. And fourth, the Act did not provide Congress with greater access to the recordings than the public. The Court also noted in passing the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," citing FOIA, the Privacy Act, and other statutes.[232]

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226 Presidential Recordings and Materials Preservation Act §§ 101, 103–04, Pub. L. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 note (2014)).

227 *Nixon*, 433 U.S. at 432–33, 439–55.

228 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

229 *Nixon*, 433 U.S. at 443.

230 *Id.* (internal citation omitted).

231 *Id.* at 443–45.

232 *Id.* at 445.

The import of *Nixon v. Administrator of General Services* with respect to courts' inherent publication power is plain. So long as any interference with courts' publication power does not prevent the judiciary from accomplishing its constitutionally assigned function, the publication power must be but an implied or beneficial power subject to regulation and, potentially, abrogation. In contrast, to the extent that courts must control access to their records to accomplish their assigned function, the power must be a core power that is not subject to congressional or executive branch override, absent a particularly compelling need.

For the reasons laid out below, it follows that the nature of courts' publication power differs depending on the type of judicial records at issue. The Constitution's text, history, structural considerations, and doctrine dictate that courts' power to make public their orders, judgments, and opinions is a core judicial power that must be free from interference. In contrast, courts' publication over most other judicial records is subject to regulation and likely even abrogation.

A. *The Core Nature of Courts' Publication Power over Access to Their Orders, Judgments, and Opinions*

Whatever the nature of courts' inherent power over public access to judicial records in general, the text of the Constitution, history, structure, and doctrine all indicate that neither the legislative nor the executive branch may interfere with Article III courts' inherent power over public access to their orders, judgments, and opinions. That power must be a core judicial power.

1. Constitutional Text and History

The Constitution does not specifically address or assign the power to control access to court records, let alone to court orders, judgments, and opinions. But several textual clues suggest the Framers generally assumed courts would conduct their proceedings in public.

Most significantly, Article III assigns the judicial power of the United States to "courts"—specifically, to "one Supreme *Court*, and in such inferior *courts* as the Congress may from time to time ordain and establish."[233] As Frankfurter and Landis explain, "[a]t the time of the

[233] U.S. CONST. art. III, § 1 (emphases added).

framing of the Constitution, a few basic ideas, more or less definite, had clustered around the very notion of a court."[234] The Framers' use of the word "court" in Article III must therefore be read to impute to federal courts certain attributes and powers which the Framers would have understood to "inhere" in the very nature of a "court."[235]

No doubt, the Framers understood "courts" to be bodies that generally conduct their work publicly. Professor Judith Resnik traces the origins of "open adjudicatory processes" back to ancient Rome.[236] But whatever the precise origins of court publicity, "the rule in England from time immemorial" has been "that all judicial trials are held in open court, to which the public have free access."[237]

In *Richmond Newspapers, Inc. v. Virginia*, Chief Justice Burger exhaustively recounts the "unbroken, uncontradicted history" of open court proceedings in the Anglo-American justice system.[238] Prior to the Norman Conquest, public attendance at cases in England was compulsory for freemen.[239] The requirement was relaxed with the development of the jury system after the Norman Conquest, but there is no evidence that the public was ever denied access to court proceedings.[240] Though the nature of courts and court proceedings evolved significantly over the next seven centuries, writings from the fourteenth and sixteenth centuries confirm that open-court proceedings were a "tradition . . . which has . . . persisted through all changes."[241]

Colonists carried the tradition of open courts to America. The 1641 Massachusetts Body of Liberties specified that "[e]very Inhabitant of the Countrie shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court."[242] The 1682 Frame of Government of Pennsylvania required "[t]hat all courts shall be open" and "[t]hat all

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234 Frankfurter & Landis, *supra* note 11, at 1020.

235 *See id.* at 1023.

236 Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1637 (2015).

237 EDWARD JENKS, THE BOOK OF ENGLISH LAW 73–74 (6th ed. 1967).

238 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565–73 (1980).

239 *Id.* at 565.

240 *Id.*

241 *Id.* at 566 (quoting FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 31–32 (1904)).

242 MASSACHUSETTS BODY OF LIBERTIES ¶ 48 (1641), *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 148, 153 (Richard L. Perry & John C. Cooper eds., rev. ed. 1991).

pleadings, processes and records in courts, shall be short, and in *English*, and in an ordinary and plain character, that they may be understood."[243] And the 1676 Charter of the English Colony of West New Jersey provided that "in all publick courts of justice for trial of causes, civil or criminal, any person or persons . . . may freely come into and attend."[244]

After the Founding, early state constitutions explicitly embraced the Anglo-American tradition of open courts.[245] Pennsylvania's Constitution of 1776 specified that "[a]ll courts shall be open."[246] So too did Kentucky's 1792 Constitution[247] and Tennessee's Constitution of 1796.[248] As Professor Akhil Reed Amar notes, given the history of open courts in the Anglo-American judicial system, it is notable that Article III speaks of "presumptively open 'courts' as distinct from closed 'chambers.'"[249]

Beyond Article III's use of the word "court," the Constitution's affirmative guarantees of open proceedings further evidence an assumption that federal courts would conduct their work in public. Article III requires that the trial of all crimes be by jury and specifically requires that any prosecution for treason occur "in open court."[250] The Sixth Amendment specifically preserves the right to a public trial in criminal cases and specifies that the jury be drawn from members of the public in the state and district where the crime took place.[251] The Seventh Amendment preserves the right to a jury in civil cases.[252]

Nor can the Constitution's explicit guarantees of access to trials be read as implicitly suggesting that other proceedings were or could be conducted in secret. As the Supreme Court has held, "the near uniform practice of state and federal courts has been to conduct preliminary

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243 FRAME OF GOVERNMENT OF PENNSYLVANIA, LAWS AGREED UPON IN ENGLAND ¶¶ V, VII (1682), *reprinted in* PERRY, *supra* note 242, at 209, 217 (emphasis added).

244 CONCESSIONS AND AGREEMENTS OF THE PROPRIETORS, FREEHOLDERS & INHABITANTS OF THE PROVINCE OF WEST NEW-JERSEY, IN AMERICA CHAP. XXIII (1677), *reprinted in* PERRY, *supra* note 242, at 184, 188.

245 *See* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS L.J. 917, 999–1054 (2012).

246 PA. CONST. OF 1776, art. II, § 26.

247 KY. CONST. OF 1792, art. XII, § 13.

248 TENN. CONST. OF 1796, art. XI, § 17.

249 AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 328 (2005).

250 U.S. CONST. art. III.

251 U.S. CONST. amend. VI.

252 U.S. CONST. amend. VII.

hearings in open court," dating back to at least the 1807 trial of Aaron Burr.[253]

Nevertheless, at the time of the founding, certain court proceedings were not generally conducted openly. Grand juries, for instance, had been used in England since the twelfth century.[254] Though early grand jury proceedings were not necessarily conducted in secret, secrecy became a core component of grand jury proceedings beginning in the fourteenth century.[255] The American colonies adopted the routine use of grand juries in the early seventeenth century.[256] And, after the revolution, the Framers' enacted the Fifth Amendment, which "made grand jury secrecy an implicit part of American criminal procedure."[257]

But grand jury proceedings usually did not (and do not) result in judicial decisions. The whole point of grand juries is to give members of the public—the grand jurors—authority over investigative and prosecutorial decision-making.[258] Moreover, early judicial precedent in the years after the Framing indicates that at least as early as 1806, it was generally understood that federal courts possessed the power to lift the veil of secrecy over grand jury proceedings where justice so demanded.[259]

The Framers were also quite familiar with ex parte warrant proceedings. A typical search warrant at the time of the Framing "was issued at the request of an accuser or the government, ex parte, with no notice or opportunity to be heard afforded the target."[260]

But, as Telford Taylor has persuasively argued, there are significant differences between the uses and publicity of traditional ex parte search warrants that the Framers would have been familiar with and modern ex parte surveillance orders.[261] Traditional search warrants "lie[] for a physical thing of some sort, and in a sense . . . look[] to the past,

253 Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 10 (1986).

254 *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 5–6 (1996).

255 *Id.* at 12–13.

256 *Id.* at 9–10.

257 *Id.* at 16.

258 *See* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 227–34 (1998).

259 Kadish, *supra* note 254, at 16–17.

260 Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 773 (1994); *see* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 24–25 (1969).

261 *See* TAYLOR, *supra* note 260, at 79–85.

inasmuch as the thing is in existence before the warrant issues."[262] Surveillance orders, in contrast, look to the future and do not concern things in existence; instead, "it is hoped that the order will enable the police to observe the scrutinee at work or play, and, by observing, damn him with evidence of criminal conduct."[263]

As Taylor argues, these differences matter. Search warrants became (and become) known to the subject as soon as they were executed, and, traditionally, the common law required the executing officer to furnish the subject of the search with an inventory of things seized.[264] In other words, "the common law took special pains to ensure that the warrant should lose its clandestine feature immediately upon its execution."[265] In addition, the common law required the prompt return of search warrants to the issuing magistrate, affording the subject an immediate opportunity to appear and move to quash the warrant.[266] These key procedural features of traditional search warrants—inventory and return, as well as the measure of transparency they guaranteed, are entirely absent in the process for obtaining and executing modern day surveillance orders, including those issued by the FISC. There was simply no analogue for the sort of "secret court" proceedings conducted by the FISC at the time of the Framing.

Outside of the judicial context, other constitutional provisions further suggest that the Framers generally did not conceive of what some have called "secret law,"[267] of which sealed judicial decisions are a part. As Professor Jonathan Manes explains, the Constitution's Presentment and Journal Clauses, coupled with the First Amendment's Petition Clause, embody a strong presumption against secret law.[268]

Neither the text of the Constitution, nor the backdrop against which it was enacted, definitively answer whether courts' power to make their opinions public is a core power. But the Framers' reference to "courts" in Article III, as informed by the public procedural guarantees they built into the Constitution and the Bill of Rights, the long history of open courts in the Anglo-American system, and the Constitution's anti-secret-law provisions, suggests that the Framers

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262 *Id.* at 80.

263 *Id.* at 80–81.

264 *Id.* at 81–82.

265 *Id.* at 82.

266 *Id.*

267 *See* Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803 (2018); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241 (2015).

268 Manes, *supra* note 267, at 867–68.

understood themselves to be authorizing the creation of judicial bodies that would generally conduct their work in public and issue public decisions.

2. Structure

The clearest indication that the Framers intended the judiciary to control public access to their orders, judgments, and opinions lies in their decision to create an independent judiciary powerful enough to check the legislative and executive branches of the federal government. The nature of the independence the Framers sought to bestow on Article III judges is best understood against the backdrop of the development of independent "courts" in England.

There is a rich literature illuminating the rise of independent courts, which this Article cannot begin to fully explicate.[269] But briefly, scholars trace the origins of the independent Anglo-American judicial office to the Norman Conquest of 1066.[270] The Norman Monarchs organized their governments into centralized *curia*, made up of officers who advised the monarch and carried out executive, legislative, and judicial functions.[271] In their proto-judicial capacity, those officers were effectively the "King's men," serving at the King's pleasure and deciding cases under the King's writ, "making the King himself the 'fountain of justice.'"[272] Indeed, the early King's Court worked more or less in the King's presence.[273]

Slowly, increased delegation of judicial functions, the accumulation of power among judicial officers, the formalization of rules of procedure, and the professionalization of the practice of law led to the development of distinct "courts."[274] In the late twelfth century, King Henry II established the "Court of Common Pleas," and the

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269 *See, e.g.*, THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 157–206 (5th ed. 2001); JENKS, *supra* note 237, at 12–113; Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROBS. 108, 108–14 (1970); Pushaw, *supra* note 12, at 799–843 (collecting sources); Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 587–627 (1977).

270 *See* Pushaw, *supra* note 12, at 799–843 (collecting sources); Shapiro, *supra* note 269, at 587–627.

271 Ervin, *supra* note 269, at 110; Pushaw, *supra* note 12, at 800–01.

272 Ervin, *supra* note 269, at 110 (quoting C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 218 (1913)).

273 *See* PLUCKNETT, *supra* note 269, at 140.

274 *See* Pushaw, *supra* note 12, at 801 n.344 (collecting sources).

Magna Carta subsequently fixed the court permanently at Westminster.[275] By the early thirteenth century, a new court, the "King's Bench," was formed to entertain pleas in error from the Court of Common Pleas, as well as unusually important pleas affecting the King.[276] Pleas before the King's Bench were often heard in the presence of the King himself.[277] And a close group of royal advisors, the "King's Council," worked with the King's Bench and retained the power to correct any errors of jurisdiction in the court.[278] In 1236, yet another court, "the Exchequer of Pleas," or "Court of Exchequer," began entertaining pleas in revenue cases.[279] The "Chancery" arose in the late thirteenth and early fourteenth century, and a 1357 statute established the Exchequer Chamber to hear appeals from the Court of Exchequer.[280] Beginning in the late thirteenth century, traveling "Commissioners of Assize" and "Justices of the Peace" were designated to conduct local judicial proceedings.[281]

Throughout this period, courts, though distinct bodies, were effectively still arms of the monarchy. Judicial officials continued to serve at the King's pleasure,[282] and the prevailing dogma was that all judicial power was derived from the Crown—"only the great mass of business . . . compelled him to delegate judicial power."[283] The courts were established by royal prerogative,[284] and the monarch retained the power to sit as the "judge over all . . . judges."[285] As late as the seventeenth century, King James personally attended and issued judgment in the Court of Star Chamber.[286]

Nevertheless, courts gradually gained independence between the fourteenth and seventeenth centuries.[287] In 1328, the Statute of Northampton provided that judges could ignore any royal command

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275 PLUCKNETT, *supra* note 269, at 149.

276 *Id.* at 150, 155.

277 *Id.* at 150.

278 *Id.* at 155.

279 *Id.* at 160.

280 *Id.* at 161–65.

281 *See id.* at 165–69.

282 Ervin, *supra* note 269, at 110–11; *see* Pushaw, *supra* note 12, at 800–06.

283 PLUCKNETT, *supra* note 269, at 80.

284 1 WILLIAM BLACKSTONE, COMMENTARIES *257; 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24.

285 PLUCKNETT, *supra* note 269, at 194.

286 *Id.* at 192.

287 *See generally id.* at 157–206.

that disturbed the common law.[288] In 1607, Lord Coke reversed a judgment issued by King James I, holding that "[t]he King is subject not to men, but to God *and the law*."[289] And in 1610, Lord Coke held an act of Parliament void as "against common right and reason."[290] By the early eighteenth century, it was accepted that neither Parliament nor the King could revise a court judgment in a particular case.[291]

English courts gained additional independence when, in the mid-seventeenth century, King Charles I agreed to permit judges to serve during good behavior rather than at the King's pleasure.[292] That protection was only fully secured after the Glorious Revolution of 1688 when, in 1701, Parliament codified good-behavior tenure protection for judges.[293] Though the English "judicial power" was understood to remain nested within the "executive power," the tenure protections guaranteed courts "a unique status in the [English] separation-of-powers scheme. They were part of the executive department, yet independent of direct political pressure."[294]

While the British judiciary gained ever-more independence, American colonial courts lagged behind. Colonial judges did not enjoy the tenure protections of their British peers, and colonial assemblies retained the power to reopen judgments, override judicial decisions, and act upon private bills for relief.[295]

At the Founding, the Framers chose to model the Article III judiciary after the more independent judiciary in Britain.[296] They granted Article III judges the same tenure and salary protections held by British judges.[297]

But the Framers went further. They explicitly assigned the judicial power to a separate branch of government rather than housing it within the executive branch. The Framers also explicitly rejected provisions that would have subjected the separate judicial department to greater influence from the legislative branch. During the Constitutional

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288 Statute of Northampton 1328, 2 Edw. 3 c. 8 (Eng.); PLUCKNETT, *supra* note 269, at 158.

289 PLUCKNETT, *supra* note 269, at 49, 49 n.1 (emphasis added).

290 *See* Raoul Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521, 521 (1969).

291 *See* Shapiro, *supra* note 269, at 626; Pushaw, *supra* note 12, at 809.

292 *See* Ervin, *supra* note 269, at 111; Pushaw, *supra* note 12, at 806–07 (collecting sources).

293 Act of Settlement 1701, 12 & 13 Will. 3 c. 3 (Eng.); *see* Berger, *supra* note 290, at 523–24.

294 Pushaw, *supra* note 12, at 810.

295 *Id.* at 820.

296 *See, e.g.*, *id.* at 826–27.

297 *See id.* at 826–27, 827 n.486.

Convention, John Dickinson proposed that Article III be amended to provide that judges "shall hold their offices during good behaviour," "provided that they may be removed by the Executive on the application [by] the Senate and House of Representatives."[298] Roger Sherman supported the motion, observing that a similar statute was in effect in Britain.[299] But Gouverneur Morris objected, arguing that it would be a "contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial."[300] James Wilson thought the amendment more dangerous than the British scheme because the House of Lords and House of Commons were less likely to concur on the same occasions than would the new Senate and House of Representatives.[301] Edmund Randolph also objected to the motion, arguing that it would "weaken[] too much the independence of the judges."[302] Ultimately, Dickinson's motion was voted down, seven states to one.[303]

More importantly, as noted above, the Framers also rejected an amendment to Article III that would have specified that, outside those cases in the Supreme Court's original jurisdiction, "the [j]udicial power shall be exercised in such manner as the Legislature shall direct."[304] As Professors Liebman and Ryan argue, "a legislative capacity to control the 'manner' in which federal courts exercised '[t]he Judicial Power' would have entirely neutralized the independence . . . and effectualness qualities of federal judicial decisionmaking."[305]

In crafting a truly independent judiciary, the Framers sought to create a judiciary that could meaningfully check its sister branches. Hamilton explained that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[306] It was to be the duty of the courts "to declare all acts contrary to the manifest tenor of the Constitution void."[307] At the

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298 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428, 428 n.9 (Max Farrand ed., 1911).

299 *Id.*

300 *Id.*

301 *Id.* at 429.

302 *Id.*

303 *Id.*

304 *Id.* at 425; *see* Liebman & Ryan, *supra* note 12, at 754.

305 Liebman & Ryan, *supra* note 12, at 754.

306 THE FEDERALIST NO. 78 (Alexander Hamilton).

307 *Id.*

Connecticut ratifying convention, Oliver Ellsworth responded to objections to Congress's tax power by echoing Hamilton and explaining that, "[i]f the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void."[308] And as Chief Justice Marshall would later affirm, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[309]

Yet the judiciary, Hamilton famously explained, "may truly be said to have neither FORCE nor WILL, but merely judgment."[310] "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[311] Instead, it can only "declare the sense of the law" and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[312]

Indeed, at the Constitutional Convention, the Framers specifically rejected numerous provisions that would have secured to Article III judges powers more akin to will than judgment. The Framers rejected Madison's proposal to allow Article III judges to sit on a "council of revision," which would have exercised the power to veto national laws.[313] They also rejected Gouverneur Morris's proposal that the Chief Justice be permitted to serve on a "Council of State" to advise the President and recommend legislation.[314]

Article III courts' lack of enforcement and legislative powers means that the effectualness of the federal judicial power turns entirely on the public's perception and acceptance of its exercise. If courts are to meaningfully check Congress or the President, they must be able to cultivate and wield institutional legitimacy by issuing public judgments and, if they so choose, reasons justifying those judgments.

When the Supreme Court declined to overrule *Roe v. Wade* in 1992, Justice O'Connor explained as follows:

> Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an

308 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240–41 (Max Farrand ed., 1911).

309 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

310 THE FEDERALIST NO. 78 (Alexander Hamilton).

311 *Id.*

312 *Id.*

313 Liebman & Ryan, *supra* note 12, at 710–11, 715, 718–19.

314 *Id.* at 744.

> unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.
>
> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[315]

Professor Richard Fallon offers a helpful gloss on Justice O'Connor's account of judicial legitimacy. He differentiates legal legitimacy from sociological and moral legitimacy.[316] Relevant here, legal legitimacy refers to both *substantive* legal legitimacy, meaning the correctness or reasonableness of particular decisions, and *authoritative* legitimacy, meaning the binding-ness of particular decisions; sociological legitimacy, in turn, refers to the extent to which the relevant public accepts those decisions.[317] Professor Fallon explains that Justice O'Connor's opinion in *Casey* can be read as recognizing that the Court's authoritative legitimacy stems from its sociological legitimacy, which, in turn, depends on the substantive legal legitimacy of the Court's

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[315] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–66 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

[316] *See* Fallon, *supra* note 7, at 1794–95.

[317] *Id.*

decisions.[318] In other words, the extent to which the Court is able to issue binding decisions turns on the extent to which the public accepts those decisions, which, in turn, depends on the persuasiveness of the Court's reasoning. The Court's legal and sociological legitimacy are "profoundly intertwined."[319]

In the context of the Supreme Court's exercise of judicial review, Professor Barry Friedman describes this phenomenon as a dialogic feedback loop:

> What matters most about judicial review . . . is not the Supreme Court's role in the process, but how *the public reacts* to those decisions. . . . Judges do not decide finally on the meaning of the Constitution. Rather, it is through the dialogic procession of "judicial decision—popular response—judicial re-decision" that the Constitution takes on the meaning it has.[320]

Professor Friedman, like Justice O'Connor and Professor Fallon, posits that popular support for judicial decisions is what enables enforcement of those decisions.[321] In support of that conclusion, he contrasts the Court's decisions banning school prayer, which went largely unenforced, with the "remarkably quick" and widespread implementation of the Court's reapportionment decisions of the 1960s and 1970s.[322] The difference between the two sets of opinions, Friedman contends, is that the school prayer decisions were relatively unpopular whereas "the public loved [the reapportionment] decisions."[323] Drawing on this comparison and other examples, Friedman concludes that "[t]he decisions of the justices on the meaning of the Constitution must be ratified by the American people. That's just the way it is."[324] Accordingly, the Justices must "care about public opinion . . . . if they care about preserving the Court's institutional power [and] about having their decisions enforced."[325]

Today, Article III courts, and the Supreme Court in particular, enjoy broad authoritative legitimacy—parties, including the executive and legislative branches, nearly always obey federal court rulings.[326] But

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318 *Id.* at 1839–41.

319 *Id.* at 1842.

320 FRIEDMAN, *supra* note 7, at 381–82.

321 *See, e.g.*, *id.* at 380–81.

322 *Id.* at 269; *see also id.* at 261–70.

323 *Id.* at 269; *see also id.* at 261–70.

324 *Id.* at 380–81.

325 *Id.* at 375.

326 Fallon, *supra* note 7, at 1830–31.

there is no reason to assume that that will always be so. During the Civil War, President Lincoln and his military commanders defied Chief Justice Taney's order to produce John Merryman so that the Court could hear Merryman's habeas claim, and Congress ultimately ratified Lincoln's defiance.[327] In the Supreme Court's earliest days, states regularly defied its rulings.[328] There is no particular reason why the executive branch, legislative branch, or others could not or would not defy courts in the future.

In order for the courts to maintain and exercise the authoritative legitimacy necessary to meaningfully check the legislative and executive branches, it is critical that the courts are able to speak to the public.[329] Without the power to speak publicly, as Justice O'Connor and Professors Fallon and Freidman explain, courts lack any meaningful power whatsoever. As a structural matter, courts therefore *must* be able to exercise more than "mere[] judgment";[330] they must be able to exercise *public* judgment and, if they so choose, to issue public judgment supported by reasons. Only then do courts have any power to cultivate and wield the institutional legitimacy required to effectuate their orders and check the coordinate branches of government.

3. Doctrine

Finally, various doctrinal lodestars further support the conclusion that the power to issue public judgments and opinions is a pure judicial power.

From *United States v. Klein*, we know that Congress cannot tell courts how to decide particular pending cases within their jurisdiction.[331] From *Hayburn's Case*, we know that Congress cannot vest review of Article III courts' decisions in officials of the executive

327 FRIEDMAN, *supra* note 7, at 122–23.

328 *Id.* at 83–88.

329 To filter this through Professors Liebman and Ryan's lens, if the pure "judicial power" reposed in Article III courts comes with the power to decide cases "finally" and "effectually," then courts must be able to decide cases publicly. *See* Liebman & Ryan, *supra* note 12, at 771. Similarly, if Article III courts' pure judicial power includes the power to "render[] a final, binding judgment," as Professor Pushaw contends, then within that power lies the power to decide cases publicly—courts have no other means by which to bind litigants other than to persuade the public that litigants should be bound. *See* Pushaw, *supra* note 12, at 844.

330 *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

331 United States v. Klein, 80 U.S. 128, 146–47 (1871); *cf.* Liebman & Ryan, *supra* note 12, at 775 n.362.

branch.[332] From *Plaut v. Spendthrift Farm, Inc.*, we know that courts must have the power to render dispositive judgments and that Congress cannot retroactively command federal courts to reopen final judgments.[333] From *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, we know that Congress cannot vest non–Article III judges with jurisdiction to exercise the judicial power of the United States."[334] And from *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, we know that Article III judgments "may not lawfully be revised, overturned or refused faith and credit by another Department of Government."[335]

Yet, if Congress or the executive branch were permitted to control public access to judicial orders, opinions, and judgments, they could accomplish indirectly what those cases prohibit Congress and the executive branch from accomplishing directly. What need would there be to prohibit a court from issuing a particular decision or to revise a particular decision, if Congress or the executive branch could simply prevent a decision's publication and refuse to comply with it? Or if Congress or the executive branch could simply redact those portions of the decision with which they disagree and only comply with those with which they agree? The power to censor judicial decisions *is* the power to review, revise, and dictate judicial outcomes.

The California Supreme Court, though not a federal court, recognized as much in 1859 when it struck down a California statute regulating judicial opinions. On May 15, 1854, the California Legislature amended California's Practice Act to provide that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor[e]."[336] After the California Supreme Court reversed a district court's decision on an ejectment action in an oral ruling from the bench, the plaintiff filed a petition with the California Supreme Court requesting that the court file an opinion, citing the 1854 statute.[337] The California Supreme Court denied the request, holding that it was beyond the power of the California Legislature to control the court's decisions and opinions. It reasoned as follows:

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332 Hayburn's Case, 2 U.S. 408, 408 (1792).

333 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995).

334 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60–61 (1982).

335 Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

336 Houston v. Williams, 13 Cal. 24, 25 (1859).

337 *Id.* at 24–25.

> To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?
>
> The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. . . .
>
> . . . .
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> The records of the Courts are necessarily subject to the control of the Judges, so far as may be essential to the proper administration of justice. The Court hears arguments upon its records; it decides upon its records; it acts by its records; its openings, and sessions, and adjournments, can be proved only by its records; its judgments can only be evidenced by its records; in a word, without its records it has no vitality. Legislation, which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt.[338]

On a related note, the Supreme Court has also made clear that Congress cannot grant private individuals a right to control access to judicial opinions. As early as 1834, the Supreme Court held that Congress cannot grant individuals a copyright in judicial decisions.[339] In 1888, the Supreme Court elaborated, explaining that "[t]he whole work done by the judges constitutes the authentic exposition and

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338 *Id.* at 25, 27–28.

339 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) ("It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.").

interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."[340] As a result, "no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties."[341]

* * *

Constitutional text indicates that the Framer's did not suppose that the executive or legislative branches would force courts to operate in secret. The Framer's decision to create a truly independent judicial department that lacks any enforcement capacity but is tasked with effectively checking the executive and legislative branches dictates that Article III courts must be able to issue their rulings publicly. And doctrinal guideposts since the Framing gird the conclusion that courts must be able to issue their opinions publicly. For each of these reasons, courts' inherent power over public access to their orders, judgments, and opinions must be a core judicial power. Indeed, it is the heart of "the judicial power."

B. *The Non-Core Nature of Courts' Publication Power over Other Judicial Records*

In contrast to judicial opinions, orders, and judgments, existing regulations and related caselaw strongly indicate Congress and the executive branch may override courts' inherent power to control access to other judicial records. Indeed, Congress has long regulated public access to many court records, and courts have already upheld existing regulations.

The Judiciary Act of 1789, for instance, empowered the Supreme Court and district courts to appoint clerks and required those clerks "to record the decrees, judgments and determinations of the court."[342] It also required circuit courts:

> to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself,

[340] Banks v. Manchester, 128 U.S. 244, 253 (1888).

[341] *Id.*

[342] Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76.

> or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.[343]

Today, Congress effectively regulates public access to many court records via the Rules Enabling Act.[344] Enacted in 1934, the Rules Enabling Act grants federal courts the power "to prescribe general rules of practice and procedure and rules of evidence."[345] Today's Federal Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, and Bankruptcy Procedure are all promulgated under that authority.[346] Those rules of procedure are all subject to congressional override, as Congress may "enact[] legislation to reject, modify, or defer . . . rules" proposed by the judiciary.[347] In 1941, the Supreme Court upheld that authority, explaining that "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."[348]

By operation of the Rules Enabling Act, rules of procedure that dictate access to court records are in effect congressional regulations of access to court records. Examples include Federal Rule of Criminal Procedure 6(e)'s governing access to grand jury materials;[349] Federal Rule of Civil Procedure 26(c)'s requirement that court's issue protective orders only where there is "good cause";[350] and Federal Rule of Appellate Procedure 25(a)(5)'s[351] and Federal Rule of Bankruptcy

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343 *Id.* § 19. Nevertheless, Congress did not provide for the public distribution of the record. The provision instead appears to have been aimed at facilitating judicial review in the Supreme Court.

344 Act of June 19, 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended in 28 U.S.C. §§ 2071–2077).

345 28 U.S.C. § 2072(a).

346 *See* FED. R. CIV. P. 1 advisory committee's note; FED. R. CRIM. P. 1 advisory committee's note; FED. R. APP. P. 1 advisory committee's note; FED. R. BANKR. P. 1001 advisory committee's note.

347 *How the Rulemaking Process Works*, U.S. CTS., http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/DA3C-ZFRS].

348 Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941). Scholars debate the extent to which Congress could fully abrogate procedural common law, but "[t]here is substantial agreement that Congress possesses wide authority to regulate judicial procedure." Barrett, *supra* note 12, at 833.

349 FED. R. CRIM. P. 6(e).

350 FED. R. CIV. P. 26(c).

351 FED. R. APP. P. 25(a)(5).

Procedure 9037's requirements that certain private information be redacted from court filings.[352]

There are other, record-specific examples of congressional regulations of access to court records. The Classified Information Procedures Act (CIPA), for example, establishes the procedures through which criminal defendants may obtain and use classified information at trial.[353] Prior to a defendant's use of classified information, CIPA requires courts to conduct *in camera* hearings on the relevance and admissibility of any classified information whenever the Attorney General certifies to the court that a public proceeding could result in the disclosure of classified information.[354] If, after an *in camera* hearing, a court determines that classified information may not be disclosed or elicited at trial, CIPA requires that "the record of such in camera hearing shall be sealed."[355] Several courts have held that CIPA's statutory closure requirements override the public's First Amendment right of access to court records.[356] And no court has suggested that the requirements impermissibly intrude on courts' inherent power to control access to their records.

To take another example, the False Claims Act (FCA)[357] requires courts to keep certain complaints temporarily sealed. The FCA authorizes private individuals to file actions on behalf of the United States against those who have allegedly made false claims to the government.[358] It requires that those complaints be filed and maintained under seal for sixty days, during which time the government must decide whether to intervene and take over the litigation.[359] In *ACLU v. Holder*, the Fourth Circuit specifically upheld those provisions

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352 FED. R. BANKR. P. 9037.

353 Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16).

354 18 U.S.C. app. § 6(a).

355 *Id.* app. § 6(d).

356 *See In re* Wash. Post Co., 807 F.2d 383, 392–93 (4th Cir. 1986) (holding that CIPA cannot override the public's First Amendment right of access); United States v. Ressam, 221 F. Supp. 2d 1252, 1259 (W.D. Wash. 2002) (acknowledging that Congress could not use CIPA to override the public's right of access); United States v. Poindexter, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access . . . ."); United States v. Pelton, 696 F. Supp. 156, 157–60 (D. Md. 1986) (rejecting the contention that CIPA allowed the closure of a public trial).

357 False Claims Act, 31 U.S.C. § 3729.

358 *See id.* § 3730(b)(1).

359 *Id.* § 3730(b).

of the FCA against an inherent powers challenge.[360] There, public interest groups filed a lawsuit arguing that the FCA's mandatory sealing provisions violate the Constitution's separation of powers by infringing on lower federal courts' inherent power over their records.[361] The Fourth Circuit rejected the challenge. Adopting the Third Circuit's and Professor Pushaw's three-tiered hierarchy of inherent powers, the court concluded that "[t]he power . . . to seal a complaint or docket sheet for 60 days" is but a beneficial power, or at most an implied indispensable power.[362] Either way, the Fourth Circuit concluded that "the FCA's seal provisions are a proper subject of congressional legislation and do not intrude on 'the zone of judicial self-administration to such a degree as to prevent the judiciary from accomplishing its constitutionally assigned functions.'"[363]

In *Nixon v. Warner Communications, Inc.*, the Supreme Court itself strongly suggested that Congress may also regulate public access to trial exhibits. During the 1974 trial of seven Watergate co-conspirators, twenty-two hours of the Nixon White House tapes were played for the jury, and the reels were entered into evidence.[364] Six weeks after the trial began, PBS, Warner Brothers, and CBS filed a motion with the district court seeking permission to reproduce and broadcast the portions of the tapes introduced into evidence.[365] The district court denied the motion, but the D.C. Circuit reversed, holding that the public had a common law right of access to the tapes.[366] The Supreme Court overturned the D.C. Circuit's decision, holding that Congress had provided an alternative method for accessing the tapes in the Presidential Recordings Act. It explained that, through the act, Congress "ha[d] created an administrative procedure for processing and releasing to the public" the tapes.[367] It held that "the existence of the Act" was "decisive" in determining "the proper exercise of discretion with respect to release of the tapes."[368] It reasoned that "[t]he Executive and Legislative Branches . . . possess superior resources for assessing

360 *See* ACLU v. Holder, 673 F.3d 245 (4th Cir. 2011).

361 *See id.* at 255.

362 *Id.* at 256.

363 *Id.* (quoting United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982)).

364 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 594 (1978).

365 *Id.*; *see* United States v. Mitchell, 551 F.2d 1252, 1255 n.4 (D.C. Cir. 1976) (identifying the broadcast companies).

366 *See Nixon*, 435 U.S. at 595–96.

367 *Id.* at 603.

368 *Id.* at 607.

the proper implementation of public access" to the tapes,[369] and that "court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of . . . affected persons."[370] Although the Court reserved the power to entertain "[q]uestions concerning the constitutionality and statutory validity of any access scheme finally implemented,"[371] the Court effectively held that any inherent power the trial court had to release the tapes yielded, at least in the first instance, to Congress's own regulation of public access.[372]

Together, widespread congressional regulation of access to judicial records and precedent upholding those regulations strongly indicate that Article III courts' publication power over many judicial records is not a core judicial power. Instead, courts' publication power over most judicial records must either be a beneficial power or an implied indispensable power subject to congressional regulation and executive control.

As between the latter two categories, courts' power over access to most court records would seem to be but a beneficial power. There is no obvious reason why courts must necessarily control public access to most court records in order to exercise the judicial power or to function as a court in a more basic sense.

Take pleadings, for example. Imagine Congress passed a statute requiring courts to seal all complaints. Setting aside that the statute would likely violate the public's First Amendment right of access to court records, it would not interfere with any of the five "crucial qualities" of the "judicial Power" identified by Liebman and Ryan.[373] A congressional regulation requiring complaints be sealed would not interfere with a court's ability to issue an independent decision free from political influence. It would not restrict a court from answering every—and the entire—question affecting the normative scope of supreme law (including whether the congressional requirement that complaints be sealed violated the First Amendment). It would not restrict the court from analyzing a case based on the whole supreme law. It would not undermine the finality of a court's decision or subject that decision to non–Article III review. And it would not undermine the

[369] *Id.* at 606.

[370] *Id.*

[371] *Id.* at 607–08.

[372] *Id.* at 608.

[373] *See* Liebman & Ryan, *supra* note 12, at 884.

capacity of a court to effectuate its judgment in a case and in precedentially controlled cases.

Nor is it indispensably necessary for courts to exercise power over public access to complaints in order to function as a court. Certainly, many administrative powers *are* indispensably necessary. As Pushaw points out, courts' power to schedule hearings, stay proceedings, and grant recesses, for example, are indispensably necessary for courts to manage their proceedings.[374] A statute denying courts those powers would effectively grind the judiciary to a halt. In contrast, a statute closing off public access to complaints would not inhibit a court or litigants from proceeding to litigate a case. So long as a court and litigants have access to the complaint, there is no reason why the court could not proceed to adjudicate the merits.

In general, then, it would appear that Congress and the executive are largely free to regulate, and perhaps even displace, courts' inherent power over public access to court records.

C. *What the Nature of Courts' Publication Power Does Not Mean*

Before turning to the implications of the nature of courts' publication power for the FISC, it is important to articulate two things that do not follow from the analysis laid out above. *First*, the conclusion that Congress and the executive branch may override courts' publication power for most judicial records does not mean that Congress and the executive branch are entirely free to mandate the sealing of most court records. *Second*, the fact that courts' publication power over their opinions, orders, and judgments is a core power does not mean that courts *must* make their decisions public.

1. Other Constitutional Provisions Limit Congress and the Executive Branch's Power to Close Access to Judicial Records

Although Congress and the executive branch are generally free to override courts' publication power over most judicial records, both Congress and the executive branch remain subject to the Constitution's other internal, external, and procedural limitations on their power to

[374] Pushaw, *supra* note 12, at 853–54.

restrict publication.[375] Congress, for instance, could not exercise control over judicial records in ways that exceed the Necessary and Proper Clause. Nor could the executive exercise control over judicial records in ways that violate Article II's Take Care Clause.

Most significantly, neither Congress nor the executive can restrict access to judicial records in violation of the public's First Amendment right of access. Even lawyers are often surprised to learn that the First Amendment guarantees the public a "right of access" to certain government proceedings and information. The First Amendment's text contains no enumerated right of access.[376] Nor is it an immediately obvious corollary of those rights that are enumerated. Yet in its 1980 decision in *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court held that the First Amendment guarantees the public a qualified right of access to certain government proceedings for which there is a history and logic of access, including criminal trials.[377]

In *Richmond*, the Court was faced with determining whether the First Amendment prohibits judges from excluding the press and public from criminal trials.[378] In 1976, John Paul Stevenson (not to be confused with Justice Stevens) was indicted for murdering a hotel manager.[379] After his initial conviction was reversed and two subsequent mistrials, Stevenson's attorney moved for the courtroom to be closed prior to the fourth trial.[380] The government did not object, and the judge ordered the courtroom cleared, removing two reporters for Richmond Newspapers, Inc.[381] The journalists filed suit, challenging their ejection.

When the case reached the Supreme Court, it held, for the first time, that the press and public have a First Amendment right of access to certain government proceedings and processes, including criminal trials.[382] The majority identified two considerations that support its holding. First, the majority observed that there is an "unbroken" history of public access to criminal trials in the Anglo-American justice system

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375 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 297 (2d ed. 1988); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578–79 (2014).

376 *See* U.S. CONST. amend. I.

377 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

378 *Id.* at 558. A year earlier, the Court had rejected the claim that the Sixth Amendment grants the public a right of access to criminal trials, holding that the Public Trial Guarantee Clause is for the benefit of defendants, not the press or public. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

379 *Richmond*, 448 U.S. at 559.

380 *Id.*

381 *Id.* at 559–60.

382 *Id.* at 575–80.

dating back to the Norman Conquest.[383] Second, the majority explained that public access to criminal trials is "an indispens[a]ble attribute of an Anglo-American trial."[384] Specifically, public access ensures the "proper functioning" of trials by assuring fairness, discouraging perjury and misconduct, serving as a check on judicial bias, ensuring that trials provide therapeutic value to the community, and promoting public education about the legal process, as well as the rule of law, in general.[385] In light of the history and logic of access to criminal trials, the majority concluded that the First Amendment guarantees the public a qualified right to attend criminal trials.

Over the next four years, the Court issued two more decisions on the right of access, striking down a Massachusetts law that required judges to close the courtroom during the testimony of minor victims of certain sexual assault crimes,[386] and recognizing the public's right of access to jury selection in criminal cases.[387] In 1986, the Supreme Court issued its fourth and, to date, final opinion on the right of access, holding that the right of access extends to pretrial hearings in criminal trials.[388] In that decision, the Court clarified the test for determining whether the right of access is overcome for a particular proceeding, holding that where the right of access attaches to a type of proceeding, a specific proceeding of that type can only be closed if a court makes "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[389]

In the aftermath of *Richmond* and its progeny, lower courts have extended the public's right of access to nearly every type of proceeding in criminal and civil cases, including proceedings related to claims of access.[390] And the lower courts have also widely held that the constitutional right of access extends to judicial records in criminal and civil cases.[391]

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383 *Id.* at 564–74.

384 *Id.* at 569–73.

385 *Id.*

386 Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

387 Press-Enter. Co. v. Superior Ct. (*Press-Enter. I*), 464 U.S. 501 (1984).

388 Press-Enter. Co. v. Superior Ct. (*Press-Enter. II*), 478 U.S. 1 (1986).

389 *Id.* at 13–14 (quoting *Press-Enter. I*, 464 U.S. at 510).

390 *See* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 266–67 (1995).

391 *Id.* at 267–68.

In accordance with this doctrine, although Congress and the executive branch may choose to regulate access to many judicial records themselves, neither could do so in a way that violates the public's First Amendment right of access, nor any other constitutional limitation on Congress and the executive branch.

2. Courts' Publication Power over Their Opinions, Orders, and Judgments Does Not Require Them to Make Their Decisions Public

The second important caveat is that although courts' publication power over their opinions, orders, and judgments is a core power, it does not follow that courts *must* make their decisions public simply because they have the power to do so. Courts, like Congress and the executive branch, are subject to other limitations on their ability to deny access to judicial records, including judicial opinions. Those limits include the First Amendment right of access,[392] as well as the Due Process Clause.[393] And some have argued that courts must generally publish their opinions for those opinions to have precedential effect.[394] Jack Boeglin and Julius Taranto have made that argument specifically with respect to the FISC, arguing that the FISC must either publish all of its opinions or stop issuing precedential opinions altogether.[395]

While it is beyond the scope of this Article to identify all of the limits on courts' power to keep their decisions secret, one thing is clear: the fact that courts' have core power over access to their decisions does not, in and of itself, require courts to make their decisions public. Any requirement that courts' publish their opinions must be grounded in something outside of the inherent powers doctrine.

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392 *See, e.g.*, Doe v. Pub. Citizen, 749 F.3d 246, 267–68 (4th Cir. 2014) (holding that the First Amendment right of access extends to a judicial opinion ruling on a summary judgment motion).

393 *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion' [from judicial proceedings].") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979)).

394 Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 770 (1995); William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 314 (1985) ("The development of 'hidden' precedents mocks the concept of stare decisis . . . .").

395 Jack Boeglin & Julius Taranto, Comment, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2189 (2015).

IV. COURTS' PUBLICATION POWER AND THE FISC

In this final Part, I lay out two significant implications that follow from the nature of courts' publication power. First, courts are empowered to make public classified information contained in their decisions. Second, courts have ancillary jurisdiction over claims of access to court records. Both conclusions have special significance for the FISC.

A. *Courts' Power to Make Public the Entirety of Their Orders, Judgments, and Opinions, Including Those Portions Consisting of Classified Information*

The first implication is relatively straightforward. As noted above, Article III courts' pure judicial power lies beyond the reach of the legislative and the executive branches.[396] Because courts' publication power over their decisions is a pure judicial power, neither Congress nor the executive branch can prevent a court from issuing public decisions, including decisions that discuss classified information. Moreover, because courts' inherent powers inhere to each Article III judge, an Article III judge's decision to issue a public opinion is subject only to review by an appropriate appellate court for an abuse of discretion; Article III judges cannot otherwise prevent one another from issuing public decisions.

That courts have the final say over whether to disclose national security information contained in judicial opinions is not a particularly radical claim. Indeed, it dovetails with the Supreme Court's jurisprudence and practice in other judicial settings involving sensitive national security information.

For example, in the Pentagon Papers litigation, the Supreme Court held that the validity of a prior restraint premised on national security turned on the district court's own determination of whether harm to the national security outweighs a restrainee's First Amendment rights. After *The New York Times* began to publish information from the Pentagon Papers on June 13, 1974, the government rushed to court to try to obtain an injunction preventing further publication.[397] The government argued that the executive had inherent authority to protect

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396 *See supra* Section II.A.

397 *See* United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971).

the national security and that the national security would be damaged by further publication.[398] District court Judge Gurfein, however, did not defer to the government's assertions of harm. After conducting an *in camera* hearing at which representatives of the Department of State, Department of Defense, and the Joint Chiefs of Staff testified, Judge Gurfein denied the government's request for a preliminary injunction, explaining that the government "did not convince this Court that the publication of these historical documents would seriously breach the national security."[399] When the case reached the Supreme Court, the Court explained that even with respect to national security information, "[t]he Government . . . 'carries a heavy burden of showing justification for the imposition of [a prior] restraint.'"[400] It too held that "the Government had not met that burden."[401]

Similarly, the Supreme Court has held that courts must determine whether the state secrets privilege is properly invoked. In *United States v. Reynolds*, the Supreme Court recognized the so-called "state secrets privileges," which permit the executive branch to shield from civil discovery military and state secrets that, in the interest of national security, should not be divulged.[402] But the Court made clear that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[403] Instead, a "court itself must determine whether the circumstances are appropriate for the claim of privilege."[404]

Likewise, when courts consider whether the public has a right of access to court proceedings concerning sensitive national security information, courts themselves must determine whether any compelling interest cited by the government overcomes the public's right of access. In *In re Washington Post*, for example, press organizations asserted a First Amendment right of access to records of a sealed plea hearing and sentencing in an espionage case.[405] The government argued that any First Amendment right of access to the records was overcome based on the national security interests at

[398] *Id.* at 330.

[399] *Id.*

[400] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

[401] *Id.*

[402] *See* United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

[403] *Id.* at 9–10.

[404] *Id.* at 8.

[405] *In re* Washington Post Co., 807 F.2d 383, 385–86 (4th Cir. 1986).

stake.[406] And it argued that rather than the district court decide whether the constitutional access right was overcome, the court should defer to the judgment of the executive branch.[407] The Fourth Circuit emphatically rejected that argument, explaining that to defer to the executive branch would run afoul of separation of powers:

> We note further that, troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.[408]

The conclusion that Article III courts have plenary power to make determinations about public access to their opinions has implications for the FISC. First, it means that the FISC itself bears ultimate responsibility for determining whether information in its opinions should be disclosed. The FISC cannot simply defer to the executive branch to decide what portions of its orders, judgments, and opinions are ultimately published.

Second, because Article III courts' inherent powers inhere to individual Article III judges, it leaves some doubt about the propriety (perhaps the constitutionality) of FISA's provision specifying that "[t]he record of proceedings under [FISA], including applications made *and orders granted*, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence."[409] It also calls into question Congress's decision to require the Director of National Intelligence, in consultation with the Attorney General, to declassify FISC and FISCR opinions that include a "significant" or "novel" "construction or interpretation of any provision of law," or, if declassification is not possible, to produce a public summary of the

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406 *Id.* at 391.

407 *Id.*

408 *Id.* at 391–92.

409 50 U.S.C. § 1803(c) (emphasis added).

significant or novel opinion.[410] Any construction of those provisions that would leave the power to disclose FISC opinions, orders, and judgments, solely with executive branch officials would render them impermissible infringements of FISC judges' inherent publication power. Ultimately, final authority over public access to FISC orders, judgments, and opinions must rest with the FISC itself.

The provision permitting the Chief Justice of the Supreme Court to dictate to FISA judges whether their decisions be made public runs afoul of the Constitution for an additional reason. As now-Justice Amy Coney Barrett persuasively argues, Article III inherent powers inhere to individual Article III judges.[411] As a result, even in an appeal from a lower court's exercise of its inherent powers, appellate review is severely circumscribed.[412] And, in general, Article III's Vesting Clause may be read to prevent a superior court from crippling a lower court's exercise of "the judicial power."[413] FISA's provision authorizing the Chief Justice to establish procedures by which FISC judges disclose their opinions would therefore seem to violate Article III's Vesting Clause. Each FISC judge must be permitted to determine whether to publish their own decisions. It might be a closer call if FISA authorized "the Supreme Court" to establish procedures for disclosure, as an appeal from any decision of the FISC regarding publication would ultimately lie in the Supreme Court.[414] But it seems plainly improper for FISA to grant publication authority to the Chief Justice alone.

For the same reasons, the FISC's own rules merit constitutional scrutiny. As noted above, FISC Rule 62 governs FISC's own publication of its rules:

> (a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review

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410 *Id.* § 1872.

411 *See supra* notes 163–64and accompanying text.

412 *See supra* notes 163–64and accompanying text; *see also In re* Morrissey, 305 F.3d 211, 217 (4th Cir. 2002) (holding that appellate courts may review district courts' exercise of contempt power only for abuse of discretion); *In re* Jacobs, 44 F.3d 84, 87–88 (2d Cir. 1994) (holding that appellate courts may review district courts' exercise of inherent power to discipline the bar only for abuse of discretion).

413 *See* Barrett, *supra* note 13, at 357.

414 *See* 50 U.S.C. § 1803(b).

> the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).[415]

This rule, like FISA itself, could be read to suggest that the executive branch has the final authority over disclosure, and it improperly assigns each FISC judge's own inherent authority over publication to another Article III judge—here, the presiding FISC judge. To the extent it assigns publication authority to the executive branch or FISC's presiding judge, it may well contravene Article III's Vesting Clause.

B. *Courts' Ancillary Jurisdiction to Entertain Claims of Access to Court Records*

The second implication relates to the nature of courts' jurisdiction over claims asserting a right of access to judicial records. Today, courts routinely permit third parties to intervene in civil and criminal cases and move to unseal court records long after those cases have concluded.[416] But that practice does not neatly sync up with existing rules of procedure. In the ordinary course of civil litigation, a final judgment or stipulation of dismissal with prejudice renders a case moot and deprives a court of continuing jurisdiction, except for the limited purpose of reopening a final judgment, order, or proceeding under Federal Rule of Civil Procedure 60.[417] Permitting post-judgment

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415 FISC R.P. 62(a).

416 *See, e.g.*, Carlson v. United States, 837 F.3d 753 (7th Cir. 2016) (adjudicating request to unseal seventy-year-old grand jury records); Doe v. Pub. Citizen, 749 F.3d 246, 253 (4th Cir. 2014) (adjudicating consumer groups' move to intervene and unseal court records one week after entry of judgment); Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1015 (11th Cir. 1992) (adjudicating request to unseal summary judgment materials six months after a case was settled and dismissed). Courts also occasionally sua sponte order the unsealing of court records following the conclusion of a case. *See, e.g.*, Gambale v. Deutsche Bank AG, 377 F.3d 133 (2d Cir. 2004) (ordering sua sponte unsealing of summary judgment papers following settlement).

417 *See* FED. R. CIV. P. 60 (specifying limited conditions under which a party may obtain post-judgment relief); *see also*, *e.g.*, *In re* Brewer, 863 F.3d 861, 869 (D.C. Cir. 2017) ("In our view, a stipulated dismissal, aside from its immediate effectiveness, is no different in jurisdictional effect from a dismissal by court order: Each resolves all claims before the court, leaving it without a live Article III case or controversy between the plaintiff and the defendant. The absence of a live controversy, then, not any special feature of a stipulated dismissal, is what deprives the district court of continuing jurisdiction.") (internal citation omitted); Hinsdale v. Farmers Nat'l Bank & Tr. Co., 823 F.2d 993, 995–96 (6th Cir. 1987); *cf.* Kokkonen v. Guardian Life Ins. Co. of Am., 511

intervention is particularly disfavored "because it usually creates delay and prejudice to existing parties."[418] And as some courts have pointed out, Federal Rule of Civil Procedure 24, which governs intervention, does not seem to contemplate intervention—before or after the conclusion of a case—for the purpose of unsealing court records.[419] As for criminal cases, the Federal Rules of Criminal Procedure provide no mechanism for intervening in criminal cases.

Some courts have reasoned that because federal district courts could entertain separate civil actions seeking to unseal court records pursuant to their general federal-question jurisdiction, they may instead choose to permit intervention as a more efficient alternative.[420] That is not a wholly satisfactory answer as it suggests that Article III courts that lack general federal-question jurisdiction cannot entertain access claims. For example, neither the United States Court of Federal Claims nor the FISC have general federal-question jurisdiction.[421] Are they accordingly barred from entertaining third-party access motions?

The better answer lies in recognizing the connection between the existence and exercise of courts' inherent publication power and federal courts' residual ancillary jurisdiction. Prior to 1990, federal courts developed the twin concepts of "pendent" and "ancillary" jurisdiction to govern federal courts' jurisdiction to entertain claims over which they did not have an independent basis of jurisdiction.[422] "Pendent" jurisdiction generally referred to federal courts' power to entertain related state claims filed by a plaintiff in a non-diversity, federal-

U.S. 375, 382 (1994) (holding that absent a court order retaining jurisdiction or incorporating the terms of settlement, courts lack jurisdiction to enforce settlement agreements).

418 Floyd v. City of New York, 770 F.3d 1051, 1059 (2d Cir. 2014); *see, e.g.*, Calvert v. Huckins, 109 F.3d 636, 638 (9th Cir. 1997); United States v. Yonkers Bd. of Educ., 801 F.2d 593, 596 (2d Cir. 1986).

419 *See, e.g.*, Jessup v. Luther, 227 F.3d 993, 997 (7th Cir. 2000); EEOC v. Nat'l Child.'s Ctr., Inc., 146 F.3d 1042, 1045 (D.C. Cir. 1998); *cf.* Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992).

420 *See, e.g.*, Flynt v. Lombardi, 782 F.3d 963, 967 (8th Cir. 2015) ("[F]or reasons of judicial efficiency, Rule 24(b) intervention in [claims concerning access to court records] may often be preferable to the third party filing a separate action."); *Beckman*, 966 F.2d at 473; N.Y. Times Co. v. Biaggi, 828 F.2d 110, 113 (2d Cir. 1987) (explaining that the appellate court had jurisdiction to hear an appeal from a court's denial of a third party's motion to intervene in a criminal case because the district court could have treated the motion as a new civil case).

421 28 U.S.C. § 1295 (read in conjunction with 28 U.S.C. 1331); Crocker v. United States, 37 Fed. Cl. 191, 197 (1997), *aff'd*, 125 F.3d 1475 (Fed. Cir. 1997) ("The Court of Federal Claims does not have general federal question jurisdiction . . . ."); *see supra* Section I.A.1.

422 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3523.1 (3d ed. 2008).

question lawsuit.[423] "Ancillary" jurisdiction generally referred to federal courts' power to entertain non-federal, non-diversity claims filed by a party other than a plaintiff in a diversity lawsuit.[424] In 1990, Congress purported to codify both of these traditional doctrines in 28 U.S.C. § 1367, delineating the power of federal courts to exercise both pendent and ancillary jurisdiction under the rubric of "supplemental jurisdiction."[425]

In 1994, however, Justice Scalia and the Supreme Court held that 28 U.S.C. § 1367 did not, in fact, codify all of common law ancillary jurisdiction. In *Kokkonen v. Guardian Life Insurance Co. of America*, the Court was confronted with the question of whether a federal court has jurisdiction to enforce a settlement agreement after a stipulation of dismissal with prejudice where the court neither explicitly retains jurisdiction nor incorporates the settlement agreement into its order of dismissal.[426] The district court in *Kokkonen* permitted a party to seek an enforcement order of a settlement agreement that was not made part of the district court's dismissal order and even though the district court had not otherwise explicitly retained jurisdiction over the settlement agreement.[427] The district court ultimately entered an enforcement order, asserting its "inherent power" to enforce the settlement agreement.[428] The Ninth Circuit upheld that order on appeal, explaining that "a district court has jurisdiction to decide the enforcement motion under its inherent supervisory power."[429]

The Supreme Court reversed. In doing so, it first clarified that even after the enactment of 28 U.S.C. § 1367, federal courts retain "ancillary jurisdiction" "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[430] In support of the second type of residual ancillary jurisdiction, Justice Scalia cited *Chambers v. NASCO, Inc.*, which concerns federal courts'

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[423] *Id.*

[424] *Id.*

[425] Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089 (1990) (codified at 28 U.S.C. § 1367); *see* WRIGHT ET AL., *supra* note 422, §§ 3523.1, 3567.

[426] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

[427] *Id.* at 377.

[428] *Id.*

[429] *Id.* (citation omitted).

[430] *Id.* at 379–80 (internal citations omitted).

inherent power to compel payment of attorneys' fees;[431] and *United States v. Hudson & Goodwin*, which concerns federal courts' inherent power to hold individuals in contempt.[432] The Court then clarified that it was this "second head of ancillary jurisdiction, relating to the court's power to protect its proceedings and vindicate its authority, that both courts in the . . . case appear[ed] to have relied upon, judging from their references to 'inherent power.'"[433] The Court ultimately held that, unless federal courts explicitly retain jurisdiction over settlement agreements, they lack inherent power to enforce settlement agreements that are not incorporated into an order of dismissal.[434]

Since *Kokkonen*, numerous federal appellate courts have read *Kokkonen* as standing for the proposition that federal courts' inherent powers are coterminous with their ancillary jurisdiction such that federal courts have ancillary jurisdiction over matters related to the exercise of their inherent powers.[435] For example, courts have since held that federal courts possess ancillary jurisdiction to exercise their inherent powers to award attorneys' fees[436] and to hold individuals in contempt.[437]

Courts' ancillary jurisdiction over the exercise of inherent power is the fount of their jurisdiction over claims of access to judicial records. As explained above, given the publication power's binary nature, courts are constantly exercising their inherent power over access to court records.[438] Courts therefore have ancillary jurisdiction over claims related to their exercise of that power. That is the lesson of *Kokkonen*.

That is particularly true with respect to constitutional access claims, alleging that a court's decision to keep certain records secret violates the First Amendment. As Professors Liebman and Ryan

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431 Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

432 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

433 *Kokkonen*, 511 U.S. at 380.

434 *Id.* at 380–82.

435 *See, e.g.*, United States v. Wahi, 850 F.3d 296, 298 (7th Cir. 2017) (recognizing that "[a]ncillary jurisdiction is the formal name for the inherent power" that federal courts have "to reopen a closed criminal case to consider a request to expunge the judicial record"); United States v. Coloian, 480 F.3d 47, 52 n.7 (1st Cir. 2007) (citing *Kokkonen* for the proposition that "claims of a district court's 'inherent power' . . . fall[] under ancillary jurisdiction"); *In re* Austrian & German Bank Holocaust Litig., 317 F.3d 91, 98–99 (2d Cir. 2003) ("District Court[s] ha[ve] ancillary jurisdiction to consider exercising the 'inherent power' of federal courts to discipline attorneys practicing before them.").

436 *See, e.g.*, K.C. *ex rel.* Erica C. v. Torlakson, 762 F.3d 963 (9th Cir. 2014); Garcia v. Teitler, 443 F.3d 202 (2d Cir. 2006).

437 *See, e.g.*, Kelly v. Wengler, 822 F.3d 1085 (9th Cir. 2016).

438 *See supra* p. 134.

explain, "the judicial power" vested in Article III courts necessarily includes the power to decide cases based upon the *whole* law.[439] Congress may not direct the courts to ignore the Constitution in the course of exercising the judicial power. Or as Chief Justice Marshall explained, Congress cannot dictate that "courts must . . . close their eyes on the constitution, and see only the law."[440] Instead, "a law repugnant to the constitution is void; and . . . *courts,* as well as other departments, are bound by [the Constitution]."[441]

It is axiomatic that courts can no more ignore the Constitution in reaching a decision on the merits than they can ignore the Constitution in issuing remedies, supervising their proceedings, or otherwise carrying out their constitutionally assigned function. For example, courts cannot order specific performance of personal services contracts because doing so would violate the Thirteenth Amendment's prohibition against involuntary servitude.[442] Nor may courts enter gag orders preventing pre-trial publicity without running afoul of the First Amendment's prohibition on prior restraints.[443]

The same principle applies with respect to courts' exercise of their inherent powers. Indeed, the Supreme Court itself has already held that when courts exercise their inherent power to award attorneys' fees, they "must comply with the mandates of due process."[444] Similarly, because courts are bound by the Constitution in the exercise of their inherent powers, they must have jurisdiction to consider whether the manner in which they are exercising control over their records violates the First Amendment and, if they agree with those claims, to remedy any constitutional harm by ordering disclosure.

It is true that, under the majority view, the mere fact that one possesses constitutional rights does not mean that courts must therefore have jurisdiction to entertain claims related to those rights. Under the majority view, Congress has plenary power to deprive courts of jurisdiction, including of all federal-question jurisdiction.[445] But the

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439 Liebman & Ryan, *supra* note 12, at 771–72, 813–23.

440 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

441 *Id.* at 180.

442 *See* RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981); *see also* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2022 nn.4–8 (2009) (compiling authorities).

443 Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

444 Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

445 *See, e.g.*, Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (describing Congress's plenary control over jurisdiction over cases outside the Supreme Court's original jurisdiction as "the rock on which rests the legitimacy of the judicial

lesson of *Klein* is that Congress's *greater* power to withhold jurisdiction entirely does not include the *lesser* power to strip courts of the ability to consider the Constitution once jurisdiction is granted.[446] As Professor Henry Monaghan has written:

> There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be "jurisdictionally" shut off from *full consideration of the substantive constitutional issues*, at least absent adequate opportunity for consideration of those claims in another article III tribunal.[447]

As a result, in any case in which a court has jurisdiction to decide any matter, it must also be able to hear a claim that its exercise of inherent power over its records in the course of deciding that case runs afoul of the Constitution.

This brings us to the next point, which is that, unlike constitutional claims unrelated to a court's exercise of its inherent powers, Congress cannot give one federal court jurisdiction over claims related to another court's exercise of its inherent power. Again, as then-Professor Barrett points out, courts' inherent powers belong to individual Article III judges.[448] And the principle of judicial independence prevents judges from interfering with one another's exercise of those inherent powers.[449] Congress, therefore, cannot strip one court of jurisdiction over constitutional access claims to its records and assign those claims to a different court without running afoul of this principle of independence.

To understand this second point, it is important to understand that, like protective orders, a court's exercise of its inherent power to keep records sealed operates "like any ongoing injunction."[450] Namely, a court's sealing order enjoins the public from accessing court records. It is well settled that the court that issues an ongoing injunction "retain[s] power to modify [the] injunction[] in light of changed

work in a democracy"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution . . . . They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.").

446 *See* United States v. Klein, 80 U.S. 128, 147 (1871).

447 Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 11 (1983) (emphasis added).

448 *See* Barrett, *supra* note 13, at 357–89.

449 *Id.* at 358.

450 Gambale v. Deutsche Bank AG, 377 F.3d 133, 141 (2d Cir. 2004) (quoting Poliquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993)).

circumstances."[451] In contrast, considerations of comity generally prevent courts from interfering with another court's continuing injunction.[452] Congress would run headlong into that internal judicial independence if it were to grant one court jurisdiction to disrupt another court's inherent authority over its records.

Note, however, that the analysis in this section has proceeded on the assumption that courts have inherent power over their judicial records. Because courts' power over many judicial records is merely beneficial, the legislature and the executive may deprive courts of that power with respect to most court records. If a court, in fact, lacked inherent power over access to certain records, then it would also lack ancillary jurisdiction over claims of access to those records—a constitutional challenge to such regulations might lie in a district court with federal-question jurisdiction, but it would not lie in a court that lacked federal-question jurisdiction and that ultimately did not have authority to withhold or publish records. However, because the legislative and executive branches *cannot* deprive Article III courts of power over access to their orders, judgments, and opinions, courts always have ancillary jurisdiction over claims of access to those records.

In sum, every Article III court necessarily has ancillary jurisdiction to consider constitutional access claims with respect to those records over which they exercise control. That is so regardless of whether a court has general federal-question jurisdiction or not. Accordingly, federal district courts and the FISC alike may entertain right of access claims to those records over which they exercise control. In addition, federal courts generally retain jurisdiction to permit parties to intervene in closed cases for the purpose of asserting a right of access claim because a sealed court record is akin to an ongoing injunction, and federal courts retain the power to reassess the necessity of closure.

CONCLUSION

Every Article III court is vested with "the judicial Power of the United States" upon creation. As Chief Justice Marshall famously recognized long ago, the judicial power is the power "to say what the law is." This Article reveals a closely related and important

451 Dombrowski v. Pfister, 380 U.S. 479, 492 (1965).

452 *See, e.g.*, Alley v. U.S. Dep't of Health & Hum. Servs., 590 F.3d 1195, 1203–04 (11th Cir. 2009); Mann Mfg., Inc. v. Hortex, Inc., 439 F.2d 403, 408 (5th Cir. 1971); Doe v. Doe Agency, 608 F. Supp. 2d 68, 71 (D.D.C. 2009).

constitutional precept: the power to say what the law is necessarily comes coupled with the power to say so publicly. Neither Congress nor the executive branch can prevent Article III courts from making their decisions public. Were it otherwise, the judicial power would be sapped of its effectiveness—having "neither FORCE nor WILL"[453] *nor public voice*, courts would have no way of cultivating the legitimacy necessary to ensure that the coordinate branches of government respect and enforce their decisions.

Courts' core publication power over their decisions has two significant consequences for the FISC. First, the FISC must be empowered to publish its decisions if it so chooses, including those portions that the executive branch deems classified. Second, the FISC generally retains ancillary jurisdiction over constitutional access claims for its records, and it always has ancillary jurisdiction over claims of access for court orders, judgments, and opinions.

453 THE FEDERALIST NO. 78 (Alexander Hamilton).